



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CORAM: D.S.MAJANJA J.**

**CRIMINAL APPEAL NO. 18 OF 2018**

**BETWEEN**

**LEVI MUCHITI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against the original conviction and sentence of Hon. N. Mosei, RM dated 16<sup>th</sup> March 2018 at the Magistrates Court at Eldoret in Criminal Case No. 49 of 2016)***

**JUDGMENT**

1. The appellant, **LEVI MUCHITI**, was charged convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act** (“the Act”). It was alleged that on 17<sup>th</sup> February 2016 at **[particulars withheld]** in Lugari sub-county within Kakamega county he unlawfully and intentionally caused his penis to penetrate the vagina of DN, a girl aged 7 years.
2. The appellant now appeals against the conviction and sentence on the grounds that the offence was not proved beyond reasonable doubt. He contended that the prosecution did not prove penetration and that the complainant was not a credible witness. He pointed out that he was not afforded a fair trial as he was not assigned a lawyer by the state. He urged that the case was brought as a result of a grudge against him by people using the complainant.
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**).
4. The complainant, PW 1, was affirmed after a *voire dire*. She recalled that she knew the appellant as he used to herd cattle for a neighbour by the name *Mama F*. She testified that on 17<sup>th</sup> February 2016 at 4.30pm, she had gone to *Mama F*'s place to pick some fruits. She saw the appellant who pulled her into the nearby sugarcane shamba, removed her pants, removed his trousers, laid her on the back and proceeded and caused his penis to enter into her vagina. She screamed causing *Mama F* to come and rescue her.
5. The PW 1's mother, PW 2 testified that at 5.00pm on the material day she was called by neighbours and told what happened. She immediately went and found many people at *Mama F*'s home. She took the child to the dispensary where she was treated. PW 4, the doctor who produced the P3 medical form testified that PW 1 had been treated at Lumakanda Sub-County hospital on 17<sup>th</sup> February 2016. He noted that there were bruises on the labia majora and minora and tenderness on the lateral aspect of the vagina.
6. The investigating Officer, PW 5, told the court he received the complaint of defilement on 18<sup>th</sup> February 2016 at 8.00am when PW 1 was brought to the police station accompanied by PW 3, an employee of a charity dealing with vulnerable children. The appellant had already been arrested by police officers at the patrol base. He took witness statements and arraigned the appellant in court.
7. In his sworn defence, the appellant denied that he committed the offence and testified that he was employed by a teacher and that he was being framed for defilement of PW 1 as she had disagreements with his employer.
8. The appellant's case is that the prosecution failed to prove 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 main evidence in this matter is that of PW 1 who gave a description of what took place. She knew the appellant, who admitted that he was working for the complainant's neighbour. The child's testimony is, of itself, was sufficient to support a conviction under **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which provides that the court may convict on the basis of the uncorroborated testimony of a victim in a sexual offence if, for reasons, to be recorded, it believes the child is telling the truth. In this case, the trial magistrate was satisfied that the child was telling the truth and he expressed himself as follows:

*I had the opportunity to hear all the witnesses in this case. Although PW 1 was a girl of tender years, her evidence was coherent and consistent. Her evidence was not shaken in cross-examination. I believed her. Her evidence was corroborated.....*

10. I also find that there was corroborative evidence in the form of the medical evidence that showed PW 1's private parts were injured in a manner consistent with penetration. The medical examination was done within a day of the incident. In light of all this evidence, and the evidence putting the appellant at the scene of the incident, his defence is a sham as he did not raise the issue of the grudge with the PW 1 or PW 2.

11. The age of a child is a question of fact. In this case, PW 1's age was proved by PW 2 who produced the Baptism card which showed that she was born on 8<sup>th</sup> September 2009. She was aged 7 years on the time of the offence and in line with **section 8(2)** of the **Act**, the mandatory sentence of life imprisonment was properly enforced.

12. The conviction and sentence are affirmed. The appeal is dismissed.

**DATED and DELIVERED at ELDORET this 24<sup>th</sup> 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.