



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CORAM: D.S.MAJANJA J.
CRIMINAL APPEAL NO. 11 OF 2016
BETWEEN
DAVID EGESA EBRA.....APPELLANT
AND
REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. H. Barasa, PM dated 18th January 2016 at the Magistrates Court at Eldoret in Criminal Case No. 7435 of 2014)

JUDGMENT

1. The appellant, **DAVID EGESA EBRA**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (3)** of the **Sexual Offences Act** (“the Act”). The particulars of the offence were that on diverse dates between 16th and 24th November, 2014 at **[particulars withheld]** within Uasin Gishu County, he intentionally caused his penis to penetrate the vagina of GK, a child aged 13 years.
2. The appellant was sentenced to 20 years’ imprisonment and now appeals against conviction and sentence. In his grounds of appeal, he complains that he was convicted on the basis of uncorroborated evidence and that the medical evidence could not sustain the charge against him. He also complained that the sentence was harsh and excessive.
3. Before I deal with this appeal, I recognise that it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**). In order to proceed with this task, I will set out a summary of the evidence as it emerged before the trial court.
4. The prosecution case was that the child, PW 1, was abducted by the appellant on 16th November 2014 and kept in his house until 24th November 2014. PW 1 testified that during that time she was subject to acts of penetration. She managed to leave the house on 24th November, 2014. The fact that PW.1 was missing on 16th November, 2014 was confirmed by her grandmother, PW 2, whom she was living with and who testified that when she left home for church on the material day and returned, PW.1 was missing until she was informed that she had been found and they proceeded to the appellant’s home with village elders and found PW.1.
5. PW 3 was also informed by PW 2 that PW 1 was missing. On 24th November 2014 at about 1.00pm, he found PW.1 playing outside his home. He called PW 2 and they looked for PW 1 and found her in the appellant’s house. PW4, a friend of PW 2, also testified that PW 1 was missing. On 24th November 2014, PW 3 called her and told her that he had seen PW 1. She went where he was and they found PW 1 in the appellant’s house. A village elder, PW 5, testified that on 24th November 2014, PW2 came to report to him that PW 1, who had been missing, had been located. He accompanied her to a house where she had been shown. When he peeped through the window of the house and saw PW 1. On that evening PW 2, PW 3, PW 4 and PW 5 who had come to rescue PW 1 after she was found in the appellant’s house recalled the appellant came home late and was promptly arrested.
6. PW 6, the doctor who examined PW 1, on 26th November 2014 noted that PW 1’s hymen was broken and tears on the vagina were healing. She concluded that there was penetration.
7. In his sworn testimony, the appellant denied the offence and told the court that he was seeing the child for the first time at the police station.

8. Since the issue in this appeal is whether the prosecution proved its case beyond reasonable doubt, under **section 8(1)** of the **Act**, the prosecution must prove that an accused did an act of penetration with a child. “*Penetration*” under **section 2** of the **Act** means, “*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*”

9. The testimony of PW 1 on how she was subjected to penetration over a period of 8 days is corroborated by the medical evidence of PW 6. The appellant was identified as the person who took PW 1 to his house as she was found in his house, a matter confirmed by PW.2, PW.3, PW.4 and PW.5. He could not explain what the child was doing in that house. His defence was a bare denial which was overwhelmed by the prosecution evidence.

10. The child’s age was proved by production of the birth certificate which showed that she was born on 19th March 2000 meaning that she was 14 years old when the offence was committed. The sentence imposed on the appellant was the mandatory minimum sentence under **section 8(3)** of the **Act** and it was therefore lawful.

11. I affirm the conviction, sentence and dismiss the appeal.

DATED and DELIVERED at ELDORET this 25th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Mumu, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.