



JARED ONDIEKI KEMIENGO APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGMENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Nyamira, Hon. J. Wanjala in Criminal Case No. 518 of 2010 dated 13th July, 2011)

The appellant, **Jared Ondieki Kemiengo** was charged with the offence of defilement contrary to section 8 (1) (3) of the **Sexual Offences Act**. The particulars of the offence are that on the 28th August 2010 at *{particulars withheld}* in Nyamira District within Nyanza Province he unlawfully and intentionally by use of his genital organ caused penetration to the genital organ of **R. K** a girl aged 13 years. A birth certificate showing that she was born on 7th February 1997 was produced in court. The appellant was tried and convicted by the SRM's court at Nyamira. He was sentenced on 13th May, 2011 to serve 25 years imprisonment. He has now preferred an appeal to this court. In his petition filed on 18th May 2011, he has listed the following grounds:-

- *That he was not positively identified.*
- *That the court relied on the evidence of PW4 which was collected after 2 days.*
- *That the charge was motivated by personal differences between himself and the accused's father arising out of land dispute.*
- *That the trial court rejected his sworn testimony.*
- *That the sentence was overly harsh and excessive.*

The appeal came up for hearing before me on 7th February, 2012. The appellant gave written submissions and only added that he at no time committed the offence he was charged with. In his written submissions, the appellant has stated that the prosecution witnesses gave contradictory testimony with regard to where the complainant slept on the material night. He further submitted that the medical examination conducted on the complainant did not demonstrate that she had been defiled as there were no lacerations or tears and neither was there any discharge. He also pointed out that the complainant had been sexually active prior to the incident. In further submission with respect to himself, the appellant stated that he was not examined so there was no medical evidence to link him to the offence.

Mr. Mutai, learned counsel for the respondent in opposing the appeal, submitted that the prosecution proved its case beyond reasonable doubt; that the conviction was safe and the sentence lawful.

This is a first appeal. As such I am obligated to reconsider and evaluate the evidence afresh, weigh and

consider the judgment of the trial court. As stated in **Okeno –vs Republic (1973) EA 32:-**

“The first appellate court must reconsider the evidence, evaluate it itself, and draw its own conclusion, in deciding whether the judgment of the trial court should be upheld as well of course as to deal with any questions of law raised on appeal”.

In his first ground of appeal, the appellant has complained that he was not positively identified. The evidence before the trial court was that the complainant, a minor aged 13 left her grandmother’s house and spent the night in the appellant’s house. When she returned home in the morning, she was questioned and beaten by her father and it was then that she confessed to have slept in the appellant’s house. Her testimony before the court which was not shaken on cross-examination was that she had sexual intercourse with the appellant in his house on the material night. She testified that she had had sex with him before.

She further testified that she had been in communication with the appellant earlier in the day when he had asked her to go to his house. PW2 who is the complainant’s father and her grandmother whom she lived with knew the appellant. He is said to have been a neighbour. The question of identification therefore does not arise as the appellant was known. Consequently I find that the complaint on identification lacks merit.

Another ground raised by the appellant is that the medical evidence did not show that the complainant had been defiled as it showed that she had had sexual intercourse before. While it is true that the P3 report produced in court by PW4 showed that it was not conclusive on when the hymen was broken, it does not exonerate the appellant. It is enough to establish that there was sexual intercourse. It matters not that it was the first, second or third time. It matters not also that the girl willingly went to the appellant’s house. The only determining factor is the age of the complainant. Once it was established that she was 13 years old, it followed that she had no capacity to consent.

The third ground raised by the appellant is that the charge was motivated by a land dispute. From his testimony and that of PW2, the complainant’s father, it appears that there was a subsisting land dispute between the complainant’s father and the appellant’s employer. That being the case it is not apparent why then the appellant would be framed and yet he was just an employee. This ground therefore sounds farfetched and I reject it.

The last ground relates to sentence. The appellant was sentenced to serve 25 years imprisonment. Section 8(3) of the **Act** under which the appellant was sentenced provides that:-

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term not less than twenty years”.

The appellant was sentenced to 25 years. The sentence was lawful since it is only the minimum sentence that is provided. The complainant’s age was found by the trial court to be 13 years. Once the court determined the age of the complainant, the minimum sentence was determined.

Consequently, I find that the sentence was lawful. However, I would in the circumstances of this case, grant the appellant the benefit of the minimum sentence. I therefore set aside the sentence of 25 years and substitute therefore 20 years imprisonment. The appellant is to serve 20 years from the date of sentence by the trial court. The appellant has a further right of appeal to the Court of appeal.

Judgment dated, signed and delivered at Kisii this 25th day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

Jared Ondieki Kemiengo: appellant (present/absent)

.....: counsel for respondent (present/absent)

..... court clerk

R. LAGAT-KORIR
JUDGE