REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 127 OF 2010

SIMON LOVONE……..……..……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1216of 2009 Republic vs Simon Lovone in the Resident Magistrate's Court at Eldoret by N.Shiundu, Senior Resident Magistrate on 26th August 2010)

JUDGMENT

1. The appellant was convicted for the offence of defilement of a girl aged four years contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to 20 years imprisonment.
2. The appellant has appealed against his conviction and sentence. The primary grounds urged can be broken into five. First, that the charge was not proved beyond reasonable doubt; secondly, that the evidence of the minor was not corroborated;thirdly, that his defence of an *alibi* was not considered; fourthly, that there was no clear medical evidence connecting him with the offence; and, lastly, that the sentence was too harsh in the circumstances.
3. The appellant filed written submissions on 20th June 2012.At the hearing of this appeal, he highlighted his key arguments. He contended that the investigations by police were shoddy at best. He attacked the medical evidence on two fronts: that there was variance in the age of the injuries; and, that there were contradictions and inconsistencies in the P3 forms. He also stated that his constitutional rights were violated by being brought late to court. He submitted that the language of the trial court was not specified. The appellant pleaded for leniency saying he is the eldest son in the family. He said he had worked for his employer for nine years and had never engaged in criminal activities. He also said there was another suspect who was released by the police. He raised an argument that since they were not together with the suspect, it cast doubt on his conviction.The evidence of PW3, PC Shadrack Mwendwa shows he had two suspects. The circumstances under which the other suspect was released are not clear. The accused did not cross-examine on that aspect. In any event, that does not absolve the appellant from the charge.
4. The appeal is contested by the State. The State has also given notice that it will seek enhancement of the sentence. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses.See *Njoroge v Republic* [1987] KLR 99, *Okeno v Republic* [1972] EA 32, *KariukiKaranja v Republic* [1986] KLR 190.
5. The language of the trial court *must* be placed on the record. Failure to state the language of the trial is fatal. See *Lusiti v Republic* [1976-80] 1 KLR 585, *Desai v Republic* [1974] EA 416, *Adan v Republic* [1973] EA 445, *Feisal Adan v Republic*, Mombasa High Court criminal appeal 77 of 2008 [2008]eKLR. I have examined the record in the lower court. It states clearly from the date of

the plea on 25th February 2009 that the language was English with Kiswahili interpretation. The trial proceeded in a language understood by the appellant. He entered a plea of not guilty to the main count and the alternative charge. He was grantedbail pending his trial. The appellant actively participated in his trial and cross-examined the witnesses. I find it rather odd that the appellant would raise that issue so late in the day. That ground is a red herring.

6. The accused was arrested on 21st February 2009. That was a Saturday. He was presented to court on Wednesday 25th February 2009. Considering the intervening weekend, that was a delay of about *two* days. Fundamentally, the accused did not raise that issue when he was presented to court. The true remedy for such delay or breach of constitutional rights is not an acquittal on the criminal charge. It does not vitiate the trial in the lower court. An action for damages lies for unlawful confinement.
7. The record of appeal shows that a *voire dire* examination was conducted on 6thNovember 2010. The record states as follows:

> *"Voire – dire.*
>
> *I am called [minor's name withheld]. I am 4 years old. I do not go to school. I know the difference between telling the truth and lies. I will tell the court the truth.*
>
> *Court: The witness understands the nature of an oath. To give sworn evidence"*

