REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 26 OF 2012

LOREI TUNKEN …..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(*Appeal arising from the decision of Hon. T. A. Odera PM, in Kitale Chief Magistrate's Court in Criminal Case No. 733 of 2011)*

J U D G M E N T

The appellant was charged with the offence of defilement of a child contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. Particulars are that on the 1st day of April 2011 at ***[particulars withheld]*** Village within Trans-Nzoia County, intentionally caused his penis to penetrate into the vagina of S C, a child aged 5 years.

The appellant was convicted and sentenced to life imprisonment. He preferred an appeal against the conviction and sentence. During the hearing of his appeal, he applied to amend his grounds under Section 350 (2) of the Criminal Procedure Code. He raised new grounds as follows:-

1. *That the Learned Trial Magistrate erred in law and in fact in convicting the appellant when the evidence of a medical officer showed that there was no penetration.*
2. *That the Learned Trial Magistrate erred in law and in fact in convicting the appellant on insufficient evidence.*
3. *That the Learned Trial Magistrate erred in both law and fact in convicting the appellant when key witnesses had not been called to testify.*

The facts leading to the conviction of the appellant are that on 01/04/2011 Pw 1 S C a girl aged 5 years was playing with S A who was younger than her. The appellant who was a herdsman at their home called her. She went to the kitchen and found the appellant who was seated on a chair. The appellant then removed her pant and put her on his laps and inserted his male member into her vagina. She cried and her cries attracted Pw 2 I K who came and found her putting on her pant. The appellant was by then pretending that he was lighting fire.

Pw 2 I K is a cousin of the minor (Pw 1). He testified that he was 16 years old; a class 8 pupil at ***[particulars withheld]*** Academy. On 01/04/2011 at around 5.00pm he was passing near the kitchen when he saw the appellant having sex with the minor. The appellant was seated on a mud made chair. The appellant put the minor down on seeing him. He (Pw 2) took the minor to his uncle N K who asked the minor what had been done to her. The minor told him that the appellant had done bad things to her. His uncle asked Pw 2 to take the child to his grandfather who was seated nearby. Pw 2's grandfather asked Pw 2 to go and call a Police Reservist which he did. In the meantime, the minor was taken to some

women for observation. The appellant was arrested and taken to Maili Saba Police Patrol Base. The minor was taken to hospital the following day.

Pw 4 Jane R C is the grandmother of the minor. She testified that on 01/04/2011 she returned home at around 8.00 pm. Pw 2 told her that the appellant had defiled the minor. On the following day that is 02/04/2011, she took the minor to Kitale District Hospital. She was asked to bring back the minor the following day. On 03/04/2011, she took back the minor where a P3 form was filled.

Pw 5 PC Paul Kamau Mwangi is the Investigating Officer in this case. He testified that on 02/04/2011 at around 3.00 pm he was at Kitale Police Station when he received the appellant who had been brought from Maili Saba Police Post. The appellant had been brought to Kitale Police Station by a Police Officer called Mohamed who informed him that he had arrested the appellant on suspicion that the appellant had defiled a minor who was 5 years. The minor was taken to him by her grandmother. When he interrogated the minor, she revealed to him that the appellant had carried her to the kitchen where he defiled her and that her brother K (Pw 2) found her in the kitchen while wearing her pant and that the accused ran behind the kitchen.

Pw 3 Francis Barchebo is a Clinical Officer attached to Kitale District Hospital. He testified that the minor was taken to the hospital on 03/04/2011. He examined her and found that there was slight penetration. The hymen was slightly broken.

When the appellant was put on his defence, he stated that he was employed by one Rono as a herdsman at Maili Saba until March 2011. That he was owed Kshs. 2,500 by Rono and that when he demanded for the money, he was arrested.

At the hearing of the appeal, the appellant's appeal was opposed by M/S Limo for State who argued that there was enough evidence to convict the appellant. The appellant had been found with the minor in a compromising position. The minor's evidence was corroborated by that of Pw 2. She urged the Court to dismiss the appellant's appeal and affirm the conviction and sentence.

As a first appellate Court, I have to examine the evidence adduced in the lower Court afresh. The examination has to be exhaustive. I have to weigh any conflicting evidence and reach my own conclusions and findings. My role as a first appellate Court was clearly set out in the case of **Okeno Vs. Republic [1972] EA 32.**

The minor herein testified and gave details on what happened on the material day. She testified that the appellant removed his trouser and inserted his penis into her vagina. She testified that she cried and that her cries attracted Pw 2 I K who came and found her putting on her pant and that the appellant pretended that he was lighting fire. The minor's testimony is not supported by the evidence of Pw 2 I K. I said that he was passing by the kitchen when he saw the appellant having sex with the minor. Whereas the minor testified that when Ian came, she was wearing her pants, Ian on the other hand testified that when he passed by the kitchen, he found the appellant having sex with the minor and that the appellant dropped the minor from his laps.

