REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 114 OF 2010

DAVID NOAH OKWEMBA ……..……..…… APPELLANT

VS

REPUBLIC …… RESPONDENT

(Appeal from the judgment of the Chief Magistrate's Court at Nakuru (C.A. Otieno, R.M.) delivered on 25th March, 2010 in Criminal Case No. 119 of 2009)

JUDGMENT

1. The appellant, **David Noah Okwemba**, was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act.** The particulars of the charge were that on diverse dates between 27th May, 2009 and 30th May, 2009 in Nakuru District within the Rift Valley Province unlawfully and intentionally defiled **S A A** a girl aged 14 years and **L N D** a girl aged 13 years.

2. In the alternative, the appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006.**

3. The appellant faced a further charge for maim contrary to **section 234** of the **Penal Code**. The particulars for the charge were that on the aforesaid dates and place he unlawfully did grievous harm to **S A A** and **L N D**

4. The facts of the case as recorded by the trial magistrate are that on 27th May 2009 the complainants (PW1 and PW2) were walking home when they met the Appellant and another man. The two men took the girls to [particulars withheld] Lodging where they beat and defiled them. On the third day of the ordeal, PW2 managed to escape and alerted PW1's father. The appellant was arrested and subsequently charged in court. The complainants were examined at the Provincial General Hospital, Nakuru where a P3 form was completed for each. The Appellant was tried and convicted at the Chief Magistrate's court for the main charge and was sentenced to twenty years imprisonment. He was also convicted for the charge of maiming and fined Kshs. 20,000 in default to serve a six months imprisonment.

5. Being aggrieved by both conviction and sentence, the appellant filed a petition of appeal on 7th March, 2010, raising three grounds. That there was no proper identification; that the prosecution did not prove its case beyond reasonable doubt and that the trial magistrate disregarded the appellant's defence.

6. The appeal was heard on 7th October, 2014 with Mr. Ngovi appearing for the State and the appellant was present in person. It was the Appellant's case that the evidence adduced by the Prosecution did not support its case beyond reasonable doubt. In particular, that the medical report does not indicate that PW2 had injuries consistent with defilement.

7. Mr. Ngovi, the Prosecuting Counsel for the State submitted that the Appellant was arrested at the scene of crime but was not identified by the complainants as the actual offender. Moreover the testimonies of PW1 and PW2 do not give a clear account of what took place on the material days. Counsel further submitted that though the medical report shows PW1 to have been defiled, her testimony was that she was defiled by another person and not the appellant herein. Counsel therefore left the matter to court to look at the evidence in its entirety and decide the matter on appeal. He proposed that the charges be substituted to gang rape and aiding and abetting.

ISSUES FOR DETERMINATION

Whether the Appellant was positively identified;

Whether the prosecution proved the key ingredient of penetration beyond reasonable doubt;

ANALYSIS

This being the first appellate court it behoves me to re-evaluate the evidence on record and to reach an independent conclusion. Refer to the case of Okeno vs R (1972) EA 32.

The evidence of the Complainants that is PW1 and PW2 on the issue of identification was given under oath after a voire dire test had been carried out by the trial magistrate. She made a finding that the witnesses were intelligent and truthful. Their evidence was subjected to cross-examination and their evidence was unshaken as to how the Appellant held them in captivity for three (3) days in a room at a lodging.

It is my considered view that in the span of three days spent together with the appellant; he was the one who fed them on maize and water; during this period the Complainants were able to observe the appellant at length; there was also proximity in that they were all holed up in the same room with the appellant; the conditions for identification were also favourable as there were periods of daylight during the captivity period.

The evidence of PW4 was that PW2 took him to the lodging where the complainants had been held in captivity. PW4 made noise outside the room and it was his testimony that the Appellant was the one who opened the door of the room and attempted to flee but was apprehended by the crowd that had gathered around.

The evidence of PW5 was that she was a receptionist at the lodging and the appellant booked rooms 29 and 30. The arresting officer (PW7) also confirmed that the appellant and one of the complainants were found in the room at the lodging.

The appellant called a witness DW2 who was a watchman at the lodging. He confirmed that PW5 gave the Appellant two (2) rooms numbers 29 and 30. That the appellant and his friend came back later with two girls. His evidence also corroborates the evidence of PW4 and PW7 that the appellant was arrested in the lodging room. Unfortunately this defence witness's does assist the Appellants case as it does not vindicate him but instead fortifies the prosecution's case on the issue of identification and places the Appellant squarely at the crime scene.

This court is satisfied that the complainants positively identified the appellant and that their evidence on identification was corroborated by PW4, PW5, PW7 and DW2.

On the issue of defilement of PW2, this court has perused her evidence which is corroborated by the evidence of PW6 in that upon examination of PW2 a broken hymen was found and the clinical officer confirmed that there was vaginal penetration. The P3 Form and PRC1 were tendered into evidence as exhibits in support of the evidence of PW6 and both were marked as PExb.2

This court is satisfied that there was sufficient medical evidence in support of the crucial ingredient of the

offence of defilement, which is penetration.

At this juncture I would respectfully wish to point out that had the State filed a cross- appeal on the acquittal this court would have been obliged to set it aside as there was sufficient evidence on record to support a conviction for aiding and abetting the commission of the offence of defilement committed on PW1.

FINDINGS

For those reasons this court makes the following findings;

This court finds that the appellant was positively identified.

This court finds that the prosecution proved its case to the required and desired threshold.

DETERMINATION

The appeal is found lacking in merit in its entirety and is hereby dismissed.

On Count 3 the conviction is found to be safe and the sentence, lawful and both are upheld.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 3rd day of February, 2015.

A. MSHILA

JUDGE.