8. The minor then proceeded to give sworn evidence. The true purpose of a *voire dire*examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth. In sum the court would be trying to establish whether the child possesses sufficient intelligence to understand the duty of speaking truthfully. See *Republic v Peter KirigaKiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445. If the court proceeds to take unsworn evidence, the accused should not be convicted in the absence of *corroborating* testimony. There is an exception for sexual offences. From the above verbatim record of the court titled *voire dire*, a number of questions were answered by the child. The court immediately formed an impression that the girl, aged four comprehended the nature of an oath. I am of the considered opinion that the *voire-dire* examination could have been a little more detailed. Ideally, the questions posed by the court should have also been recorded. But that was not fatal. See *Macharia v Republic* [1976-80] 1 KLR 260. The brief *voire dire* in this case nevertheless meets the test in *Johnson Muiruri v Republic* [1983] KLR 445. As I will discuss shortly, the evidence of the minor was not the *sole* convicting evidence. I cannot then say that there was non-compliance with section 124 of the Evidence Act.
9. The child gave a vivid account of the events of 19th February 2009. At about 1.00p.m., she was at her grandmother's house with another child known as C .She said that *"Simon [the appellant] called [her] and took [her] to the bush. He removed [her] clothes and defiled [her]".* She reported the matter to her grandmother and sister. She identified the accused. When cross-examined by the appellant, she was very firm in her answers that it was the appellant who defiled her. As stated, the complainant also reported the matter to PW2, R B, her sister, who informed their father. Their father, PW 3, reported the matter at Kogo Police Station. He was issued with a P3 form. He took his daughter to Turbo Health Centre for examination. He knew the appellant.
10. The appellant was arrested the next day. PW5, Jane Lemakoko, is a clinical officer. She examined the complainant on 23rd February 2009, nearly five days later. She said it was six days later. I think the correct version from the dates is five days. The appellant has cited this discrepancy to impugn her evidence. I do not think it is a material variation. Her examination as recorded on the P3 is as follows:

> *"Bruises on vaginal orifice. Broken hymen…urinalysis-few epithelial cells seen. VDRL- negative"*

Her evidence was that the epithelial cells in the urine sample were evidence of penetration. The same witness also examined the appellant on 24th February 2009. The examination revealed a

few pus cells and epithelial cells. Due to the lapse of time, she did not detect much else.

11. The injuries to the minor's private parts were consistent withpenetration. Penetration is defined in section 2 of the Sexual Offences Act as follows-

> *"penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person".*

The complainant's hymen was a broken. She had epithelial cells in her urinalysis. Her evidence was corroborated by PW5 and the P3 examination report. PW6, PC Shadrack Mwendwa, told the trial court that he conducted the investigation. From the witnesses presented and their evidence, I am unable to say the investigations were incomplete or shoddy as urged by the appellant.

12. I have then considered the unsworn statement of the appellant in the trial court. It was brief. He stated:

> *"I hail from Likuyani. I had been employed as a farm hand. I do recall on 19-2-2009. I was at home working and no [sic] strange incident. I was arrested on 21-2-2009 on allegation I had defiled the complainant. I tried to explain to the police but they did not take my version. I was then charged with the offence"*

13. That is the *alibi* the appellant refers to. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. Theappellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution's case. It was thus open to the trial court to weigh it against the evidence already tendered. See *Wang'ombe v Republic* [1976-80] KLR 1683. I have studied the judgment in the lower court. The learned trial Magistrate considered the *alibi*. At page 16 of the record, he found the evidence of the complainant to be truthful and corroborated by PW5 as well as the medical report. The onus of proof of the offence lay with the prosecution throughout. But faced with the evidence of the prosecution, the appellant put forward a feeble defence. There was no grudge between him and the parents of the child. There was no plausible reason for the child of four years to frame him up.
14. In the end, I agree with the findings of the learned trial Magistrate that the offence was proved beyond reasonable doubt. The defence put forward by the appellant at the trial was *inconsistent* with his plea of innocence. His *alibi* was unbelievable when weighed against the strength of the evidence of the complainant and the other witnesses. I find that on the totality of the evidence, all the ingredients of the offence of defilement were proved beyond reasonable doubt. In the end, I uphold the conviction by the trial magistrate. The appeal is accordingly dismissed.
15. Under section 8(2) of the Sexual Offences Act, defilement of a child below eleven years attracts imprisonment for life. I find that the learned trial Magistrate erred in sentencing the appellant to 20 years imprisonment. The record shows that the accused did not even offer any mitigation in the lower court. This is a grave offence perpetrated against a defenceless child. She is a vulnerable person as defined in section 2 of the Act. She will carry the scars for life.The appellant was given a warning that the State would seek enhancement of the sentence. Section 8(2) of the Sexual Offences Act provides for life imprisonment. I will set aside the sentence of the lower court. I hereby substitute it with life imprisonment.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 22nd day of October 2013

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr……in person, appellant.

Mr…….……..……..…for the State.

Mr. P. Eketela, Court Clerk.