



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**CRIMINAL APPEAL NO. 115 OF 2013.**

**JOSECK JUMA MUSUNGU.....APPELLANT.**

**VERSUS**

**REPUBLIC.....RESPONDENT.**

*(Being an appeal from the original conviction and sentence of J.A. Owiti – AG. PM. in Criminal Case No. 1021 of 2012 delivered on 22nd November, 2013 at Kitale.*

**J U D G M E N T.**

The appellant, **Joseck Juma Musungu**, appeared before the Principal Magistrate at Kitale charged with defilement contrary to section 8 (1) read with section 8 (3) of the **Sexual Offences Act**, in that on the 19th April, 2012 in Trans Nzoia County, defiled M A A, a child aged fourteen (14) years.

After a full trial, the appellant was convicted and sentenced to serve twenty (20) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant lodged this appeal on the basis of the grounds contained in the petition of appeal filed herein on 28th November, 2013 by the firm of **Katama Ngeywa & Co. Advocates.**

At the hearing of the appeal, Learned Counsel, **Mr. Ngeywa**, appeared for the appellant and opted to argue his nine (9) grounds of appeal together. He thus submitted that the complainant (PW1) gave various versions in her evidence. She said that she never met the appellant in her evidence of the 2nd August, 2012. Thereafter, she was remanded at the juvenile remand home Eldoret with a view to forcing her to give contrary evidence and on the 27th September, 2012, when she was brought back to the court she testified. Her evidence of that day was relied upon by the trial court to convict the appellant.

Learned counsel, submitted that on the 27th September, 2012, the complainant did not disclose her age, neither did her mother (PW3). That, the doctor (PW5) alleged that the complainant was fifteen (15) years yet he did not himself assess the age as this was done by a clinical intern one Martin Ngare. That, the document prepared by Martin Ngare did not fall under section 77 of the Evidence Act since the doctor did not tell the court whether the intern had worked under him.

Learned counsel, contended that the age of the complainant was not established and went on to submit that the offence was committed on 19th April, 2012, when the complainant was staying with her grandmother called E and this fact was corroborated by the complainant's mother (PW3). That, the grandmother did not testify yet her evidence was fundamental in determining where the complainant slept on the material night in view of the complainant's contradictory evidence.

Learned Counsel, further submitted that the complainant admitted that she was not a virgin and was

not new to sexual intercourse and whereas PW2 stated that there was penetration, he did not say whether it was by a male sexual organ. That, PW4 did not notice spermatozoa when he examined the complainant four (4) days after the alleged offence and therefore, it could not be overruled that the complainant had engaged in sexual intercourse after the material date. That, PW2 was based at the Kitale District Hospital and could not have corroborated the whereabouts of the complainant on the material date. That, the judgment of the trial court was a mere summary of the evidence without any analysis and if there was any analysis, then it was erroneous. That, PW3 could also not tell the whereabouts of the complainant on the material date and that the proper person was the grandmother who was not called to testify.

Learned Counsel, contended that the appellant's defence was rejected by the trial court without reasons being given and that the burden of proof was shifted to the appellant. Further, that the trial court convicted the appellant under section 255 CPC which was repealed by legal Notice No. 13 of 1982.

Learned Counsel, urged this court to allow the appeal while contending that the defence evidence was clear and unshaken and that there was a grudge between the complainant's mother and the appellant.

In response to the foregoing and in opposing the appeal, the learned prosecution counsel, **M/s. Kiigi**, appearing for the state respondent submitted that the evidence before the trial court was sufficient. That, PW1 testified that she was defiled by the appellant and her evidence was corroborated by that of PW2 and PW3. That, section 124 of the Evidence Act allowed the consideration of the evidence of a single witness without corroboration but herein, the complainant's evidence was duly corroborated. That, the complainant was aged fifteen (15) years and any contradictions in the prosecution case did not water down the evidence against the appellant.

Learned Prosecution Counsel, submitted that the appellant was convicted under section 215 CPC and not section 255 CPC and that the mention of section 255 CPC was a typographical error.

Learned Prosecution Counsel, urged this court to dismiss the appeal.

The foregoing rival submissions have been given due consideration by this court in the light of the grounds of appeal. The duty of this court was therefore to re-visit the evidence adduced at the trial and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.

In that regard, the court has considered the prosecution case as narrated by the complainant, **M A A (PW1)**, the clinical officer, **Kirwa Labatt (PW2)**, the complainant's mother **M M (PW3)**, the arresting officer, **APC Menganyi Jacob (PW4)**, the doctor, **Dr. Ken Ndege (PW5)**, and the investigations officer, **P.C. Richard Kimuli (PW6)**. The evidence of the appellant by way of his defence was also considered.

It was apparent from the evidence, that there was no dispute that the complainant (PW1) was indeed sexually assaulted in a transaction which had all the hallmarks of a willing or consenting victim who initially attempted to conceal the identity of her sexual partner until "pressure" was applied on her by being declared a hostile witness and being remanded at the Eldoret Juvenile Remand Home. The trial court noted that the victim (complainant) demonstrated her unwillingness to testify against her partner for reasons that they had reconciled. However, in a case of defilement such as the present one, consent and reconciliation do not apply and are normally given a wide berth by the courts so as to protect a child victim and give meaning to the criminal justice process. It therefore mattered not that the complainant (PW1) may have consented to engaging in the sexual act which led to the arraignment of the appellant.

