REPUBLIC OF KENYA

IN THE HICH COURT AT ELDORET

CRIMINAL APPEAL NO. 65 OF 2015

JULIUS KIPCHOGE KORIR ……..……. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(Being an Appeal from the original conviction and sentence by Honourable G. ADHIAMBO Senior Resident Magistrate, dated 5th May, 2015, in Kapsabet Principal Magistrate's Court Criminal Case No. 2731 of 2014)

JUDGEMENT

1. The appellant was tried and convicted of the offence of defilement contrary to *Section 8(1)* as read with *Section 8(3)* of the *Sexual Offences Act No. 3 of 2006.*

2. The particulars of the offence alleged that on the 4th day of June 2014 at around 7 p.m at [particulars withheld] village, Chemase location of Nandi County, the appellant intentionally and unlawfully caused his penis to penetrate into the vagina of the *S.J* (Name Withheld) a girl aged 14 years.

3. Upon his conviction, the appellant was sentenced to twenty years imprisonment. He was dissatisfied with his conviction and sentence hence this appeal.

4. In his petition of appeal dated 15th May, 2015, the appellant raised eight grounds which can be summarized into the following three main grounds;

(i) That the learned trial magistrate erred in law and fact in convicting him on evidence which did not prove his guilt beyond reasonable doubt.

(ii) That the trial magistrate erred by disregarding the evidence of the appellant's witnesses.

(iii) That the trial magistrate erred by shifting the burden of proof from the prosecution to the appellant.

5. At the hearing, the appellant was represented by learned counsel *Mr. Z.K Yego* while learned prosecuting counsel *Ms Oduor* appeared for the state. In his submissions, *Mr. Yego* urged the court to find that the appellant was wrongly convicted as the prosecution failed to prove the essential elements of the offence of defilement beyond any reasonable doubt; that the complainant's age was not proved as no age assessment report was produced as an exhibit; that there was no evidence to prove penetration of the complainant by the appellant mainly because the P3 form was produced by a nurse and was therefore inadmissible in evidence; that the evidence of the complainant was not credible and it was not

corroborated by any other evidence. Counsel implored me to find merit in the appeal and allow it.

6. The appeal is contested by the state. *Ms Oduor* in her submissions asserted that the appeal lacks merit as in her view, all the ingredients of the offence of defilement were proved by the prosecution beyond any reasonable doubt; that the complainant's evidence was credible and was even corroborated by the evidence of defence witnesses. She invited the court to find that the appellant was properly convicted and dismiss the appeal.

7. This is a first appeal to the High Court. I am alive to the duty of a first appellate court which is to revisit and re-evaluate all the evidence tendered before the trial court and arrive at my own independent conclusion on whether or not to uphold the appellant's conviction and sentence. In doing so, I should be careful to remember that unlike the trial court, I did not have the benefit of hearing and seeing the witnesses and give due allowance for that disadvantage – See: ***Akeno V Republic [1972] EA 32;*** ***Soki V Republic [2004] 2 KLR 21***; ***Mwangi V Republic [2004] 2 KLR 28.***

8. I have read and carefully considered the grounds of appeal; the evidence presented before the trial court; the submissions made by *Mr. Yego* and *Ms. Oduor* as well as all the authorities cited. I have also read the judgement of the learned trial magistrate.

9. I wish to start with the appellants claim that the trial magistrate failed to give due consideration to the evidence proffered by his witnesses and that the trial court shifted the burden of proof from the prosecution to the appellant.

10. A reading of the learned trial magistrate's judgment clearly reveals that the trial court analyzed the evidence tendered by the appellant and his witnesses but after weighing it against the evidence adduced by the prosecution witnesses discounted it on grounds that it was incredible and did not shake the evidence adduced by the prosecution. Nothing therefore turns on that ground of appeal.

11. Regarding the complaint that the trial court erred in shifting the burden of proof from the prosecution to the appellant, I have meticulously scrutinized the judgement of the learned trial magistrate and I have not come across any indication that he wrongly applied the principle on the burden of proof.

