REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 33 OF 2013.

D.A.O……………………………………...APPELLANT.

VERSUS

REPUBLIC………………………………..RESPONDENT.

(Being an appeal from the original conviction and sentence of P. Kulecho – RM in Criminal Case No. 1470 of 2012 delivered on 28th March, 2013 at Kitale.)

J U D G M E N T.

The appellant, **D.A.O,** appeared before the Resident Magistrate at Kitale, charged with five count viz:-

(I) & (II). Sexual Assault contrary to section 5 (1) (a) (ii) read with section 2 of the Sexual Offences Act, in that on the 15th June, 2012, at (particulars withheld) Trans Nzoia County, unlawfully penetrated the vagina of C.A.O with fingers and sticks manipulated by her and with a cooking stick.

(III) Benefitting from child prostitution, contrary to section 15 (d) read with section 15 of the Sexual Offences Act, in that on unknown date in the month of December, 2011 at Machungwa Maili Saba Trans Nzoia County, being step mother to C.A.O, a child aged eight (8) years took advantage of her to procure her for sexual intercourse.

(IV) Assault causing actual bodily harm, contrary to section 251 of the penal code, in that on diverse dates between 1st August, 2011 and 15th June, 2012 at (particulars withheld) Trans Nzoia County, assaulted C.A.O thereby occasioning her actual bodily harm.

(V) Cruelty to a child in accordance with section 127 (1) (a) read with section 127 (11) of the Children Act, in that on diverse dates between 1st August, 2011 and 15th June, 2012, at (particulars withheld) Trans Nzoia County, having parental responsibility to C.A.O, a child aged eight (8) years, willfully assaulted and ill-treated her thereby exposing her to unnecessary suffering and injury to her health.

The lower court record shows that there were two charge sheets in this matter. The first one dated 19th June, 2012, related to a single charge of sexual assault while the second one dated 4th July, 2012, related to four counts i.e. sexual assault, benefiting from child prostitution, assault causing actual bodily harm and cruelty to a child. It would appear that the two charge sheets were treated as one and hence the five counts against the appellant.

Nonetheless, the first count of sexual assault seems to have been repeated in the second count similarly of sexual assault and therefore amounting to a duplicity of counts.

Suffice to say that the second count was defective for want of duplicity.

Be that as it may, the appellant denied all the counts. She was tried and convicted on counts one and two and sentenced to ten (10) years imprisonment on each count to run concurrently. She was however, acquitted on counts three, four and five.

Being aggrieved with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds in the petition of appeal filed herein on 12th April, 2013. She appeared in person at the hearing of the appeal and relied on her written submission in support of her case.

M/s. Limo, the Learned Prosecution Counsel, appeared for the state/respondent and opposed the appeal by submitting that the appellant was properly convicted and sentenced. That, the evidence against her was strong as the complainant (PW1) gave a candid history leading to the offence. That, the complainant's evidence was corroborated by that of PW5 and that PW2 made the discovery of the injuries suffered by the complainant and then took her to hospital. That, the complainant was aged eight (8) years at the time.

Having considered the appeal in the light of the submissions by both the appellant and the respondent, the duty of this court is to re-consider 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 has considered the evidence adduced against the appellant by five (5) prosecution witnesses including the complainant **C.A.O (PW1)**, her father, **J.O.O,** the investigating officer, **Sgt. Justine Wabwire (PW3)** and the clinical officer, **Linus Ligare (PW4)** as well as **Dr. Kiprop (PW5)**. The defence by the appellant has also been considered.

From the evidence, it is the opinion of this court that there was no dispute that the complainant was indeed sexually assaulted in a manner which was most cruel. Even in her tender years she was able to vividly narrate her ordeal which involved her being assaulted with metal rod, wooden rod and a cooking stick and having sticks and fingers inserted into her private parts.

Her father J (PW2), noted blood stains on her dress and on enquiry, was told that she had abdominal pains. He noticed that she was bleeding from the private parts and took her to hospital.

The clinical officer at Kitale District hospital (PW4) examined the complainant and compiled the necessary P3 form, which indicated that she (complainant) had been defiled and had suffered injuries on her body including the private parts. **Sgt. Justina Wabwire (PW3)** investigated the matter and in the process confirmed that the complainant had been defiled and assaulted while in the custody of her father (PW2) and step-mother, the appellant.

The issue which presented itself for determination by the court was the alleged involvement or responsibility of the appellant in the offences. The defence raised by the appellant was a denial and an indication that she was arrested and charged without good cause.

However, the evidence by the complainant clearly indicated that she (appellant) was responsible for tormenting her (complainant) by physically and sexually assaulting her while her father was away. Her evidence was found by the learned trial magistrate to be truthful.

Being alive to the provisions of section 124 of the Evidence Act and noting that the complainant's evidence was corroborated by that of the clinical officer (PW4), the learned trial magistrate concluded that the appellant was responsible for sexually assaulting the complainant as indicated in the particulars of the first and second counts. The learned trial magistrate went further to find that counts three, four and five had not been proved beyond reasonable doubt.

This court does not see any tangible reason to interfere with the foregoing findings by the learned trial magistrate.

Indeed, there was sufficient and credible evidence against the appellant respecting the first two counts but not the last three counts.

Consequently, this court upholds the conviction and sentence on count one but not count two which has noted hereinabove was defective for want of duplicity.

The conviction on the said count two is hereby quashed and the sentence set aside. It is only to that extent that the appeal is allowed.

The appeal regarding the first count is however dismissed.

[Delivered and signed this 18th day of March, 2014.]

J.R. KARANJA.

JUDGE.