REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 8 OF 2016

EDWIN OSORO OMUNDI…….....APPELLANT

V E R S U S

REPUBLIC……..RESPONDENT

J U D G M E N T.

INTRODUCTION.

This is a judgement in a **Criminal Appeal No. 8 of 2016** where the **EDWIN OSORO OMUNDI** is the **Appellant.**

The Appellant was charged in the lower court of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of Sexual Offences Act.

The particulars were that on the **25th** day of **September 2014** [*particulars withheld*] within **Nyamira County** intentionally caused his penis to penetrate the vagina of **J K O** a child aged **15** years.

A criminal Trial was duly conducted and the Appellant was found guilty, convicted and sentenced to **30** years imprisonment. It is important to note that the Appellant knew at the time of defilement that he was HIV Positive.

THE APPEAL

The Appellant being dissatisfied with the conviction and sentence has appealed against both the conviction and sentence.

THE GROUNDS ARE:

1. The Learned Trial Magistrate erred in law and fact in relying on evidence of recognition which was not free from error.

2. The Learned Trial Magistrate failed to note that there were material contradictions in the prosecution witnesses' testimonies.

3. The Learned Trial Magistrate erred in law and fact in rejecting the Appellant's defence.

4. The Learned Trial Magistrate erred in law and fact in shifting the burden of proof to the Appellant.

5. The sentence was manifestly excessive in the circumstances.

SUBMISSIONS

a) By the Appellant's Counsel, C. R. Sagwa

1. Grounds 1 & 2 to be consolidated and argued together.

2. Grounds 3 & 4 same as above.

3. Ground 5 to be argued alone.

On Ground 1; above, the complainant, **PW1** gives time of the incident as **5 – 5.30 a.m**. States that there were two people at the scene, one who walked away and the other who raped her. I submit that it was still dark to know the person who raped her.

PW1 states that she knows the person who raped her for a period of 3 years and their respective homes were neighbours. And yet she was unable to give the name to the police when asked. I submit that being unable to give a name of a person you have known is in questionable. If it is recognition, it is questionable too. This was the issue in case of **James Omondi Onyango (2014) EKLR, Page 4, Paragraph 3** thereof.

I further submit that **5 - 5.30a.m** cannot be daylight. **This is dawn, and dawn is darkish or towards darkness.** For the Trial Magistrate to have relied on evidence of recognition without interrogating the source of light, the intensity of light and the impairment of light, if any was not safe to convict. From the evidence, there was no source of light, if it were, it was impaired by a forest.

Therefore, I submit that the basis of conviction on that piece of evidence is unsafe. This was pointed out in the **Court of Appeal, supra line 2** thereof the court addressed the issue on **page 3** of the **judgement**.

Whether there was any description made of by the complainant to the police of the appellant or any other person she into contact with. Court of appeal, **supra, page 4** of the said judgement.

In the instance case, the complainant, page **6** of the proceedings, **PW1** told **PW2** – a teacher, at school that a person who raped her had a shaved beard and was short. However, **PW2** at page **7** of the proceedings, the rapist had black cloths on. Page **8**. **PW3 – mother,** that the rapist had stripped cloths. On being cross-examination, **PW3** – however says, she met the complainant for the first time at the police station. Thus it appeared they had not talked. These discrepancies in descriptions is a pointer that the complainant was definitely mistaken.

We submit that the Trial Magistrate ought to have construed this in favour of the appellant.

2. **On Grounds 3 & 4,** see page **14 – 15** of the **proceedings.** The appellant raised a defence of alibi. In rejecting that line of defence, at page **18** of the proceedings, the Trial Magistrate noted that the appellant had failed to call his brother as a witness and also failed to call **Osoro Wycliffe** to corroborate his line of defence on alibi, and that in doing that, we submit, the Trial Magistrate shifted the burden of proof to the appellant, especially as the prosecution had failed to place the appellant at the scene of the crime. Thus we submit that this was an error on the part of the Trial Magistrate.

3. **On Grounds 5,** it is on record that the appellant, taking into account, those factors, we submit that the sentence meted out was massively excessive. We urge that the same be reviewed. The sum total is that we urge this court to find that, this appeal has merit, quash the conviction and set aside the sentence.

b) <u>By The Respondent's Counsel, Mr. Ochieng, opposing the appeal, submitted as follows:</u>

<u>On Ground 1,</u> it is trite law that evidence of recognition is stronger & reliable than evidence of identification. **PW1** in her testimony told the court that she recognized the voice of the appellant when he called her **"Wewe Msichana"** she equally recognized the appellant's face when he held her by the neck and pushed her down. Even the appellant lay on top of her. It is her evidence that these events took place at **5.00a.m**, it was not so dark. She could recognize the appellant because of proximity of their respective homes.

I submit therefore, that the light required for recognition was sufficient enough to enable the victim – the complainant- to recognize the assailant.

It was not in dispute that the appellant was a neighbour to the victim. This is reconfirmed by evidence of **PW1 – the victim** and the evidence of **PW3-** the mother to the victim. That they have been neighbours for (3) years.

