REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 70 OF 2014.

EUGENE TEREM EDWIN.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(*An appeal from the original conviction and sentence of J.M. Nang'ea – SPM in Criminal Case No. 2723 of 2011 delivered on 30th June, 2014 at Kitale.)*

J U D G M E N T.

1. The appellant, **Eugene Terem Edwin**, appeared before the Senior Principal Magistrate at Kitale, charged with two counts of defilement, contrary to section 8 (1) read with section 8 (3) of the Sexual Offences Act. It was alleged that on the 8th September, 2011, at [particulars withheld] farm and the 15th October, 2011, at [particulars withheld] trading centre both within Trans Nzoia County, the appellant defiled S C, a child aged fifteen (15) years.

2. After a full trial, the appellant was convicted on both counts and sentenced to concurrent terms of fifteen (15) years imprisonment.

   Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds in the petition of appeal dated 4th July, 2014 and filed herein on the 9th July, 2014.

3. At the hearing of the appeal, learned counsel, **Mr. S. Wekesa** assisted by learned counsel, **M/s. Kibonei**, appeared for the appellant while the learned prosecution counsel, **Mr. Kakoi**, appeared for the state/respondent.

   In his submissions, the appellant through his learned counsel, stated that the trial court erred in convicting him in the absence of crucial witnesses in that the mother of the complainant minor (PW1) was the first person to learn of the alleged acts yet she did not record a statement with the police and was not called as a witnesses for the prosecution.

4. It was further submitted by the appellant that the age assessment report was produced by the investigations officer (I.O) instead of a doctor. That, on the basis of the decision in the case of **Thomas Kwanya Dzomo vs. Republic (2010) e KLR**, the age of the complainant ought to have been established as it was crucial and essential for the prosecution to determine under which provision of the law the charge would be preferred. That, there was no documentary evidence of the age of the complainant despite the alleged existence of a baptismal card and a birth certificate.

5. The appellant submitted that the elements of the charge were not proved as PW2 stated that he could not conclude that the complainant was sexually assaulted and there was no medical evidence in the form of treatment notes to corroborate the complainant's evidence. That, the only medical document availed was the P3 form respecting the complainant but not that respecting him (appellant). That, the evidence of PW2 and PW10 indicated that the accused was not treated or examined for purposes of compiling a P3 form.

6. While relying on the decision in **Adam Muragurui Mungara Vs. Rep. (2010) e KLR**, the appellant submitted that the evidence of the complainant ought to have been corroborated by medical evidence and although PW2 clearly indicated that the hymen could be torn by physical activity, he did not conclude that the complainant was sexually assaulted. Therefore, his report was inconclusive and unreliable in offering corroboration respecting the complainant's evidence.

The appellant contended that the prosecution failed to call crucial witnesses and also failed to prove the age of the complainant as well as the alleged sexual acts, therefore, the present appeal ought to be allured to the extent that his conviction by the trial court be quashed and the sentences set aside.

7. In response, the learned prosecution counsel, submitted on behalf of the state/respondent that procedural and evidential gaps have not been detected to warrant the success of this appeal. That, the P3 form produced by PW2 established that the hymen was torn and evidence by the complainant indicated how the tearing occurred and also indicated that she was defiled on two occasions by the appellant.

8. On the question of age, the Learned Prosecution Counsel, submitted that there was documentary evidence (P. Ex. 2) establishing that the complainant was aged fifteen (15) years and that this (P. Exh. 2) was produced by the investigating officer without objection from the defence.

Learned Prosecution Counsel, argued that in any event, the age of the complainant was not disputed. He further submitted that the mother of the complainant was not a crucial witnesses for the prosecution and that under section 124 of the Evidence Act, the complainant's evidence could be considered and accepted even without corroboration.

9. Learned Prosecution Counsel, contended that the offences were proved against the appellant beyond reasonable doubt and stated that the decision cited herein by the appellant did not support his case since the age of the complainant was herein proved.

The appellant, however, replied by contending that the age of the complainant was not proved as the assessment report showed that she was fifteen (15) years while she stated in her evidence that she was aged sixteen (16) years. That, the birth certificate allegedly in possession of her mother was not produced.

