



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**CRIMINAL APPEAL NO. 45 OF 2009.**

**ERNEST MATUNI OCHIENG ::: APPELLANT.**

**VERSUS**

**REPUBLIC ::: RESPONDENT.**

*(Being an appeal from the original conviction and sentence of D.M. Ochenja – AG. PM in Criminal Case No. 3746 of 2006 delivered on 31st July, 2009 at Kitale.)*

**J U D G M E N T.**

The appellant, **Ernest Matuni Ochieng**, appeared before the Principal Magistrate in Kitale charged with three counts viz:-

***[i] Defilement of a child contrary to section 8 (1) read with section 8 (2) of the Sexual Offences Act in that on the night of the 4th/5th December, 2006 at [particulars withheld] Trans Nzoia District, defiled F N, aged three (3) years and in the alternative, indecently assaulted her by touching her private parts contrary to section 11 (1) of the Sexual Offences Act.***

***[ii] Unnatural offence contrary to section 162 (a) of the penal code, in that on the night of 4th/5th December, 2006, had carnal knowledge of F N against the order of nature.***

***[iii] Resisting arrest contrary to section 123 (b) of the penal code, in that on 6th November, 2006 at about 10.30 a.m. at [particulars withheld] Trans Nzoia District, resisted being arrested by P.C. Haron Jilo who was acting in due execution of his duty.***

After a full trial, the appellant was convicted on all the three counts and sentenced to life imprisonment for count one, three (3) years imprisonment for count two and one (1) year imprisonment for count three. The sentences were ordered to run concurrently.

Being aggrieved by the conviction and sentence, the appellant preferred this appeal on the basis of the grounds in his petition of appeal filed herein on 12th August, 2009 which were argued by way of written submissions presented in court at the hearing of the appeal.

The Learned Prosecution Counsel, **Mr. Chelashaw**, appeared for the state/respondent and opposed the appeal by submitting that the child victim did not testify but there was enough evidence from the prosecution showing the child disappeared from home and when she was traced near the appellant's house she was found to have been sexually assaulted. That, previous to the disappearance of the child, the appellant had threatened to do something to PW1 and PW3 and although there was no direct evidence against the appellant, the existing circumstances implicated him as he was revenging against PW1 and PW3 for being responsible for the disappearance of his wife.

The learned prosecution counsel contended that the behaviour of the appellant at the time of his arrest did not portray the image of an innocent person.

Both the written and oral submissions by the appellant and the respondent respectively have been considered by this court whose primary role is to re-consider the evidence adduced at the trial and draw its own conclusions bearing in mind that unlike the trial court it did not have the advantage of seeing and hearing the witnesses.

Briefly, the prosecution case was that the child victim aged three (3) years at the time, lived with her parents, **E N (PW1)** and **N A (PW3)** who on the material 4th November, 2006, had a visitor in the person of the appellant who had come looking for his run away wife. He (appellant) alleged that E had taken his wife to her parents. He ordered for traditional brew called “busaa” and asked for cigarettes to be brought for him. He appeared fidgeting and uneasy and threatened to do something to the child victim's parent such that they will never forget. He left the homestead unnoticed. Thereafter, E and N realized that the child victim had gone missing.

A search for the child was mounted with the help of **A O (PW2)** and **A W O (PW4)**.

On the 5th January, 2006, the child was found away from her home by villagers who did not know her including, **Beatrice Nalesho Makokha Nasimiyu (PW6)**, who noted that she had been defiled. She (PW6) alerted the local village elders and later took the child to Kitale District Hospital where she was examined by a clinical officer, **Reuben Bunyasi (PW5)**.

The clinical officer opined that the child had been defiled and possibly sodomized due to the injuries in the anal area.

**P.C. Harun Jilo (PW7)**, of Moi's Bridge Police station was on duty on the 6th November, 2006 when he was informed that a defilement suspect had been spotted but could not be apprehended for fear that he was armed and dangerous.

P.C. Jilo and his colleagues confronted the suspect who was the appellant. He saw the police officers and came out of his house armed with two pangas and a sword ready to attack. He made an attempt to escape when members of the public and the police officers approached him. After a spirited effort which entailed usage of police firearm the appellant was arrested despite his resistance which led to P.C. Jilo being injured while protecting him from being lynched by members of the public.

**Cpl. David Makau (PW8)** of C.I.,D. Kitale investigated the case and thereafter preferred the present charges against the appellant who denied the same and stated that he was a tractor driver and was on duty on the 4th November, 2006 upto 3.00 p.m. thereafter, he boarded a vehicle to Sikhendu where he took his bicycle and started cycling towards his home. However, he was stopped on the way by a group of five people who were strangers to him. They beat him up such that he lost consciousness and later found himself at the Kitale District Hospital where he stayed for two (2) days and thereafter told to go to the police station and record a statement. He did as instructed but was arrested and charged with the present offences.

The trial court considered all the foregoing evidence and concluded that the prosecution evidence was clear and consistent and its credibility was not thwarted by the appellant.

As a result, the appellant was found guilty as charged in all the three counts and convicted accordingly.

On its own consideration of the evidence, this court agrees with the conclusion reached by the trial court as there was cogent, credible and consistent evidence from the prosecution which established without any particular dispute that the child victim was indeed sexually assaulted in a most cruel manner by way of being defiled and sodomized. The act was not witnessed by anybody as the culprit made all efforts to conceal it. This explains why the child was found in a strange place away from her home and in a very sorry state. She had gone missing from her home and was rescued by strangers who took her to the

hospital before her parents traced her. The appellant was implicated with the offences of sexually assaulting the child because he had earlier threatened her parents when he visited them and after his unannounced exit the child went missing only to be found after a few days near his home having been sexually assaulted.

At the time of his arrest, the appellant put up a formidable resistance before he was subdued.

All the foregoing factors provided strong circumstantial evidence showing that most likely than not he was the person who sexually assaulted the child victim. His defence was a lame denial and an attempt to show that he was arrested and charged without good cause. His conduct right from the time he visited the child's parents to the time he was arrested was that of a guilty person. It was not a coincidence that the child went missing from her home minutes after the appellant had been there and disappeared mysteriously.

It is therefore the finding of this court that the appellant's conviction by the learned trial magistrate in all the counts was proper and lawful and so were the sentences meted out against him.

In sum, this appeal is devoid of merit and is dismissed in its entirety.

**[Delivered and signed this 4th day of March, 2014.]**

**J.R. KARANJA.**

**JUDGE.**