Therefore, not knowing the name of the appellant is not an issue. It took nothing away from the case.

PW2 – A complainant's teacher, testified to the court that the complainant described the manner of appellant's facial appearance, the way he had shaved. And the same was confirmed when the appellant was finally arrested **PW1's** testimony remained unshaken on cross-examination and no contradiction.

It is therefore, my submission that the Trial Magistrate rightly considered the evidence of recognition.

<u>On Grounds 2,</u> above, I submit that on issue of contradiction that were alluded to by the counsel, there were discrepancies on order of events at the time of reporting this case and were only found in the statement of **PW3** – the mother of the victim. The same corrected during re-examination where she confirmed that she met the complainant at the police station. I submit that this in no way interfered with evidence which was very solid.

<u>On Ground 3 & 4,</u> above, I submit that the defence given by the appellant was a mere and casual denial and the Trial Magistrate rightly noted if the appellant intended to rely on an alibi, that it would have been, in his interest to call the **(2)** two witnesses in his defence who he alleged were with him. I submit therefore, this was not shifting the burden of proof, it was to buttress his defence. In any case the appellant did not mention in his defence where exactly he was, neither did he notify the police during the taking of statements of his alibi, to enable the police to interrogate the alibi to exonerate him. He only mentioned it as an afterthought at the defence level.

<u>On Ground 5,</u> and summing up, the prosecution proved its case beyond reasonable doubt. The court considered the evidence **PW1** where she claimed that she was defiled and this rightly so under **Section 124 of Evidence Act**. This evidence was corroborated by medical evidence which confirmed that there was penetration and there was sperms in the vagina of the complainant. The same was buttressed by evidence of **PW2** – the teacher was the first person to meet the complainant after that evening and confirms that she was scared, had mud on her clothing and blood on the pants.

Therefore, it is our submission that the sentence was proper, as provided for under the act, The Trial Magistrate considered the fact that medical evidence confirmed that the **Appellant** was **HIV positive** i.e thus aggravated the offence because he was intentionally affecting the minor.

I urge the court to dismiss this appeal and retain both conviction and sentence in the interest of justice.

RESPONSE BY THE APPELLANT'S COUNSEL.

1. The court showed note that even if the victim and the Appellant were neighbours, in difficult circumstances as this, errors of recognition can occur, see my legal authority **No. 3** of the authority list.

On the issue of discrepancies occurring in order of events, to which we disagree; these touched on description and recognition.

On defence of alibi, **Section 309 Criminal Procedure Code**, the prosecution had power to amend the charge when matters such as these arise. It was the duty of the prosecution to counter the defence of alibi. This was not done.

Therefore, we urge the court to allow the appeal.

FIRST APPEAL.

The first Appellate has to contain by reading the proceedings to re-evaluate the evidence and come to his own independent conclusion without the benefit of having seen and heard the witnesses **Viva Voce**, giving allowances for that fact. **See Okeno Vs Republic (1972) E.A. 32**

FACTS OF THE CASE.

On **25th** day of **September, 2014**, one **J K** then only aged **15** years was a student at [*particulars withheld*] Primary School in class 8 was while going to school at 5.30a.m was accosted by a neighbour. She heard a voice telling him **"Wewe msichana."** The accused Edwin Osore, using his hand, grabbed her neck and dragged her to some trees by the right side of the road. He removed her panty lay on her on the ground. She lost consciousness since he was grabbing her neck tightly.

She regained consciousness and tried to fight him back but he threatened to stab her with a knife if she screamed. He had sex with her. She felt his penis penetrating her vagina. He had moved his trousers up to the level above the knees. She remained silent. Accused on finishing to have sex with her stood up, wore his trouser and left. She also stoop up wore her panty and proceeded to school where she informed her teacher Esther that she had been raped.

She testified she could recognize the accused as there was daylight. She went to school with her dirty dress. Upon examination by the doctor, there were discharge from her vagina and her hymen was broken, spermatozoa in her vagina and pus cells were visible.

ISSUES FOR DETERMINATION.

(i) Was there penetration into the complainant's vagina?

FINDINGS.

PW1's testimony was corroborated by **PW5 – The Clinical Officer** was confirmed on examination that there was some discharge in **PW1's** vagina, the hymen was broken and the vagina swab revealed spermatozoa in her vagina plus pus cells.

I am of the considered view that this case was proved beyond reasonable doubt by the prosecution.

The Trial Magistrate was right to find that there was penetration of the vagina of the **PW1** – the **ingredient** of defilement as set in the law.

CONCLUSION.

In the premise and for the reasons stated herein above, the Appeal herein be and is hereby dismissed. The

conviction and sentence to stand.

Orders accordingly.

Dated and delivered at Nyamira this 28th day of April 2017.

Right of appeal 14 days

C. B. NAGILLAH

JUDGE

In The Presence of:-

Madam Sagwa for Appellant

Ochieng for Respondent state

Mercy - Court Clerk