There is evidence from Pw 2 I K that the minor was checked by some women. There was no effort to call any of these women who checked the minor. The minor was taken to hospital on the third day. The Clinical Officer who examined her found that the hymen was slightly broken. He did not make any observations whether there were any bruises on the genitalia of the minor. The minor's age was assessed as 5. Here is a case of an adult who is alleged to have defiled her. Surely if there was penetration and the hymen was broken, there would have been some blood on her pants. There is no one who bothered to collect such crucial evidence.

If indeed the minor was crying as she stated, then the penetration would have been painful and such evidence would have been visible. The appellant is said to have been defiling the minor while seated. The minor is said to have been sitting on his laps. The minor testified that the appellant had removed his trouser. Pw 2 did not testify as to whether the appellant had removed his trouser when he found the

alleged defilement going on.

When the minor's mother went to report the incident to Police, it was reported that when the appellant was found defiling the minor, he ran behind the kitchen. This is contrary to the minor's evidence in which she said that when Pw 2 found them in the kitchen, the appellant pretended to be lighting fire. There was no evidence from Pw 2 as to the state of the appellant when he found them. He merely stated that he found the appellant having sex with the minor and that he saw the minor put on her pants. He did not say whether the appellant's trouser was on or not. What Pw 2 said is that the appellant was seated on a mud made chair. Well, I do not know how a mud made chair looks like and I cannot visualize how the appellant was seated while defiling the minor. The Trial Magistrate may have been in a better position to understand what this chair was.

The Trial Magistrate in her judgment stated that when Pw 2 found the appellant with the minor, he took her to his uncle who questioned her and that she disclosed that the appellant had defiled her. The Trial Magistrate in her judgment made a finding that Pw 2 was exaggerating when he said that he found the appellant defiling the minor. Having made this finding, she went on to state that it was important to separate issues of exaggeration and falsehood. She then went on to state that since Pw 1 had stated in her evidence that Pw 2 found her as she was putting on her pant, Pw 2 was merely exaggerating that he found the appellant in the act. The Trial Magistrate then said in her judgment that this exaggeration did not go to the root of Pw 2's testimony.

It is very clear from the judgment of the Trial Magistrate that she did not believe the evidence of Pw 2. Having disbelieved the evidence of Pw 2, the minor's evidence which was not given under oath remained unsupported. The Clinical Officer was himself at pains to conclude whether there was defilement. He stated in his evidence that there was slight penetration and that the hymen was slightly broken. It is clear from the judgment of the Trial Magistrate that she was at pains in accepting the Clinical Officer's evidence. She regretted that no initial treatment notes were availed but she nevertheless went ahead to accept the minor's evidence where she said that the appellant removed his thing for urinating which he inserted in her thing for urinating which she concluded to be the penis and vagina and accepted the child's testimony that there was partial penetration.

The Trial Magistrate brought in the issue of recognition and warned herself on the danger of convicting on the evidence of a single identifying witness and went ahead to find that the conditions for proper recognition were there and that the minor had no reason to falsely testify against the appellant. The issue of recognition was never in issue. The appellant had worked as a herds boy at the minor's home. The appellant was arrested based on the evidence of Pw 2 who said that he had found the appellant having sex with the minor. The Trial Magistrate having found that the testimony of Pw 2 was not credible, she should not have proceeded to convict the appellant. There was no any other credible evidence left to suggest that the appellant had been involved in defiling the minor. Medical evidence itself was not conclusive that defilement had taken place. The mere fact that a Clinical Officer had remarked that there was some penetration without that evidence being supported by other evidence does not amount to corroboration.

Had the Trial Magistrate properly addressed herself to the evidence before her and taken into account the contradictions in the same, she would not have arrived at the decision she reached. The evidence of the minor was doubtful and the Trial Magistrate should not have relied on it. I find that the conviction of the appellant was not safe in the circumstances. The conviction is hereby quashed and the sentence set aside. The appellant should be set free unless otherwise lawfully held.

Dated, signed and delivered at Kitale on this 12th day of November, 2013.

E. OBAGA

JUDGE

In the presence of:

M/S Limo for State.

Court Clerk: Lobolia

E. OBAGA

JUDGE

12/11/2013