

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 148 OF 2012

EUGINE LUMUMBA SHIKWENYI APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal against conviction and sentence arising from the original Criminal Case No. 471 of 2010 in Hamisi Senior Resident Magistrate's Court [J. K. NG'ARNG'AR, SPM])

J U D G M E N T

The appellant was charged with the offence of defilement of a girl child contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that *on the 1.9.2010 in Vihiga District within Western Province the appellant unlawfully defiled a girl namely IM by causing penetration of your genital organ namely penis into her genital organ namely vagina, a girl aged 10 years old.*

The appellant was also charged with an alternative charge of indecent act with a girl child contrary to **section 11(1)** of the Sexual Offences Act No. 3 of 2006. The appellant was convicted of the main count and sentence to serve life imprisonment. The grounds of appeal are that the trial court failed to properly analyze the evidence, the conviction is based on circumstantial evidence and suspicion, the conviction is against the weight of the evidence on record, he was not referred for medical examination and the sentence is harsh. The appellant filed written submissions which are titled supplementary grounds of appeal. The submissions expound on the grounds of appeal. The appellant contends that essential witnesses such as the scene of crime experts and neighbours were not called. No DNA test was conducted on the victim and himself. He was not taken for medical examination and the prosecution evidence was contradictory. The age of the complainant was given as 70 years as per the evidence of the complainant. The appellant further contends that PW1 testified that she was his neighbor and there is a family dispute. It was a land dispute and not defilement. Three different hospitals namely Vihiga district hospital, Serem hospital and Mbale hospital were mentioned to have treated the complainant. No referral letter was produced.

The State opposed the appeal. Mr. Oroni submitted that the case was proved beyond reasonable doubt.

The record of the trial court shows that **PW1 I A** was the complainant. She was aged 10 years old but testified under oath as the trial court was satisfied that she could give evidence under oath. Her evidence was that she was a class four student at [particulars withheld] Primary School. On the 1.9.2010 at about 5.00 p.m. she went to draw water from the river with a five liter jerrican when the appellant took her to the bush. He made her to lie down and he removed her clothes. The appellant then defiled her twice. Some kids went for assistance and the appellant ran away. She went home and informed her mother. She was taken to Serem Hospital and later record a statement. She knows the appellant who splits firewood as his main job.

PW2 P A is the mother of PW1. On the 1.9.2010 at about 5.00 p.m. she sent PW1 to the river. She went out to look for food and when she came back she found P1 sleeping and crying. On inquiry PW1 told her that the appellant had defiled her. PW1's neck was swollen and she took PW1 to Mbale district hospital. She also reported the matter to the police. The appellant was arrested by the village elder. According to PW2 PW1 knows the appellant very well. **PW3 J B** is the village elder. On the 1.9.2010

PW2 went to his home and informed him that her child had been defiled. PW3 went to PW2's home and saw PW1. According to PW3 he was informed by PW1 that it was the appellant who had defiled her. PW3 later arrested the appellant and took him to Serem police station.

PW4 PC JOSEPH CHEPSOI was based at the Serem police station. On 15.10.2010 the appellant was taken to the station by three village elders and members of the public. He investigated the case and charged the appellant. The complainant's under pant was also taken to the station and was produced. **PW5 CHARLES LEPAMNJO** is a clinical officer at Vihiga district hospital. He examined PW1 who had visited the hospital on 2.9.2010 complaining of defilement. PW1's age was assessed at 10 years old. PW1 was bleeding from her private parts and according to PW5 PW1 was defiled. A P3 form was filled and produced.

The appellant was put on his defence. In his unsworn testimony he stated that he is a casual worker. On the 14.10.2010 at around 4.00 p.m. he was from his work while carrying his power saw when he was arrested by unknown people. He was taken to the police station and later charged with the offence.

The main issue for determination is whether PW1 was defiled and whether it was the appellant who defiled her. According to PW5, PW1 was examined and she was bleeding from her private parts. The clinical officer established that PW1 had been defiled. A P3 form was produced and it was filled at Vihiga District Hospital. The appellant contends that three different hospitals were mentioned. Vihiga district hospital and Mbale district hospital is the same. The complainant could have been taken to Serem hospital before being referred to Vihiga district hospital. The P3 form was issued on the 3.9.2010 by the Serem police station where the matter had been reported. According to the P3 form the matter was reported under OB number 29 of 1.9.2010. From the medical evidence it is established that the complainant was defiled. The complainant testified that she was defiled. I do find that the complainant was indeed defiled.

The next issue is whether it was the appellant who defiled PW1. The incident occurred at about 5.00 p.m. and it is clear that it was during the day. According to PW1 it is the appellant who took her to the bush informing her that he had something important he wanted to inform her. PW1 knew the appellant and the appellant defiled her. There was no other eye witness who testified. **Section 124** of the Evidence Act allows the court to convict an accused in a case involving a sexual offence if the court is satisfied that the victim is telling the truth. The evidence of PW1 is corroborated by that of PW2 and PW5. It is the evidence of PW2 that she sent PW1 to the river. According to PW1 while at the river the appellant approached her and took her to the bush. PW1 knew the appellant very well and told the court that the appellant splits firewood for living. The medical evidence shows that PW1 was defiled. According to PW3 the appellant ran away and was arrested later. From the evidence on record I do find that PW1 was telling the truth. There is no evidence that there was any family dispute as alleged by the appellant. The appellant testified and did not mention any land dispute. The age of PW1 was given as 10 years and PW5 testified that PW1's age was assessed at 10 years. PW1 was a primary school student in class four. PW1 was examined by the trial court before she testified and the court found that she could give evidence under oath. She was cross-examined by the appellant and answered his questions.

Given the evidence on record I do find that it is the appellant who defiled the complainant. PW1's evidence was corroborated by the evidence of PW2 and PW5. The matter was reported to the police and the appellant was arrested. The sentence is provided for under the law. The complainant was under the age of 11 and the prescribed sentence is life imprisonment. The case was proved beyond reasonable doubt and the evidence was direct. The appeal lacks merit and is disallowed.

Delivered, dated and signed at Kakamega this 26th day of June 2014

SAID J. CHITEMBWE

J U D G E

