REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 117 OF 2018

BETWEEN

LEAKEY EGESA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. N. Wairimu, PM dated 16th November 2018 at the Magistrates Court at Eldoret in Criminal Case SO No. 202 of 2018)

JUDGMENT

1. The appellant, **LEAKEY EGESA**, was charged, convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act***. The particulars of the offence were that on 16th August, 2017 at [particulars withheld] in Wareng District within Uasin Gishu County he intentionally caused his penis to penetrate the vagina of SM, a child aged 15 years.

2. In his grounds of appeal, the appellant contends that the prosecution failed to prove penetration as a key ingredient of the offence of defilement and that the medical evidence was insufficient support the charge. He stated that the sentence imposed on his was malicious and that he alibi defence was plausible enough to water down the prosecution case. He also complained that he was not given a chance to address the court at the close of the prosecution case. The appellant supported his grounds with detailed written submissions.

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. According to the prosecution, the appellant was living in a plot owned by PW 3. PW 3 testified that the appellant was her tenant and on that on 16th August 2017, she had left to go and visit her mother. She had left her two daughters, PW 1 and PW 2. Before she left, she requested the appellant to pay outstanding rent but he did not have it. She was called that night and told that the appellant had attacked her daughters.

5. The complainant, PW 1, testified that she was 16 years old and on the material night, the appellant, who was a neighbor called her and told her he wanted to pay rent. He pulled her into his house and locked the door. He told her he would pay her money. He went out and told PW 2 that she should not tell anyone where PW 1 was and he would give her money. When he came back, he removed his clothes and pulled up his shirt and then pulled up her skirt and proceeded to *"do bad manners to her"*. In short while, she heard PW 2, started screaming and a neighbour locked the door from outside by the appellant broke the door and run away.

6. PW 3, who was present on that night, recalled that the appellant came to the house and told PW 1 to go and collect rent but she refused to leave. He pulled PW 1 to his house and came back and told her he should not tell anyone where PW 1 was as he would give her money. She waited for a while and when PW 1 did not return, she called a neighbor. They both came and started screaming. The neighbor locked the door from outside by the appellant broke it and ran away.

7. Both PW 1 and PW 2 were taken to the Police Post and Moi Teaching Referral Hospital ("MTRH"). PW 3 took PW 1 for treatment. A doctor from MTRH, PW 4, produced the P3 form and on behalf of the doctor who examined PW 1 on 18th August 2017. She noted that the child's zip of the skirt was torn and the clothes were muddy. The child's vagina was injured and had several cuts on the hymen and a laceration.

8. The investigating officer, PW 5, confirmed that he received PW 1 on 18th August, 2017 and investigated the matter. He also issued the P3

form. He told the court that the appellant was arrested by members of the public on 24th October 2017 and then charged.

9. In his sworn defence, the appellant claimed that he had moved from PW 3's plot on 5th August 2017 and did not pay rent for July, 2017 as he was sick. He told the court that he was in constant communication with PW 3 in August and September 2017and that they even met and he told her that he had not received money. He claimed that he was arrested due to the fact that he had not paid rent.

10. The thrust of the appellant's case is that the prosecution failed to prove every element of the offence of defilement 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."*

11. I have considered the entirety of the evidence and I find as follows: As regards penetration, PW1 gave lucid evidence on how she was sexually assaulted. Her evidence was corroborated by the medical evidence, following the next day of the incident, which shows that her vagina had several injuries.

12. As regards the identity of the appellant, the appellant admitted that he was a tenant of PW 3. He lived in the same plot as PW 1 and PW 2 and when he came to see them on the material night, they had no difficulty in recognizing him. PW 1 and PW 2 put him at the *locus in quo* and I have no reason to doubt their testimony. In his defence, the appellant stated that he had vacated the plot. However, PW3 testified that he was still a tenant since June 2017 and had not left. The appellant did not put to her his allegation that he had vacated the premises or that he was in communication with her in August to September when he had disappeared. It is inconceivable that the PW 3, whose daughter, had been assaulted and the matter having been reported to the police, would not only communicate with the appellant on phone but also meet him. His alibi when weighed against the prosecution is weak tea and was properly dismissed by the trial magistrate.

13. The age of a child is a question of fact hence I find that the age of PW 1 was proved by the birth certificate and even though PW1 made an error in her age in her testimony, PW 3, her mother, confirmed that she was born on 10th May, 2002. The age of the child was accordingly proved.

14. The appellant also complained that the Mama T, who had assisted PW 1, was not called as a witness. The law concerning the number of witnesses to be called was aptly summarized in ***Keter v Republic*** **[2007]1 EA 135** the court held that, *"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."* **Section 143** of ***Evidence Act (Chapter 80 of the Laws of Kenya)*** provides that, "*No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.* In my view, the evidence would add nothing to the prosecution case. It was not suggested that she would have given any exculpatory evidence.

15. The appellant raised the issue that he was denied the opportunity to address the court at the close of the prosecution case. I find this submission without merit as the accused was given an opportunity to make submissions and he did file written submissions. Those submissions were considered by the trial magistrate in the ruling holding that the appellant had a case to answer.

16. I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at ELDORET this 23rd day of APRIL 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

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