ANDREW SIMIYU...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

[An Appeal from original conviction and sentence in Nakuru C.M.P &.C.NO.683 of 2006 by Hon T. Matheka, Senior Resident Magistrate dated 2nd October, 2007]

JUDGMENT

The appellant was charged and convicted of the **offence of defilement of a girl aged 11 years** contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act, 2006** and was sentenced to life imprisonment.

Aggrieved with both the conviction and sentence the appellant filed an appeal to this court on five (5) grounds that can be reduced to three, namely-

i) that the trial court erred both in law and fact by convicting the appellant when there was insufficient evidence to support both the charge and the conviction;

ii) that the trial court erred both in law and fact by basing its conviction on the uncorroborated evidence of the complainant and;

iii) that the trial court erred both in law and fact by failing to consider the appellant’s defence.

During the hearing of the appeal the appellant, in line with his filed grounds of appeal, denied having committed the offence, blamed his woes on bad blood that allegedly existed between the family of the complainant and that of his employer.

Regarding the sufficiency of the evidence adduced at the lower court he argued that since he was infected with HIV at the time of the alleged offence and the doctor found the complainant not to have been infected after the alleged offence, there was no sufficient evidence to link him to the offence. Consequently, he prayed that his appeal be allowed, his conviction quashed and the sentenced imposed by the lower court set aside.

Learned counsel for the State supported the decision of the lower court. He submitted that the complainant knew the accused before the incident; that the incident occurred during the day and that the alleged defilement was confirmed by the doctor.

I have considered the appellant’s submissions alongside those of learned State Counsel, opposing the appeal.

This being the first appeal, the evidence on record must be subjected to to fresh scrutiny so as to enable the court to arrive at an independant conclusion, of course bearing in mind that the trial court had the

advantage of seeing and hearing the witnesses.

During the hearing of the case before the lower court the prosecution called a total of five (5) witnesses. P.W.1, the complainant, who was 11 at the time of the alleged offence told the court that she knew the appellant before the alleged incidence and that she was alone at their home when the incident occurred. She described candidly what happened before and after the alleged offence. This is what she told the court:

" I heard someone call me from the neighbours. I went to the house. I found this "*Kijana*", Andrew Simiyu. He had been brought to take care of the neighbour's house. He was alone. He told me to go and pick money from the stool inside the house. I went to pick the money. He followed me. He shut the door. He put me on bed. Covered my mouth and did me "*tabia mbaya.*" He told me not to scream. He took his thing, one for urinating and put it into mine..."

The appellant was known to the complainant, being her neighbour. She was eleven (11) years old and the trial magistrate in compliance with provisio to **Section 124** of the **Evidence Act** found her to be a witness of truth.

Although there is no requirement for corroboration, the evidence of the complainant was corroborrated by that of P.W.2 and P.W.5. P.W.2 told the court that when she arrived home at about 5.00 pm she noted that the complainant looked dull and sickly and upon inquiry the complainant narrated to her what the appellant had done to her. P.W.5 upon examination of the complainant did confirm that indeed the she was defiled. She repeated to the investigating officer that she had been defiled by the appellant.

Having re-evaluated the totality of the evidence adduced before the trial court, I find that there was sufficient evidence to support the charge and the conviction of the appellant. For those reasons the appellant's appeal on ground 1 and 2 fails. The trial court considered the appellant's defence. For my part, I find that the appellant's allegation of bad blood was never proved or substantiated. For this reason the appellant's appeal on this ground fails too.

Before concluding this judgment, I wish to comment on an issue that the appellant introduced in his appeal but which he never raised at the trial. This is in contention that the alleged offence was not properly investigated and that had the trial court been informed that he was HIV positive at the time of the offence; given that the complainant was not found to have been infected after the alleged defilement, the court would have found the offence not sufficiently proved.

Even though the appellant provided no proof that he was at the material time infected with HIV as alleged, it is common knowledge that infection with HIV does not manifest itself immeadiately after one has had sexual contact with an infected person. It is also common knowledge that one does not necessarily have to be infected after having sexual conduct with an infected person.

For to the foregoing reasons the appellant's appeal is dismissed.

Dated, Signed and Delivered at Nakuru this 20th day of July, 2012.

W. OUKO
JUDGE