

The appellant's submissions

8. The appellant filed written submissions that he relied on entirely. The said written submissions are not very coherent. The few issues that I picked from the said submissions are that there was no DNA or specimen sampling that was done on both the victim and the appellant. He also submitted that there were contradictions in the prosecution's case and that the charges against him were framed up to nail him to an offence he did not commit.

The respondent's submissions

9. Mr. Omwenga, learned Prosecuting Counsel supported the conviction and sentence. He submitted that the appellant in ground No. 1 of his petition of appeal asserts that there were contradictions by the prosecution witnesses and their evidence was confusing. The appellant cited the case of **Richard Appella Vs. Republic [1981] EACA 945**, in that two contradictory statements cannot be admissible in court as evidence of truth. Mr. Omwenga submitted that the six (6) prosecution witnesses did not contradict each other. PW1 informed the court that she was told about the defilement by PW4 and another person who did not testify. PW1 talked to the minor, PW2, took her to Mbale District Hospital after she said that it was the appellant who defiled her.
10. It was submitted for the respondent that PW2 confirmed that PW1 took her to hospital where PW3, the Clinical Officer from Vihiga District Hospital also known as Mbale District Hospital confirmed that PW2's hymen was broken which was evidence of penetration. The above three (3) witnesses gave evidence that was consistent. Two witnesses were Police Officers and PW4 the co-worker confirmed what PW1 said.
11. On ground No. 2, Mr. Omwenga submitted that it was not true that the father of PW2 testified and exonerated the appellant. PW2's father never testified. On ground No. 3, where the appellant states that it took a long time before the incident was reported thereby prejudicing his rights, it was submitted that the appellant did not raise this in the lower court. If this was so, there is no requirement setting the time within which complaints can be made to the Police.
12. It was also submitted for the respondent that the allegation that the appellant was held at the Police Station way above the period provided in the Constitution before being arraigned in court is not recorded anywhere in the lower court proceedings. The record does not show that the appellant raised the concern of not being provided with statements to the trial court. Mr. Omwenga concluded by saying that the appellant was sentenced to life imprisonment as the complainant was 9 years old.
13. On the violation of the appellant's rights, Mr. Omwenga invited the court to look at the decision in the case of **Julius Kamau Mbugua vs. Republic [2010] eKLR** where the court was of the view that failure to produce an accused person within the time provided in the Constitution can be compensated. He urged the court to uphold the conviction and sentence.

The duty of the 1st appellate court

14. The duty of the first appellate court is to re-evaluate and analyze the evidence adduced before the lower court and come to its own findings and conclusion on the same. This was so held in the case of **David Njuguna Wairimu vs. Republic [2010] eKLR** where the Court of Appeal reiterated this duty as follows:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything

objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

This court will re-evaluate the evidence adduced before the trial court as required of it and make its own findings on the same.

The prosecution’s case

- 15.PW1, NKJ [name withheld] works as an Accountant at [Particulars Withheld] Child Development Centre which takes care of needy children. On 4th July, 2011, she received a report that an 8 year old girl under their care had been defiled. PW1 talked to the child who told her that she was defiled on 16th June, 2011. She took the child to Mbale hospital for examination and the Doctor confirmed that the child had been defiled. She was treated and a P3 form filled. The appellant was arrested.
- 16.PW2, a minor by the name EK [name withheld] gave unsworn evidence of how her Aunt F sent her on 16th June, 2011, to the appellant’s house to collect maize. While at the appellant’s home, it started raining. He closed the door, got hold of her and took her to bed where he did bad things to her. She reported the incident to her Aunt who did not ask the appellant. PW2 informed the court that she was taken to Mbale hospital by PW1 and then recorded a statement.
- 17.PW3, Charles Leparmorgo, a Clinical Officer based at Vihiga District hospital examined PW2, a nine year old child on 4th July, 2011. On examination of her genital area, he found that her hymen was broken and torn which was evidence of penetration. He assessed the degree of injury as harm. He explained that for a 9 year old girl the hymen should be intact unless interfered with sexually or by other cutting.
- 18.PW4, HK [name withheld] a Social Worker, received a report from a villager informing him that PW2 had been defiled. On 2nd July, 2011, they went to the home of one F who used to live with her who told them that the child had gone to her parents. On 4th July, 2011, PW2 was taken to them by F and she was taken to hospital where it was confirmed that she had been defiled. The said F and the appellant who are neighbours were arrested.
- 19.PW5, APC Bashur Hussein, received a report of defilement on 4th July, 2011 to the effect that PW2 was defiled by the appellant.
- 20.PW6, Daina Watena attached to Serem Police office received a defilement report on 5th July, 2011. PW2 narrated the incident to her and reported that it was the appellant who defiled her. Although she informed her Aunt about the defilement, she told her not to tell anyone. She was also warned by the appellant. PW2 was taken to hospital and treated. PW6 produced PW2’s clinical card as exhibit 3 and a birth dedication card as exhibit 2, to establish PW2’s age.

The defence case

- 21.The appellant in his defence informed the court that on 4th July, 2011, he was in the house preparing to go to work when 2 people went there. He was arrested and taken to the police.

Determination of the appeal

- 22.The appellant raised the issue of contradiction in the evidence of prosecution witnesses, a thorough perusal of the record reveals none. Contrary to what the appellant stated in his petition of appeal, PW2’s father did not adduce evidence at all in court to exonerate him. He was not called to give evidence in court by the prosecution or the defence.

23. It is clear that a long duration of time elapsed before PW2 was taken to hospital for examination. The record is very clear that her Aunt F (F) with whom she was living with took no action at all to report the defilement incident to the Police. She shielded the appellant by keeping quiet and turned against her niece at her hour of need. The evidence of PW6 indicates that PW2's Aunt was an accomplice in the case at the lower court but she disappeared from her home.
24. The charge sheet shows that the appellant was arrested on 5th July, 2011, and charged in court on 6th July, 2011. He was therefore not kept in custody over and above the time span of twenty four hours stipulated in article 49 (1) (f) (i) of the Constitution before being charged. The appellant raised the issue of not being supplied with copies of the documentary evidence that the prosecution intended to rely on. A perusal of the lower court proceedings do not reveal the fact that the appellant applied to be supplied with the same and that he was not granted his request.
25. The court notes that the clinical examination did not exonerate the appellant from the commission of the offence. It only showed that he did not have any sexually transmitted infections that he passed on to PW2 during the defilement. DNA analysis would have yielded nought 18 days after the commission of the offence. That submission by the appellant that DNA analysis was not carried out was without merit.
26. Following an analysis of the evidence that was tendered before the trial court, I am satisfied that the prosecution discharged its burden of proof beyond reasonable doubt. Although PW2 was taken to hospital 18 days after the commission of the offence, this was attributable to her Aunt Flora to whom she reported the incident to. The said Aunt made no effort to have the appellant arrested by reporting him to the Police. The Clinical Officer found that PW2's hymen was broken, which was evidence of penetration.
27. I am satisfied that the person who perpetrated the offence against PW2 was the appellant herein. At the time the offence occurred, PW2 was 9 years old as she was born on 4th June, 2002 as per prosecution exhibit 2 which was issued in respect to her as a 'birth certificate' by the Religious Society of Friends (Quakers). The sentence applicable is therefore life imprisonment.
28. I find that the appeal is without merit. I dismiss it in its entirety. The appellant has 14 days right of appeal.

It is so ordered.

DELIVERED, DATED and SIGNED in open court at KAKAMEGA on this 26TH day of MAY, 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Appellant.**

..... **for the Respondent .**

..... **Court Assistant**