



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 57 OF 2017

BETWEEN

SAMSON LAGAT MAIYO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. C. Obulutsa,

CM dated 12th May 2017 at the Magistrates Court at Eldoret in Criminal Case No. 1913 of 2013)

JUDGMENT

1. The appellant, **SAMSON KIPLAGAT MAIYO**, was charged, convicted and sentence to serve 15 years' imprisonment for the offence of defilement contrary to **section 8(1) and (3)** of the *Sexual Offences Act* ("the *Act*"). The particulars of the charge were that on diverse dates between 14th January 2013 and 19th May 2013 in Eldoret East District of Uasin-Gishu County, he intentionally caused his penis to penetrate the Vagina of LA, a child aged 13 years.

2. In his grounds of appeal, the appellant contends that the charge sheet was defective and was at variance with the evidence adduced before the trial court. He complains that the P3 form was not filled by the person who produced it and that the prosecution failed to prove its case. He also contended that the medical evidence was insufficient to prove the offence.

3. It is the duty of the 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. In her testimony, the complainant, PW 2, stated that she was 15 years old and that on 14th January 2013 she met the appellant. He took her to his friend's home and at the home he proceeded to have intercourse with her and after 2 weeks she found that she was pregnant.

5. PW 3, who was residing with PW 2, told the court that in March 2013 she disappeared while her mother, PW 4 confirmed that in February 2013, PW 2 got sick and when she took her for treatment, she found out she was pregnant. She recalled that on 13th March 2013, the appellant sent people to tell her that the appellant was living with her daughter. On 15th April 2013, that appellant sent her Kshs.750/= for the girl's care. She also recalled that on 21st May 2013, PW 2 returned home and told her that the appellant had sent her away.

6. In his unsworn statement, the appellant denied the charges. He stated that he was framed as a result of differences with his neighbours. DW 2, his cousin, told the court that she knew PW 2. She left home in April and when she returned the appellant was not at home having been arrested. DW 3, a friend to the appellant, testified that PW 1 was a neighbour and that they had differences.

7. In order to prove the offence of defilement 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."

8. I have considered and I find that PW 2 was in a relationship with the appellant, after he seduced her, which resulted in sexual intercourse but since she was below 18 years as confirmed by the birth certificate produced in court, she was incapable of giving consent. She became pregnant and as such the fact of penetration was proved. Even though a DNA test was not done to confirm whether the child of was the appellant's, such evidence would be merely corroborative and evidence of the relationship between the appellant and PW 2 and it was

necessary to prove penetration which is an ingredient of the offence of defilement. The appellant's behavior toward PW 2 and PW 3 also confirms the relationship.

9. As to whether there was a grudge, the appellant did not state the nature of the grudge or put it to PW 2 and PW 3 in cross-examination. His witnesses, who would have known of the grudge, did not say anything to support his case on that score.

10. The prosecution proved the offence. The appeal is dismissed.

DATED and DELIVERED at ELDORET this 24th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

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