REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 32 OF 2017

JOSEPHAT KIBET KORIR……….…………………………….APPELLANT

VERSUS

REPUBLIC………………………………………………………RESPONDENT

(From the original conviction and sentence in Sexual Offence Case No. 3 of 2016 (Hon. S. K. Ngetich, (SRM) dated 25th September 2017)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence were that on the 3rd day of May 2016 and the 5th day of May 2016 at [Particulars withheld] village in Kipkelion West Sub-County within Kericho County unlawfully and intentionally caused his penis to penetrate the vagina of MC, a child aged 13 years. He faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and location as in the main count, he unlawfully and intentionally touched the vagina of MC, a child aged 13 years, with his penis.

2. The appellant pleaded not guilty and after a full trial, he was found guilty as charged on the main count and sentenced to 20 years imprisonment.

3. Aggrieved with both his conviction and sentence, the appellant filed this appeal. Prior to the hearing of the appeal, the appellant filed amended grounds of appeal together with his submissions on 27th September 2018 which he sought to rely on in place of the grounds of appeal set out in his initial petition of appeal.

4. He argues in these amended grounds that the court erred by relying on inconsistent, contradictory evidence, that the court erred by convicting without considering the results of the medical examination on record carried out on the accused, that the court relied on fake medical evidence, and that the court erred in not summoning crucial witnesses.

5. The prosecution case against the appellant was presented through 4 witnesses. MC's evidence was that she was 13 years old and in class 5 at [Particulars withheld] Primary School. On 3rd May 2016, she was at her grandmother's house. On the way back to her home, she met the appellant, whom she did not know before. He was on a motor cycle and offered to take her home. He did not, however, stop where she wanted to alight, at 'Kwa Zablon', but instead took her to his one bedroom house at Barshele Centre. He switched on the lights in the room, then switched them off and told her to take off her clothes. He also removed his clothes and they had sex or, as she termed it, 'played sex'. She did not scream as she was afraid.

6. In the morning, he went to a hotel to get tea, locking her inside his house. He brought back the tea which they took, and then he locked her up again and left. The following day, he took her to 'Cherigat' kiosk on his motor cycle and left her there, telling her to wait for him as he went to Barshele. She was found there, vomiting, by her aunt CR, who called her mother. Her mother came on a motor cycle and took her to Kipkelion Sub-county hospital, then they went home.

7. The following morning, M went to fetch firewood and met the accused on the road. He told her to board his motor cycle, took her to Chepseon, bought her clothes, then took her to his house where they again slept together. He locked her in his house again as he went out. The following day, he took her to his parents' home in Kimoson where she stayed for a week, after which he took her back to his home, and they again slept together. He again locked her in on Saturday and went away. Police came the following day, a Sunday, and arrested the appellant and M and they were both taken to Kipkelion Sub-county hospital. She had stayed for 5 days with the appellant.

8. AC (PW2), M's mother, testified, on the basis of M's birth certificate, which she had in court, that M was born on 2nd May 2003. A was at home on 3rd May 2016. M had gone to visit her grandmother and was expected to return home, but she did not. On 4th May 2016, A went to look for M. She was called by her sister in law, CR, who informed her that a girl had been found at Kapcherigat village. They went and found that it was M. She was vomiting, and they took her to Kipkelion Sub-district Hospital. M told them about the man taking her to his

house in Kipkelion where they spent the night.

9. On 5th May 2016, A had left M at home, but did not find her when she returned. They searched for her but did not find her, and she made a report at the Kipkelion Police Station. She was informed on 15th May 2016 that M and the man who was with her in his house had been arrested. She had gone to the police station and was shown the appellant. M had told her that the appellant had taken her as his wife.

10. SKK, the husband of PW2 and father of PW1, was with his wife on 3rd May 2016. They were expecting M to return home but she did not. On 4th May 2016, his wife received a call telling her that M was at Cherigat Shopping Centre and was vomiting. He repeated the evidence given by A about taking M to hospital, her subsequent disappearance for four days, and her being found by police.

11. The prosecution led the medical evidence through the testimony of Weldon Mutai, a clinical officer at Kipkelion Sub-county hospital. He had examined M, on 15th May 2016 and completed the P3 form. He had found that her hymen was broken and she had a whitish mucoid substance over the vulva. Analysis of specimens found that she had spermatozoa. His examination of the appellant showed no bruises on his genitalia.

12. No. 92886 PC Edgar Chilao was the investigating officer. He had also arrested the appellant. His testimony was that he had received a report from A, PW2, about her missing daughter. He had subsequently received information from an informer on 14th May 2016 about a girl who was staying with a man in Kipkelion. He had been directed to the rental house where they were staying and had found the appellant and M sleeping. He had arrested both of them and taken them to Kipkelion sub-county hospital.

13. In his defence, the appellant gave an unsworn statement. He stated that he woke up on 5th May 2016 and went to work, then went home at 8.00 p.m. While sleeping at 11.00 p.m., he heard a knock and opened the door to find police officers. He was arrested and taken to court the following day. He denied committing the offence with which he was charged.

