REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 81 OF 2009

LABAN KENDAGOR TOROITICH ..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

(Being an appeal from the original conviction and sentence contained in the Judgment of the Hon. B. Mosiria (Resident Magistrate) in Iten Resident Magistrate's Criminal Case No. 442 of 2008 delivered on 12th May, 2009)

JUDGMENT

Laban Kendagor, the Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 6th day of June, 2008 at about 4.00 p.m. in Keiyo District of the Rift Valley Province, by use of his penis, caused penetration to the vagina of J C a girl aged fifteen (15) years.

In the alternative, he was charged with indecent assault contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. It was alleged that he unlawfully and indecently assaulted J C by touching her private parts, namely the vagina.

At the end of the trial, the Appellant was found guilty in the main count. He was convicted and sentenced to serve forty (40) years imprisonment.

He appealed to the superior court against the conviction. He filed the grounds of appeal on 25th May, 2009. They number 1 to 6 but there are only three distinct grounds of appeal, namely;

> ***1. That the learned trial Magistrate failed to take into consideration that the complainant, PW1, was a girlfriend of the Appellant with whom she was two months pregnant.***
>
> ***2. That the learned trial Magistrate erred in not finding that the evidence against the Appellant was fabricated by the parents of the complainant who did not want him to marry her.***
>
> ***3. That the learned trial Magistrate erred in not upholding the Appellant's defence that the complainant was his fiancée who he intended to marry.***

The Appellant filed written submissions, which he stated he would rely on. Unfortunately, the submissions were a total deviation from the grounds of appeal. It is also in the written submissions he appeared to refer to amended grounds of appeal. A close scrutiny of the court's record shows that at no time did he apply to amend the grounds of appeal. There are also no amended grounds of appeal on the record. In this regard, I would only restrict myself to the filed grounds of appeal.

The Appellant concedes that he had a sexual relationship with the complainant. The same gave rise to a pregnancy. The concession notwithstanding, this being the first appellate court, I must re-evaluate the evidence on record and come up with my own conclusion but bear in mind that I have neither seen nor heard the witnesses.

A total of five (5) prosecution witnesses testified.

PW1, the complainant then aged fifteen (15) years gave a sworn statement of evidence. She testified that she had stopped going to school after she was impregnated by the Appellant. She narrated that on 6th June, 2008 at 4.00 p.m., she was going home after collecting cows from the forest where they were grazing. Between 4.00 and 5.00 p.m. she was walking on a foot path in the forest when she met the Appellant who grabbed her and promised to give her Ksh. 100/= to buy what she wanted. She knew the Appellant as a neighbour and herdsman who had not lived in the area for too long.

PW1 testified that the Appellant felled her to the ground, removed her pant and defiled her for about one hour. She stated that although she screamed no one could hear her as it was in a forest. She did not tell anyone because she feared her father could beat her.

It was PW1's further testimony that sometime in July, 2008 she started falling sick frequently and that is when she told her mother that the Appellant had had sex with her. Her mother in turn told her father who beat her up for not speaking out early enough. The matter was escalated to the chief at Tambach and later to the police. PW1 was referred to the hospital where she was treated and issued with a P3 form which she identified in court.

PW2, M C the mother of PW1 testified that sometime in June, 2008, PW1 started falling sick with malaria-like symptoms. When the sickness persisted into the month of July, she took her to hospital and she was treated for malaria. But the stomach of PW1 grew bigger. PW2 inquired what was happening. It is then that PW1 informed her that Laban (the accused) had defiled her. She then realized that she was pregnant.

PW2 reported the incident to PW1's school teacher who advised her to report to the police. She also took PW1 to hospital where she was diagnosed with a three-months pregnancy.

PW2 further testified that the Appellant was arrested by a member of the school committee and escorted to the police station.

PW3, Moses Chebor, a community facilitator testified that on 21st August, 2008 he learnt from members of the public that the Appellant had defiled a pupil. He accompanied PW1's brother to the police station to report the incident. Apparently, the Appellant had been arrested by the members of public.

PW4, Police Constable Ibrahim Tabot of Tambach Police Station testified that on 28th July, 2008, the Appellant was taken to the police station accompanied by the complainant and her mother (PW2). It was alleged that the Appellant had defiled the complainant (PW1) on 6th June, 2008. He issued PW1 with a P3 form and escorted her to Tambach Sub-district Hospital where she was examined and found to be pregnant. He thereafter visited the scene and confirmed that the incident took place in a bush. He also confirmed that both PW1 and the Appellant were neighbours.

PW5, Martin Lokaris Kiptarus, a Clinical Officer at Tambach hospital examined PW1 on 28th August, 2008 and filled her P3 form. According to him, PW1 was then aged fifteen (15) years. She went to hospital while accompanied by her mother and police officers. It was alleged that she was defiled by someone known to her on 6th June, 2008. On examination, her genitalia was normal with no bruises but her hymen was absent. She tested negative for syphilis and HIV. She had some infection in her urine. She was 8 weeks pregnant. She had severe malaria and an enlarged spleen. She was given medication for the ailments.

PW5 produced the P3 form as P. Exhibit No. 1.

The Appellant gave a sworn statement of defence. He stated that he used to herd his sheep. He stated that on the material date of the offence, he was at home. Thereafter, PW1's parents told him that he had defiled their daughter which he had not.

He further stated that he had been with PW1 since 2007 until August, 2008 and had not defiled her. He stated that he wanted to marry PW1 but since her parents did not want that arrangement, they ensured that he is taken to court.

