



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 126 OF 2011

BETWEEN

LUKAS KIURA NJERU APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence in Siakago Criminal Case No 750 of 2010 by S.M. Mokuu P.M on 29th July, 2011)

JUDGMENT

1. The appellant was charged and convicted of the offence of defilement contrary to **section 8(1) and (3)** of the **Sexual Offences Act**. The particulars of the offence were that on 22nd August, 2010 at **[Particulars Withheld]** village within Embu County, he caused his penis to penetrate the vagina of RW a girl child aged 13 years. He was sentenced to a period of 20 years in prison.
2. The evidence presented to support the charge of defilement was as follows: On 22nd August, 2010, the complainant was returning from Kiritiri on board a matatu. The appellant who she knew from the village was also aboard. They alighted at the same stage. He walked ahead of her and stood by the gate of the homestead he was working. He held her, took her into house, locked the house, undressed her and had sexual intercourse with her the entire night. He only released her at 5.00am in the morning. The complainant, PW 1, testified that she could not scream as he covered her mouth and he threatened to stab her with a knife which was kept at the bedside the whole night.
3. PW 2, the mother of PW 1, testified that her daughter did not come home as expected. In the morning she got home, explained what had transpired. Therefore, she contacted the Assistant Chief. She reported the incident at Kiritiri Health Center. On 24th November 2010, the appellant was apprehended.
4. The Clinical Officer PW 5, who examined PW 1 on 26th August, 2010 confirmed that PW 1's hymen was perforated and there was a foul smell and vaginal discharge and pus cells. He prepared a P3 form which was produced in evidence.
5. On his part, the appellant gave an unsworn statement where he denied the offence. He stated he was working in Nairobi and on 22nd August he got to Nairobi at about 10 p.m. He only came back to bury his grandfather on or about 23rd August, 2010. He was arrested on 24th August when he went to buy miraa at the market. He stated that the chief asked him for a bribe of Kshs 2,500 before he was arrested and subsequently charged.

6. The Magistrate was convinced that the prosecution had proved its case beyond reasonable doubt. The appellant complains that the learned Magistrate erred at convicting him on the basis of the inconsistent and uncorroborated evidence of the complainant, that the Magistrate failed to consider that the Clinical Officer examined PW 1 on 22nd August, 2010, four days after the incident and that there was no DNA test conducted to confirm that there was sexual intercourse between PW 1 and the appellant.
7. As this is the first appeal, I am required to assess and re-evaluate the evidence on record and reach independent conclusions bearing in mind that I did not see or hear the witnesses. The first issue is whether the appellant was properly identified as the person who committed the offence. The learned Magistrate after hearing PW 1, a child who gave sworn evidence and was cross-examined concluded that she was credible and she remained consistent throughout her testimony. Further, the complainant knew the appellant quite well and there was no reason for her to lie. She also identified the appellant when she reported the incident to her mother. I am satisfied on the basis of the evidence that the appellant was identified as the perpetrator.
8. Apart from the credible testimony of PW 1 which was unshaken on cross-examination, the act of penetration was confirmed by the evidence of PW 5 who examined complainant and confirmed the hymen was perforated.
9. **Section 124** of the *Evidence Act* is clear that it is not necessary for the evidence of a single witness to be corroborated in sexual offences. However, as I have outlined above, the evidence of the appellant's identity and the fact of penetration were corroborated by the other evidence.
10. In light of this evidence, the fact that the complainant was examined on 26th August, 2013 after the incident did not change the fact the complainant had been sexually assaulted by the appellant. Similarly, it was not necessary to perform a DNA test to establish that the appellant had done the felonious act.
11. Finally, the appellant's defence was considered in light of the prosecution evidence and it was found wanting by the learned Magistrate.
12. The learned magistrate appreciated that in cases of defilement, proof of the age of the victim is essential as it determines the kind of sentence. PW 1 testified she was 15 years old but her mother PW 2 stated that she was 13 years old. The P3 form confirmed that the age was 13 years while the school records produced by the head teacher of the complainant's school confirmed that the PW 1 was 13 years. The learned magistrate concluded that the fact that PW 1 was between the age of 12 to 15 years fell within the bracket of **section 8(3)** of the *Sexual Offences Act* which attracted a minimum sentence of not less than twenty years. As the complainant was within this bracket, no prejudice was occasioned to the appellant as a result. On my part and on the basis of the evidence I would conclude that the child was 13 years. As the minimum sentence is 20 years in prison, it is lawful and is neither harsh nor excessive.
13. On the whole, I conclude that the conviction and sentence were proper and ought not to be disturbed. The appeal is dismissed

DATED, SIGNED and DELIVERED at EMBU this 30th day of October 2013

D. S. MAJANJA

JUDGE