The appellant urged this court to allow the appeal.

10. After having considered the rival submissions in the light of the grounds of appeal, the duty of this court was to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, this court considered the evidence adduced by the complainant, **S C K (PW1),** the clinical officer, **Labat Kirwa (PW2)**, the complainant's father, **CA K (PW3),** and the investigating officer, **P.C. Mary M'Matsi (PW4).**

The evidence adduced by the appellant in his defence was also considered.

11. From all that evidence, it is apparent to this court that the ingredients of the charge of defilement under section 8 (1) of the Sexual Offences Act were duly established without substantial dispute. The provisions provides that a person who commits an act which causes penetration with a child is

guilty of an offence termed defilement.

"Penetration" is defined under the Sexual Offences Act to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person.

12. The evidence by the complainant (PW1) as corroborated by that of the clinical officer (PW2) was sufficient and credible enough in establishing an act of penetration against the complainant. Indeed, the complainant confirmed that she was penetrated on two occasions by a male person. She said that she was born on 8th August, 1996, meaning that she was aged about fifteen (15) years at the material time of the offence. She said that she was aged 16 years only in reference to the time when she testified in court on the 2nd July, 2012.

13. Coupled with the age assessment report (P. Exh. 2) produced by the investigating officer (PW4), the complainant's evidence and that of her father (PW3) was cogent enough in establishing her age thereby placing her under the definition of a child.

There was no prejudice occasioned to the appellant when the report (P. Exh. 2) was produced in evidence by the investigating officer (PW4) and without objection from him.

Suffice to hold that the age of the complainant was by way of oral and documentary evidence established as being fifteen (15) years.

14. Basically, the issue for determination in this matter was whether the appellant was the person responsible for defiling the complainant on the two occasions.

The defence raised was a denial and a contention that the appellant was incriminated out of sheer jealousy displayed by a certain old man who was envious of him for purchasing land while schooling in a secondary school. That, it was the said old man who claimed that he had defiled a girl. He also contended that the charges against him were false.

15. In his judgment, the Learned Trial Magistrate found that the appellant was not maliciously implicated and that the complainant was a truthful witness when she stated that the appellant was the person who defiled her on the two occasions.

16. Indeed, the complainant (PW1) stated in her evidence that she had previously known the appellant as their neighbour and on the material 8th September, 2011, she was from school at about 1.00 p.m. when she met him but declined to stop and talk to him as he had wished. She was back at home from school at about 4.00 p.m. It was at that juncture that the appellant went there and convinced her to accompany him to his shop where she was to collect her grandfather's items but on the way, he pulled her into a maize field and defiled her while promising to give her Ksh. 50/=.

17. The promise was not fulfilled and instead, the complainant learnt from the appellant that he only wanted to have sex with her.

It was further stated by the complainant that she again met the appellant on 15th October, 2011, at around 6.00 p.m. at a place called Sokomoko. He snatched the vegetables she was carrying and told her to follow him at a neighbour's maize farm where he again defiled her with a promise that he would give her a further Ksh. 50/=. The two met again on 6th November, 2011, and he gave her Ksh. 100/=. He asked for more sex but she declined and later reported to her mother what he had done to her.

18. The mother was not called as a prosecution witness but that did not water down the complainant's evidence which clearly showed that she was defiled on two occasions by the appellant whom she had previously known and was in fact, her neighbour.

The complainant's evidence went further to discredit and rebut the appellant's defence thereby

reducing it into an afterthought.

19. It is also the finding of this court that the appellant was the person responsible for defiling the complainant on the two occasions. His conviction by the learned trial magistrate on both counts was proper and lawful and is hereby upheld.

The concurrent sentence imposed on the appellant was however, unlawful in terms of section 8 (3) of the Sexual offences Act which provides for imprisonment for a term of not less than twenty (20) years.

20. The sentence of fifteen (15) years imprisonment on each count imposed against the appellant by the learned trial magistrate is therefore set aside and substituted for a sentence of twenty (20) years imprisonment on each count to run concurrently.

Otherwise, the appeal is dismissed for want of merit.

[Delivered and signed this 24th day of March, 2015.]

J.R. KARANJA.

JUDGE.