12. The trial court evidently had in mind who among the prosecution and the appellant had the onus of proving the offence and demonstrated this by basing his conviction of the appellant on the main ground that the prosecution had proved the offence against the appellant beyond any reasonable doubt. I do not therefore find any merit on that ground of appeal.

13. Turning now to the crux of this appeal which is the contention that the appellant was wrongly convicted on evidence which did not prove his guilt beyond reasonable doubt, the thrust of *Mr. Yego's* submissions on this point was that the key ingredients of the offence of defilement were not proved to the required standard of proof; that penetration was not proved as the P3 form was completed by a Nurse; that the P3 form was inadmissible in evidence as under the Nursing Act, a nurse is not described as a medical practitioner and is therefore not competent to fill a P3 form. For this proposition, he relied on the persuasive authority of ***Titus Kasyoki Mutua & Another V Republic (2014) eKLR*** where *Hon. Jaden* and *Mutende JJ* held that a P3 form completed by a Nurse was inadmissible in evidence. I agree with that finding.

14. The learned trial magistrate in this case also correctly found that the P3 form filled in respect of the complainant by PW4 *Martin Kipkorir Mutai* a Nursing officer at Chemase Health Centre was inadmissible in evidence. He correctly identified the issue that fell for his determination namely whether the evidence on record excluding the P3 form was sufficient to establish the offence of defilement against the appellant beyond reasonable doubt. But for some undisclosed reasons, the learned trial magistrate even after finding that the P3 form was inadmissible in evidence proceeded to consider the findings of the nurse in the p3 form and made them a basis for his conviction of the appellant. To illustrate this point, the learned magistrate stated the following at page 97-98 of the record;

> *"**I find that the prosecution has been able to prove beyond reasonable doubt that the accused occasioned his penis to partially penetrate the vagina of the complainant on 4 . 6.14 thereby occasioning lacerations to the labia minora of the complainant. It was not proved that there was complete penetration because PW4 did confirm that he did not examine whether the complainant's torn hymen was fresh or long standing. It is in view of the foregoing that I find the accused guilty of the main charge and convict him as per section 215 of the criminal procedure code for reasons that the prosecution has proved the main charge beyond reasonable doubt.***

15. Having made a finding that the P3 form was inadmissible in evidence, the learned trial magistrate ought not to have considered the evidence of PW4 or his findings in the P3 form. He should have completely disregarded the same. Failure to do so was an error and a gross misdirection on his part.

16. The court record also shows that though the learned trial magistrate properly appreciated the full import of the proviso to *Section 124* of the *Evidence Act*. The proviso empowers a trial court to convict an accused person in sexual offences involving minors on the sole evidence of the child complainant provided that the court believed that the victim was telling the truth and recorded its reasons for that finding.

17. In this case, the complainant who testified as PW1 was the prosecution's key witness. She is the one who incriminated the appellant claiming that he lured her into his house and defiled her three times. All the other witnesses did not witness the commission of the offence. The learned trial magistrate would have been perfectly entitled to convict the appellant on the testimony of the complainant alone had he made a finding that the complainant was a truthful witness and gave reasons on record for his finding.

18. Unfortunately, the trial magistrate in this case did not make any finding on the complainant's credibility although her testimony formed the foundation of the prosecution case. He apparently did not seek to rely on *Section 124* of the *Evidence Act* despite having made reference to it. He evaluated the evidence of the complainant alongside the evidence adduced by the other prosecution witnesses including the inadmissible evidence of PW4.

19. For the foregoing reasons, I have come to the conclusion that the appellant's conviction was unsafe. Consequently, I find merit in this appeal and the same is hereby allowed. The appellant's conviction is quashed and sentence set aside. He shall be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

C. W. GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 28th day of June 2017.

In the presence of:-

The appellant

Mr. Z.K Yego for the appellant

Ms. Kainga for the State

Mr. Lobolia Court Clerk