**WILLY CHEPSERGON CHELAWA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the judgment of H.M. Nyaga Principal Magistrate in Kabarnet Principal Magistrate's Court Criminal Case No. 260 of 2010)**

**JUDGMENT**

The appellant, **Willy Chepsergon Chelawa**, was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant on 17th March, 2010 at T[...] Sub-Location in East Pokot District within Rift Valley Province, committed an act which caused penetration with **C M** (hereinafter "the complainant") a child aged 7 years in contravention of the said Act. There was also an alternative charge of committing an indecent act with the same complainant at the same place. Upon his conviction on the main charge, the appellant was sentenced to serve life imprisonment.

The appellant was dissatisfied and has appealed to this court on the grounds that he was convicted on a defective charge; that the evidence was inconsistent and contradictory; that identification was not positive; and that investigation was poor.

When the appeal came up for hearing before me on 10th May, 2012, the appellant was unrepresented and relied upon written submissions which he had previously filed. **Mr. Chirchir**, Learned Senior State Counsel who represented the state, opposed the appeal and supported the appellant's conviction and sentence.

This is a first appeal and this court has a duty to re-evaluate and reconsider the evidence which was adduced before the lower court and come to its own independent finding bearing in mind that the court did not have the advantage of seeing and hearing the witnesses testify and should give allowance for that (See **Okeno -Vs- Republic [1972] E.A.(32).** I am also cognizant of the principle that an appellate court should not interfere with the trial court's findings based on credibility of the witnesses unless no reasonable tribunal could have made such findings or if it is shown that the findings were erroneous in law. (See **Republic -Vs- Oyier [1975] KLR 353).**

The brief facts of the case were as follows: The complainant (PW4), then aged about 7 years, was at home with her grandfather **N A** (PW5) when at about 4:00p.m. of the material date, the appellant went there. He asked to be shown the route to Loruk centre. PW5 instructed the complainant to accompany the appellant and give him the requisite directions to Loruk. The complainant and the appellant then set off together but on the way the appellant carried the complainant deep into the bush and covered her mouth threatening to kill her if she made noise. He removed his trousers and "pushed his thing into her thing". The complainant felt pain and bled. The appellant then left. The complainant went home and informed her grandparents of her ordeal. By the time she returned home, PW5, her grandfather was worried that she had taken too long and observed that her clothes were soaked in blood. She was also crying.

The complainant was taken to Kabarnet District Hospital where she was admitted for 16 days. **Dr. Cleophas Wafula** (PW1) of that hospital filled the P3 form in respect of the complainant's injuries. On examination, PW1 found that the complainant had tears on the anterior and posterior vulva. Her hymen was torn. The cervix and labia majora were inflamed and a whitish discharge mixed with blood oozed from her vagina. Pus cells were also seen on urinalysis tests being performed. The doctor concluded that there had been penetration.

On 18th March, 2010, **Elijah Charito Katuit** (PW2) organized a search of the appellant on the description he had received from his chief and, together with **Nyakol Lomuto** (PW3), arrested the appellant whom they handed over to **CPL Noor Hassan** (PW6) of Loruk Police Station.

The appellant was then charged as already stated.

The appellant testified on oath at the trial. He denied the charge and contended that on the material date, he was at home but only went out for a drink and that he knew nothing about the offence.

The Learned Magistrate upon analysing the evidence adduced by the prosecution found the appellant guilty of the main charge, convicted him and sentenced him as already stated. The Learned Magistrate concluded his judgment as follows:-

**"The next question is who did this?**

**The complainant has clearly identified the culprit.**

**The accused is said to have asked for directions to Loruk Centre. Only to turn against her and defile her. Her grandfather has also identified the accused as the one who came to his homestead. There is therefore no doubt that it was the accused who committed this heinous act. His defence is a mere denial. He has been placed at the scene at the material time. His clothes were also identified by the victim and her grandfather."**

The appellant has complained that the charge was defective because the term **"unlawfully"** was not used and further that the tool used for penetration was not stated in the charge-particulars. A perusal of the charge sheet shows that that indeed is the position. Sections 8(1) and 8(2) of the Sexual Offences Act No. 3 of 2006 under which the appellant was charged does not contain the term **"unlawfully"**. Defilement is also not defined but the offence is complete when a person **"commits"** an act which causes penetration with a child. Penetration under the said Act, means the partial or complete insertion of the genital organs of a person into the genital organs of another. In the charge-particulars being challenged, the word **"penetration"** is used and, given the definition in the Act, the tool used can only be a genital organ and the organ penetrated can only be a genital organ. In the premises the failure to state the tool used and the organ penetrated was not fatal to the charge. Even if stating the organs would be considered necessary, in my judgment the omission to state the same would not be fatal as it occasioned no failure of justice and would in any event be curable under Section 382 of the Criminal Procedure Code. The first ground of appeal is therefore without merit and is dismissed.