The fact that PW1 was sexually assaulted cannot be disputed given that at the time of the medical examination, she was pregnant. It is also worth noting that PW1 is the sole eye witness in her case. In upholding the evidence of PW1, the learned trial Magistrate had this to say;

"PW1 gave sworn evidence as she understood the nature of oath and essence of saying the truth and in her evidence she did state that accused person defiled her when she was from bringing their cows from fields. This is also the same information she gave to the mother when asked what happened to her and as noted by doctor when she was taken there for examination. She was an innocent girl who was speaking frankly and consciously. From the demeanour of PW1 even when she testified in court one concludes she is a child speaking honestly and truthfully with no contradictions and hence this court has concluded it will believe her words although she is a child. And this is essential now that her evidence regarding what happened then is not corroborated since she was the only one then at the scene."

To that extent, the learned trial Magistrate properly applied the law in upholding that she would solely rely on the evidence of PW1. Section 124 of the Evidence Act, Cap 80, Laws of Kenya provides that, in a sexual assault case, a court may uphold the testimony of a child, corroboration notwithstanding, as long as it believes in the evidence of the child. For avoidance of doubts, I duplicate the section as follows:-

"Notwithstanding the provision of S. 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

It is also the view of this court that PW1 candidly gave an account of what transpired on 6th June, 2008 as she was driving home her family cows. She did not contradict her testimony at all on cross-examination. Her narration in evidence in chief was replicated by her mother (PW2) and the investigating officer (PW5). Indeed PW2 and 5 visited the scene and confirmed it was in a bush next to a walk path as described by PW1.

PW1's long silence after the incident cannot be construed to mean she was suppressing the truth.It must be borne in mind that sexual assault is a shameful thing. It can also be depressing. Only the very brave ones speak out. The complainant in this case was timid. Save for the pregnancy, the incident would never have come to light. It is unfortunate that the assault prematurely brought her to motherhood. I am equally inclined, in the circumstances to uphold the learned trial Magistrate's finding that she told the truth.

Moreover, the Appellant was not a stranger to her. She knew him both physically and by name. She did not mince her words in disclosing who had defiled her. I therefore find that the Appellant was culpable and there was no reason to think that PW1 fabricated the story that he defiled her.

I must however address the issue of the age of PW1 vis a vis the nature of the evidence she gave.

Before she commenced her testimony, the trial court noted as follows:-

"The complainant is fifteen (15) years old and understands the nature of oath and understands the essence of swearing by bible and telling the truth as she has told the court."

The law contemplates that a voire dire examination should be conducted by the trial court so as to establish whether due to the age of the witness he/she understands the essence of giving evidence under oath and of speaking the truth.

That statement of the trial court presupposed that there was no need of conducting the voire dire examination as, in view of the court, PW1 understood the essence of telling the truth and of taking the oath.

PW1's age was placed at 15 years. There is no clear definition of who a child of tender is. An attempt to so define this age bracket was done in the case of **KABANGENY ARAP KOLIL -VS- R. (1959) E.A. at page 93;**

"There is no definition in the Oaths and Statutory Declaration of the expression 'child of tender years' for the purpose of S. 19. But we take it to mean, in the absence of special circumstances, any child of any age, or apparent ages or under fourteen (14) years."

Again, in the dictum of Lord Goddard, CJ in **R -VS- CAMPBELL (1956) 2 ALL ER 272**, the court said;

"Whether a child is of tender years is a matter of good sense of the court … whether there is no statutory definition, of the phrase approved."

The learned trial Magistrate had the first hand opportunity of looking at PW1 and correctly saw no need for a voire dire examination for the reason she thought that at her age of 15 years, she understood the meaning of an oath and of telling the truth. I have not found any fault of the evidence of PW1 and it is my view that the trial court correctly arrived at a finding that her evidence, despite her age, was sufficient to sustain a conviction.

May I add that, notwithstanding any documentation, say a birth certificate or birth card, to ascertain the age of PW1, there was no reason to doubt that age. Firstly, she was a girl then in standard six and was clearly able to tell her age. Secondly, her mother too was categorical that that was her age. Thirdly, such documentation would only be necessary when the age of the complainant is on the borderline and disputed. This scenario did not apply in the instant case.

On whether the learned trial court considered the Appellant's defence, it observed as follows:-

"The defence of accused consists of mere denials where he denies having committed the offence herein yet didn't challenge the evidence of PW1 who told court she did defile her. Neither did he challenge evidence of clinical officer who found out from investigations that complainant was defiled and pregnant as a result."

This statement summarized the court's view of the Appellant's defence. While the Appellant denied that he defiled PW1, he intimated that he had a personal relationship with her as he stated that he wanted to marry her save that her parents were against it. Whereas his statement may not have necessarily fixed him, his entire defence was out-weighed by the strong prosecution evidence.

Finally, as regards the sentence, Section 8 (3) provides for an imprisonment term of not less than 20 years. The Appellant was handed 40 years. Whereas the sentence was legal, I think it was punitive. A sentence should serve as a deterrent measure. It should not be aimed at hardening the offender. Defilement is a serious offence and deterrent measures should be taken against the offenders. Once the offenders complete their punishment they should feel reformed and ready to reintegrate with the society for the better. They should not feel bitter with the punishment. In this respect, I think the 40 years

imprisonment term was punitive. I shall accordingly revise it downwards.

In the end, I have no doubts that the prosecution proved its case in the main charge beyond all doubts. And on evaluating the entire evidence on record, it is my view that the conviction was safe. I therefore dismiss the appeal against the conviction.

As for the sentence, I set aside the forty (40) years jail term and substitute it with a twenty (20) years imprisonment term commencing from the date of sentencing.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 18th day of September, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Appellant present in person

Mr. Mulati for the Respondent