REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 52 OF 2010

(Appeal from Original Conviction and sentence of the Chief Magistrate's Court at Kakamega in Criminal Case No. 312 of 2008 [J. M. GITHAIGA ESQ., PM])

DAVID HARAMBEE OFISI .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of defilement of a child contrary to S.8 (1) as read with S.8 (2) of the Sexual Offences Act. It was alleged that on 15.2.2008 , in Kakamega South District, he unlawfully and intentionally inserted his genital organ, namely the penis, into the genital, organ namely the vagina, of J. M., a girl aged 11 years.

2. He denied the offence as well as the alternative charge of indecent assault of a child contrary to S.11 (1) of the Sexual Offences Act and was convicted and sentenced to serve twelve (12) years' imprisonment on the main count.

3. On appeal, his principal complaints are that;

i. he was convicted on the basis of a defective charge sheet in that the age of the complainant was never confirmed.

ii. The trial was marked by irregularities and that all the evidence tendered was based on hearsay.

4. The evidence on record was that PW1, J. M. aforesaid, stated that she was 11 years old and that on the material day, on her way home from school, the Appellant who she called Davis, grabbed her, dragged her to his house and while threatening to cut her up with a panga, proceeded to defile her. That because she bled during the incident, he took a piece of cloth, wiped the blood and threw her out of his house. She wore her panty and got home, slept and the next day washed the panty, and escaped to the home of one Makokha, for fear of the Appellant who had threatened to kill her. She returned after 3 days upon which she revealed her ordeal to her grandmother and she was taken to Makunga Health Centre. Later she recorded a statement and the Appellant was arrested. She named the Appellant because she had previously known him and stated that he lived 300 metres away from her home.

5. PW3, **I.M.M**, PW1's grandmother, confirmed that when PW1 returned home, she told her that the Appellant had defiled her and so she reported the incident to PW2, **Javan Ohango**, the area Assistant Chief who caused the arrest of the Appellant.

6. PW3 is the one who took PW1 for treatment and medical check-up at Makunga Health Centre and PW4, **Wycliffe Sichele** examined her. He noted that she had developed septic wounds on the labia minora and labia majora. He also found that she had a foul smelling discharge from the vagina and she had an infection. He examined the Appellant later and found that he had the same infection as PW1.

7. PW5, **PC Michael Chepkonga**, received the initial report, noted that the Appellant was the one named, recorded statements and later re-arrested the Appellant before charging him with the offence of defilement.

8. In his defence, the Appellant denied the offence and said nothing of the event of alleged defilement but said that he was arrested for no reason and that the charges were instigated by the existence of a grudge between the complainant's mother and himself.

9. I have carefully read the evidence on record and I am satisfied that the offence of defilement was indeed committed by the Appellant. I say so because the evidence of PW1 was unshaken. She had known the Appellant as a neighbor and the defilement occurred in daylight and so the question of mistaken identification could not arise. Further, I believe her evidence that because she was terrified of the Appellant's threats, she fled her home for three days and when she returned, she informed PW3 of her ordeal. Any gap in evidence, and I see none, was amply filled and corroborated by the evidence of PW4 who confirmed that indeed PW1 had septic wounds in her labias and this is consistent with her testimony that she bled during the defilement.

10. To corroborate PW1's evidence further, the Appellant upon examination was found to have the same sexual infection as PW1. That evidence could not have been manufactured nor coincidental in the circumstances of this case.

11. The Appellant has attempted to take issue with the charge sheet and the age of the Appellant. I agree that in other circumstances, those issues would have been fatal to a case. In this case however, what comes out of the charge sheet is the critical aspect of "penetration" and thus defilement. The age of PW1 was not contested as being 11 years of age and so nothing lies on the Appellant's complaints in that regard.

12. Lastly, the defence tendered was a mere afterthought and was no answer to the charge.

13. On sentence, PW1 was adjudged to be eleven years old including by PW4, a Clinical Officer. S. 8 (2) of the Sexual Offences Act provides as follows;

"S. 8 (2) - A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

14. The above being the lawful sentence under the said section and having warned the Appellant that I could enhance his sentence, I hereby substitute the unlawful sentence of twelve (12) years' imprisonment to one of imprisonment for life.

15. Save for the above substitution on sentence, the Appeal on conviction is upheld and the Appeal is dismissed.

16. Orders accordingly.

Delivered, dated and signed at Kakamega this 3rd day of March, 2011.

ISAAC LENAOLA

J U D G E