

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 150 OF 2012

V A APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal against conviction and sentence from the original Criminal Case No.2245 of 2002 in the Chief Magistrate's Court at Kakamega – the judgment of M.I.G. MORANG, SRM)

J U D G M E N T

The appellant was charged with the offence of defilement of a child contrary to **section 8(1)** as read with **section 8(3)** of the Sexual Offences Act o.3 of 2006. The particulars of the offence were that the appellant *on the 29.6.2007 in South Kakamega district within Western Province unlawfully and intentionally inserted his genital organ namely penis into the genital organ namely vagina of A K a girl aged ten years.* The appellant was also charged with an alternative count of indecent act with a girl contrary to section 11 of the Sexual Offences Act.

The appellant was convicted of the alternative count and sentenced to serve **10** years imprisonment. The grounds of appeal are that the case was not proved beyond reasonable doubt, the conviction is against the weight of the evidence, the charge was subsequently amended and no witnesses called. The conviction is based on the uncorroborated evidence of a minor and that the appellant's defence was not considered. Counsel for the appellant filed written submissions in support of the appeal. The submissions raise two issues namely- that the age of the complainant was not established and that the events at the scene were not clear. The State relied on the evidence on record.

The complainant gave unsworn evidence. She testified that she was 10 years old and a student at [particulars withheld] Primary School. On the 30.6.2007 at about 4.00 p.m. she was sheltering herself from the rain at the appellant's house. The appellant took her to a maize plantation and defiled her. She tried to resist but the appellant covered her mouth. She later went home and informed her mother. She bled from her private parts and her clothes were soiled. **PW2 J N** is the mother of the complainant. She testified that on the material day the complainant went to the posho mill with her father. She was given the maize meal to bring home. She went home at about 6.00 p.m. and informed her that the appellant had defiled her. The complainant was not bleeding from her private parts. She called **PW3** who is a midwife to check the complainant and find out whether she had been defiled. **PW3 E S** testified that she is a midwife and was called on the 29.6.2007 to check whether the complainant had been defiled. She saw spermatozoa but there was no tear of the vagina.

PW4 T L is the father of the complainant. He was informed about the incident and went to report to the area chief. The appellant was arrested and later charged with the offence. According to him **PW3** was called to confirm if there was penetration which she did.

The appellant was put on his defence and in his sworn evidence stated that he knows the complainant who is a relative. On the 29.6.2007 it rained and he was in his house with his wife and one **ERNEST (DW3)**. After the rain subsided he escorted Ernest to the road where he boarded a vehicle. He then went back home. He was arrested the same day at about 7.00 p.m. by the area chief and a village elder. He denied that he had defiled the complainant. According to him the complainant is a small girl and she is like a sister to him. **DW2 A K** is the wife of the appellant. She testified that she was together with her husband and it rained that day. She gave out Shs.100/= to Ernest as fair and her husband escorted him. Her

husband later went back home. **DW3 ERNEST MISANGO** testified that he works together with the appellant in digging pit latrines. He had been given work at Mukulusu Primary School and had gone to the appellant's house to discuss about the work. They had lunch and it rained. At about 5.00 p.m. the appellant escorted him to the road. The following day he heard that the appellant had been arrested.

The trial court evaluated the evidence and found that the investigating officer did not testify and no exhibits were produced. The court found the appellant guilty of the alternative charge for lack of medical evidence. The court concluded that medical evidence was not required for the charge of indecent act. It is clear from the evidence on record that the medical officer who attended to the complainant did not testify. The investigating officer also did not testify. The case took over 5 years before it was concluded and it is not clear why those two crucial witnesses were not called to testify. The court correctly found that there was no defilement. The evidence shows that although the complainant alleged that she bled from her vagina after the incident PW2 and PW3 established that there was no bleeding. The complainant's under-pant which she put on after the incident was produced in court and the trial magistrate noted that it had no blood stains. According to PW3 there was no tear of the vagina and according to PW2 the complainant was not bleeding from her vagina.

Given the evidence on record it is clear that the charge of defilement was not proved. The evidence on record also does not prove the charge of indecent act beyond reasonable doubt. Although the court can convict on the evidence of the complainant in sexual offences without corroboration if the court believes the evidence of the complainant, I do find that the evidence of the complainant was doubtful. She claimed that she bled after the incident but that was found not to be the case. Her under-pant was produced and it had no blood stains. That shows that the evidence she gave was not truthful. The court ought not to have convicted the appellant on the alternative charge simply because medical evidence was not necessary. The conviction ought to be based on the evidence of the complainant. Whereas the complainant alleged to have been defiled that was proved not to be the case. The prosecution evidence raised doubt on the alternative charge which I do find that it was not proved beyond reasonable doubt. The defence evidence also raised doubt on the prosecution case.

In the end I do find that the appeal is merited and the same is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 14th day of October 2014

SAID J. CHITEMBWE

J U D G E