The trial's court decision to remand the complainant in a juvenile home was meant to put sense into her and prevent her from frustrating in a deliberate manner and at the behest of unknown persons the criminal justice process. A child victim is often naive and easily misled, it is therefore the duty of the court to step in and protect her/him from those who do not have her/his interest at heart.

Be that as it may, other than the complainant's evidence, there was credible evidence from the clinical officer (PW2) confirming that there was penetration and hence defilement. The history given by

the complainant at the time of medical examination showed that the penetration was by a male sexual organ and not any other organ or object.

**Dr. Ken Ndege (PW5)**, produced a report by a medical intern (P. Exh. 5) showing that the complainant was aged fifteen (15) years at the material time.

The report was a public document signed by the officer-in-charge of the dental department at the Kitale district hospital. It was prepared by the intern for and on behalf of the doctor (PW5) thereby implying that the intern worked under the same doctor.

The report could therefore be tendered in evidence under section 77 of the Evidence Act and having been so tendered, it established the age of the complainant as being fifteen (15) years.

The act of defilement and the age of the complainant were thus fully established as by evidence led by the prosecution through the complainant (PW1), the clinical officer (PW2) and the doctor (PW5).

The evidence by the complainant's mother (PW3), indicated that the unlawful act was committed on the material 19th April, 2012, when the complainant failed to spend the night at home. The complainant was then living with her grandmother who did not testify but confirmed to the complainant's mother that the complainant had been sent to buy paraffin at a trading centre but did not return home. The mother indeed confirmed that the complainant returned home on the following 20th April, 2012, at dawn.

The place where the complainant spent the night or at what juncture she engaged in a sexual act were immaterial factors as the complainant's evidence coupled with that of the clinical officer was sufficient enough to and did establish the fact of defilement.

With regard to the identity of the offender, it was apparent from the evidence and conduct of the complainant that the appellant was responsible for engaging in sexual acts with her notwithstanding that she was a minor.

The complainant indicated that the appellant defiled her on the material date even though it was not the first time for her to engage in sexual intercourse. She implied that she had previously engaged in sexual intercourse with another man but was very firm that the appellant had sexual intercourse with her on two occasions on the material night. He was arrested by APC Jacob (PW4) after being implicated by the complainant's mother following information from the complainant that she had spent the night at his house.

Indeed, the complainant confirmed as much. She stated that she had gone to buy paraffin at the appellant's shop situated at Salama Trading centre when the appellant ushered her into the rear of the shop where his room or house was situated. He was inside the room which had a bed. He briefly went to the shop before returning to the room after which he engaged in sexual intercourse through the night. He escorted her home at dawn on the following day.

Although the appellant's defence was a denial and a contention that the appellant was implicated by the complainant's mother due to her failure to pay for fertilizer obtained on credit by her, the evidence by the complainant indicated otherwise and directly pointed at him as the offender.

His defence showed that the complainant was not a stranger to him. He said that she came to his shop on 24th April, 2012 having been sent by her mother to collect goods worth Ksh. 400/= on credit. He declined to give the good due to an already outstanding debt. The complainant then left the shop and returned with her mother with whom he (appellant) had previously had love affair with. He refused to give goods on credit and closed the shop. He went to his room at the back of the shop. He returned to the shop at 10.00 p.m. to sell goods to a needy customer and thereafter returned to the room and slept. He was arrested on the following day and taken to a police post where he met the complainant who was directed by police officers to implicate him.

The complainant contended that she was defiled by the appellant on 19th April, 2012 and therefore what happened between her and the appellant as narrated by the appellant was immaterial.

**Gladys Nasimiyu (DW2)**, said that she went to the appellant's shop on 19th April, 2012, but did not see anybody in his house. She defended the appellant by saying that he did not defile the complainant but was not present when the incident occurred. Her evidence was worthless and so was that of **Alfred Wanyonyi (DW3)**, who nonetheless confirmed that he saw the complainant at the appellant's shop on that material 19th April, 2012.

Both Gladys (DW2) and Alfred (DW3) alluded to the appellant having had a love affair with the complainant's mother (PW3). However, the complainant's mother (PW3) denied the allegation when she was cross-examined by the appellant.

Suffice to hold that there was cogent and credible evidence by the prosecution against the appellant which effectively rendered the appellant's defence unbelievable and unsustainable. His conviction by the learned trial magistrate was therefore proper and is hereby upheld.

There could not have been a conviction pursuant to section 255 of the CPC as it never existed. The conviction was pursuant to section 215 CPC and therefore the mention of section 255 in the proceedings was an oversight and most likely a typographical error which had no effect on the judgment of the trial court and if it had any effect the error is herein corrected by having the appellant convicted pursuant to section 215 CPC.

The sentence meted out against the appellant was proper and lawful in terms of section 8 (3) of the Sexual Offences Act.

In the end result, this appeal is devoid of merit and is hereby dismissed.

**[Delivered and signed this 6th day of August, 2014.]**

**J.R. KARANJA.**

**JUDGE.**