14. In his analysis of the evidence, the trial magistrate found that the complainant was barely 13 years old at the time of the offence, and was therefore a child according to the law. He also found that the complainant and the appellant had cohabited as husband and wife and the appellant had ample opportunity to commit the offence. The court therefore found that the offence of defilement had been established.

15. The state opposed the appeal. Mr. Ayodo submitted with respect to the first ground in the Amended Grounds of Appeal that contrary to the appellant's contention that the prosecution case was full of inconsistencies and contradictions, the prosecution evidence was consistent and corroborative. He summarised the prosecution evidence as it emerged from PW1, PW2, PW3 and PW4 that the appellant had taken the complainant to his home and had defiled her. The evidence of the complainant's mother had established her age, while the medical evidence had established the fact of defilement.

16. I have considered the record of the trial court and the submissions by the appellant and the state. I agree with the prosecution that the evidence of the prosecution witnesses was consistent and corroborative. The complainant had narrated being offered a lift by the appellant, being taken to his house instead of being dropped at or near her home at Kwa Zablon, spending the night with the appellant and having sex, and being locked in the house while the appellant went out.

17. She had again been taken to his house on 5th May 2016, then taken to his parents' house and later back to the appellant's home. The evidence of her parents showed that she had been missing for some days, and the medical evidence confirmed that she had been defiled. Her mother, in reliance on her birth certificate, showed that she was 13 years of age. I am therefore unable to find a basis for challenging the consistency or reliability of the prosecution evidence, and this ground must fail.

18. The appellant has argued in his second and third grounds, which are related, that the trial court erred by convicting him while relying on the results of medical examination which he deems unreliable. This is on the basis that the examination carried out on him showed no bruises on his genitalia. The state relied on the record to submit that the medical evidence was produced by a person who was a qualified doctor and his findings were reliable. He had also filled a P3 form which was produced in court and which showed that the complainant had been defiled.

19. I have considered the medical evidence produced before the trial court and find no basis to fault it. The clinical officer who produced it confirmed that he had examined the complainant and found that her hymen was broken, she had a whitish mucoid discharge on her vulva as well as spermatozoa. The fact that he did not find any bruising on the appellant does not, in my view, weaken the prosecution evidence that led to the conclusion that the appellant had defiled the complainant.

20. At ground 4, the appellant has argued that the trial magistrate erred as he did not summon crucial witnesses. He does not state which other witnesses should have been summoned to testify, but were not called.

21. The response from the state is that all the witnesses who testified were enough to prove the prosecution case. In any event, according to Mr. Ayodo, the appellant had not specified which witnesses should have been summoned to testify.

22. The law as enunciated by the court in **Bukenya & Others vs Uganda [1972] E.A 349** is that the court can draw an adverse reference against the prosecution for failure to call certain crucial witnesses. In considering the application of this principle, the court in **Daniel Muhia Gicheru vs R Cr. App. No. 90 of 2007 (UR)** stated as follows:

> ***"The often trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden? In BUKENYA AND OTHERS V. UGANDA [1972] EA 349 the Court of Appeal for Eastern Africa held that the prosecution has the discretion to decide as to who are the***

material witnesses. That Court, however, qualified that general principle by stating that:

> ***"…. There is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent …. While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***

In our view, the adverse inference can only be made where the evidence tendered by the prosecution is "barely adequate". In the instant appeal, we find from the record that the evidence adduced against the appellant was quite overwhelming. Accordingly, the prosecution has the discretion to determine which witnesses are material."

23. In this case, I find that the evidence adduced by the prosecution was sufficient to prove the offence of defilement against the appellant beyond reasonable doubt. The complainant was 13 years of age, as the testimony of her mother established. Her own testimony showed that the appellant took her-in effect abducted her- from the road, had sex with her in his house overnight, and kept her locked up in his house.

24. Even after he dropped her off at Cherigat and told her to wait for him but she found her way home, he still sought her out while she was fetching firewood, took her again to his house, and again had sex with her. He then took her to his parents' home, where he kept her for a week. Thereafter he took her back to his rented house where they were both found by the police after her mother reported that she was missing.

25. The appellant did not indicate which witness was not called, and what that witness would have added to the prosecution case. I therefore find that there was no merit in this ground of appeal either.

26. In his judgment, the trial magistrate expressed the view that if he had an option, he would have given the appellant a lesser sentence. I have not been able to find the rationale for this sentiment on the part of the trial court. If it stemmed from his finding that the appellant and the complainant were living as husband and wife, I find that it would be to sanction an offence and abuse of a young girl to give the appellant a lesser sentence ostensibly because he had taken the complainant as a wife.

27. The complainant was a child, 13 years of age. She was taken by the appellant while on her way home to his house. She was defiled, for several nights. Given her age, she cannot be said to have consented to be a 'wife' of a stranger who carries her on his bicycle, refuses to drop her off when she reaches her destination, takes her instead to his home where he has sex with her and keeps her locked up.

28. I therefore find that the appellant's appeal is without merit on all grounds and must fail. Both the conviction and sentence are hereby upheld.

29. It is so ordered.

Dated Delivered and Signed at Kericho this 7th day of February 2019

MUMBI NGUGI

JUDGE