The appellant's second complaint is that he was convicted on inconsistent and contradictory evidence. This complaint is related to his third complaint that his identification was not positive. The twin complaints are made because the complainant is alleged to have known the appellant as a person from her home area yet her grandfather (PW5), her village elder (PW2) and PW3 all testified that they did not know the appellant prior to the incident (PW5) and prior to arrest (PW2 and PW3).

The record indeed shows that the complainant's testimony of identification was in reality that of recognition of the appellant. She gave evidence that she knew the appellant who lived in her home area. She maintained that position in cross-examination. It is significant that the appellant did not suggest to her that she was lying given the testimony of PW2 and PW3. Further the incident happened in broad day light. The complainant had ample opportunity to observe the appellant. She listened to the conversation the appellant had with her grandfather (PW5) as he sought directions to Loruk Centre. She then walked

with the appellant for sometime before he carried her into the bush. She eventually suffered the ordeal at the hands of the person she was assisting. It is in the premises not surprising that she even recalled the boots and the jacket the appellant was wearing. In the end, I find and hold that there is no basis for discrediting the complainant's testimony merely because she identified the appellant by recognition unlike her grandfather PW2 and PW3.

The complainant's testimony was buttressed by her grandfather (PW5). Although he was aged over 80 years, he vividly recalled the visit the appellant made to his home and sought directions to Loruk Centre. The visit was at about 4:00p.m. He held a conversation with the appellant and asked the complainant to direct him to the said centre. His testimony was not shaken in cross examination. In the premises I find no basis to discredit his identification of the appellant.

The last issue raised by the appellant is that of poor investigation. The challenge is made because the chief who ordered his arrest was not called to testify at the trial and further that the first report made by the complainant did not describe him. The evidence of arrest was adduced by **Elijah Charito** (PW2), **Nyakoth Lomuto** (PW3) and **CPL Noor Hassan** (PW6). The record shows that the appellant did not suggest to PW2 and PW3, at the trial, that his arrest was without basis. With regard to the testimony of PW6, the appellant does not seem to have been concerned about the first report of the offence. In those premises, the challenge now raised has not been well taken.

With regard to the failure to call the chief, I only need refer to section 143 of the Evidence Act (Cap 80 Laws of Kenya) which reads as follows:-

**"S. 143: No particular number witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact."**

The prosecution in this case called six (6) witnesses to prove the elements of the offence charged. The complainant was the most crucial witness and the Learned trial magistrate believed her. Her evidence was also corroborated by that of her grandfather PW5 and that of the doctor (PW1). In law however, the complainant's testimony was receivable on its own without the requirement for corroboration under the proviso to section 124 of the Evidence Act aforesaid. In the premises, in my judgment there was no obligation to summon the Chief in view of the testimony of the complainant.

In view of the above analysis, I am satisfied that the conviction of the appellant on the principal count of defilement was safe.

On sentence, I can only interfere if the trial magistrate erred in principle or overlooked material factors or if the sentence is manifestly excessive in view of the circumstances (see **Ogalo s/o Owuor -Vs- Republic [1954] E.A.C.A. 270).** The appellant has not expressly challenged sentence but if he had done so, he would not have succeeded as he was handed the minimum sentence provided under section 8(2) of the Sexual Offences Act aforesaid.

In the end I find no merit in this appeal which I hereby dismiss.

**DATED AND DELIVERED AT ELDORET THIS 7TH DAY OF JUNE, 2012**

**F. AZANGALALA**
**JUDGE**

**Read in the presence of:-**

**The Appellant and Mr. Chirchir for the state**

**F. AZANGALALA**
**JUDGE**

**7TH JUNE, 2012**