



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 56 OF 2012.

JOSEPH EKIRU ALIAS MAJI/LOKIPI ::::::::::::::: APPELLANT.

VERSUS

REPUBLIC ::::::::::::::: RESPONDENT.

*(BEING AN APPEAL FROM THE ORIGINAL CONVICTION AND SENTENCE OF T. NZIOKI – SRM
IN CRIMINAL CASE NO. 253/2011 DELIVERED ON 4TH APRIL, 2012 AT LODWAR).*

J U D G M E N T.

The appellant, Joseph Ekiru alias Maji/Lokipi, appeared before the Senior Resident Magistrate at Kakuma charged with defilement contrary to section 8 (1) read with section 8 (3) of the Sexual Offences Act, in that on the 5th April, 2011 at [particulars withheld]Turkana West District, caused his male genital organ to penetrate the genital organ of A C, a child aged fifteen (15) years.

There was an alternative count of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. After a full trial, the appellant was convicted and sentenced to twenty (20) years imprisonment in respect of the main count. However, being dissatisfied with the conviction and sentence, he preferred the present appeal on the basis of the grounds contained in the petition of appeal filed herein on 15th April, 2012. the grounds are essentially a complaint that the evidence of identification availed by the prosecution through the complainant was insufficient and devoid of credibility.

At the hearing of the appeal, the appellant appeared in person and relied on his written submissions in support of his case.

The learned prosecution counsel, **Mr. Chelashaw**, appeared for the state/respondent and opposed the appeal by submitting that the appellant was clearly identified by the child complainant whose evidence was corroborated by that of PW4 who saw them (complainant and appellant) together.

The learned prosecution counsel further submitted that the appellant's defence was overruled by the prosecution evidence against him which showed that the child complainant was indeed defiled and suffered injuries in the process.

The learned prosecution counsel contended that since the complainant was aged fifteen (15) years, the failure by the court to conduct a “voire-dire” examination was not fatal as the complainant was not a child of tender years and in any event, her evidence was found to be credible and cogent. Therefore, the appeal ought to be dismissed.

Basically, the duty of this court is to re-consider the evidence and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, the prosecution case was based on the testimony of a **Dr. Claire Nyambati (PW1)**, based at IRC Main hospital Kakuma who examined the complainant after the alleged incident and assessed her age to be approximately 15 years.

The doctor also confirmed that the complainant was indeed assaulted and defiled.

In her evidence, the complainant, **Asimit Consolata (PW2)**, stated that at midnight on 5th April, 2011 she had gone to a nearby bush to answer a call of nature and was in the process held by her right hand and her mouth closed by a person known as “Lokipi” who forcibly moved her to his house and defiled her. He then abandoned her in the house but on the following morning she returned to her home and informed her parents. She was thereafter taken to the hospital and the matter reported to the police. The complainant identified the appellant as the “Lokipi” who assaulted and defiled her.

P.C. Gene Aila (PW3), of Kakuma police station investigated the case and preferred the present charge against the appellant.

Hellen Nakale (PW4), testified to the effect that on the material night she offered the appellant and the complainant a place to sleep and on the following morning she left the complainant alone and sleeping in her house as she (PW4) went to fetch water. Later, the complainant's parents appeared at the scene.

R A (PW5), testified that before midnight on the material night, the complainant was sleeping at her house but left the house at midnight to relieve herself outside. She did not return until the following morning when her clothes were blood stained. She informed her (PW5) that the appellant had sexually molested her. It was then that she (complainant) was taken to hospital and matter reported to the police. She was escorted to the police by her mother, **M A (PW6)**.

In his defence, the appellant denied the charge and indicated that he was never at the alleged scene of crime from the 28th March, 2011 upto 13th April, 2011 when he was arrested while at the chief's office in Kakuma.

From all the foregoing evidence, it is clear to this court that the occurrence of the offence was not disputed. It was established that the complainant was aged 15 years when she was sexually assaulted on the material night. Due to her age, her consent to sexual intercourse was not necessary. All that the prosecution was required to establish was that the complainant was sexually assaulted with or without her consent and that the person responsible was the appellant.

In denying the offence and raising an “alibi”, the appellant was in fact saying that he was not responsible for the offence as alleged by the complainant.

However, the evidence by the complainant and H (PW4) showed that the appellant was not a stranger to them. The complainant knew him by his nickname of “Lokipi” while H (PW4) knew him by his actual name “Ekiru”, her neighbour.

Therefore, it cannot be a true fact as implied by the appellant that he did not commit the offence and was not at the scene when it happened. He was identified by the complainant and H (PW4) as the person who most likely than not was responsible for the offence even though it would appear that the complainant may have reluctantly consented to the act.

The appellant's defence was thus discredited and rendered ineffective.

Consequently, it is the finding of this court that the appellant's conviction by the learned trial magistrate was proper and sound. The resultant sentence of twenty (20) years imprisonment was in accordance with the law.

In the end result, this appeal is dismissed in its entirety.

Ordered accordingly.

[Delivered and signed this 26th day of September, 2013.]

J.R. KARANJA.

JUDGE.