REPUBLIC OF KENYA

HIGH COURT AT KITALE

CRIMINAL APPEAL 45 OF 2012

JIBRIL EKAL EKIDOR.....APPELLANT.

VERSUS

REPUBLIC..... RESPONDENT.

(*Being an appeal from the original conviction and sentence of E.K. Mwaita – PM in Criminal Case No. 785 of 2010 delivered on 27th day of March, 2012 at Lodwar.)*

J U D G M E N T.

The appellant, **Jibril Ekal Ekidor,** appeared before the Principal Magistrate at Lodwar charged with defilement contrary to section 8 (1) read with section 8 (2) of the Sexual Offences Act and alternatively indecent assault with a child contrary to section 11 (1) of the Sexual Offences Act. It was alleged that on the 13th November, 2010 in Turkana County, the appellant defiled DL a girl aged nine (9) years or that he performed an indecent act with the said child.

After a full trial, the appellant was convicted on the alternative charge of indecent act with a child and was sentenced to serve fifteen (15) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds in his petition of appeal filed herein on 5th April, 2012. His complaint is generally on the insufficiency of the evidence relied upon by the trial court to convict him. He also complains that his defence was disregarded. He appeared in person at the hearing of the appeal and presented written submissions which he relied on in support of his case.

The learned prosecution counsel, **Mr. Chelashaw,** opposed the appeal on behalf of the Republic on the ground that the prosecution case was proved beyond reasonable doubt and that a need to confirm the specific age of the complainant did not arise since she was found by the clinical officer to be a minor and she stated in evidence that she was 9 years old. The learned prosecution counsel submitted that there was sufficient evidence showing that the appellant had attempted to defile the complainant. He was clearly recognised as he was a known person.

All considered, the role of this court is 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.

Briefly, the prosecution case was that on the material date at about 9.00 p.m., the complainant, **DL(PW1),** was at home when the appellant came and joined many other people sitting outside the home. These people were taking a traditional brew called “kaada” and as they were making noise, they were later asked to leave the home. They left but the appellant returned and held the complainant on the mouth and nose such that she lost consciousness. She was later awakened by her mother and asked to touch her private parts which were wet. Her mother suspected that the appellant had offended her.

The complainant's mother, **EA (PW3)**, noticed the appellant coming out of a shed (kibanda) she had prepared for her children to sleep. She became suspicious and proceeded to the shed only to find the complainant unconscious and sleeping with her legs wide open. She (PW3) noticed that the complainant's private parts had a sticky fluid resembling semen. She reported the matter to the police at Lokitaung.

EN**(PW2)**, met the complainant's mother on the following day and was informed that the appellant had been at her home on the previous night.

SA (PW4), was with the complainant on the material night when they were sleeping in a shed.

She saw the appellant enter the shed and remove his shorts. She then saw him lay on top of the complainant after holding her mouth and nose. He laid on the complainant for a while before leaving. She (PW4) said that the shed had a lamp which emitted light which enabled her see the appellant.

Kipkurui Ngeno (PW5), a clinical officer at Lokitaung sub-district hospital examined the complainant and found that she had been sexually assaulted. He compiled and signed the necessary P3 form.

The appellant was re-arrested by **P.C. Thomas Nderitu (PW6)**, of Lokitaung police station and was charged with the present charges after investigations were conducted by **Cpl. John Migwi Gitau (PW7)** among others.

The appellant's defence was essentially a denial and a contention that he was arrested and charged without good cause. He said that on the material date he was at a place called Lowarengale. He stayed with one Francis Ekitoe Ewoi but on the following day he (Francis) travelled to Ethiopia and left him (appellant) to take care of his family. It was on the same day that he was arrested by administration police officers and taken to their local camp. He was later handed over to police officers from Lokitaung. He was taken to Lokitaung and thereafter to Lodwar where he was arraigned in court.

The foregoing defence in the opinion of this court did not raise any dispute with regard to the fact that the complainant (PW1) was indeed sexually assaulted on the material date. This was confirmed by the evidence of the complainant (PW1), her cousin (PW4), her mother (PW3) and the clinical officer (PW5).

The medical examination report (P3 form) compiled by the clinical officer clearly showed that the complainant was actually defiled. She said that she was aged nine (9) years old and this was not disputed whatsoever. Indeed, during her “voire dire” examination by the court, it was ruled that she was an intelligent and eloquent nine (9) year old child.

Surprisingly, the trial court disregard its aforementioned ruling and held in its judgment that the age of the complainant was not established. This is the more reason why the appellant was convicted on the alternative count rather than the main count.

There having been no dispute that the complainant was a minor of below eleven (11) years at the time she was defiled and that her apparent age was according to her evidence and the P3 form placed at nine (9) years, it followed that the offence disclosed was defilement and not indecent act with a child.

Basically, the issue which presented itself for determination by the court was whether the appellant was the person responsible for defiling the complainant.

The defence raised by the appellant was that he was not the person responsible and was nowhere near the scene of the offence having been at the place called Lowarengak. However, there was sufficient and credible evidence from the complainant (PW1), her mother (PW3) and her cousin (PW4) showing that the appellant was the culprit to the exclusion of any other person and that he was at the scene of the offence on the material date and time contrary to what he stated in his defence which became effectively discredited and disproved. The appellant was not a stranger to the aforementioned witnesses. He was very well known to them and there was no credible indication that they implicated him without good cause.

Ultimately, it is the finding of this court that the appellant was clearly identified as the person who defiled the complainant.

Consequently, his conviction by the learned trial magistrate on the alternative charge was erroneous and is hereby substituted with a conviction on the main count of defilement contrary to section 8 (1) read with section 8 (2) of the Sexual Offences Act.

Invariably, the fifteen (15) years imprisonment sentence imposed upon the appellant is hereby set aside and substituted with the mandatory life imprisonment sentence as provided by section 8 (2) of the Sexual Offences Act.

Otherwise, the present appeal stands dismissed.

[**Delivered and signed this 14th day of May, 2013.]**

J.R. KARANJA.

JUDGE.