



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

(CORAM: MAJANJA J.)

CRIMINAL APPEAL NO. 15 OF 2014

BETWEEN

NELSON KIVISHA..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B.N. Ireri SRM delivered on 14th January 2014 at the Vihiga principal Magistrate's Court in Criminal Case No. 395 of 2012)

JUDGMENT

1. The appellant, **NELSON KIVISHA**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (4)** of the **Sexual Offences Act** ("the Act"). It was alleged that between 10th and 13th April, 2012 in Vihiga County he intentionally and unlawfully caused his penis to penetrate the vagina of LV, a girl aged 13 years. The appellant was sentenced to 15 years' imprisonment and he now appeals against conviction and sentence. The appellant's co-accused faced a charge of child trafficking contrary to **section 13(a)** of the Act. She was also convicted but has not proffered an appeal against her conviction and sentence.

2. In the petition of appeal and written submissions, he contends that the prosecution did not prove its case that the prosecution's case was contradictory and that PW 1 was untruthful. The State's position in that the prosecution proved all the elements of the offence.

3. After a *voire dire*, PW 1 testified on oath that she was 13 years in class 5. She stated that she knew the appellant as she had previously been taken to his house by the appellant's co-accused. She recalled that on the material day, the appellant's co-accused took her to meet the appellant who took her to his house. She described what took place as follows;

Nelson took me to his house then locked the door from inside, he took me to a bed, he removed his trouser and his underwear.....he removed my skirt and panty and he lay on me on the bed..... He lay on top of me. He inserted his thing for urinating 'his penis' into my thing for urinating. ...

4. PW 1 further recalled that she stayed with the appellant in his house for three days and he proceeded to have sexual intercourse with her but when she refused to continue having sexual intercourse, he chased her and she went to stay in the appellant's mother's house for two days. Thereafter she went to visit her aunt who then called her parents.

5. The complainant's mother, PW 2, confirmed that PW 1 left home on 10th April, 2012 at 7.00pm and did not return. She reported the matter to the village elder and a search was mounted. PW 1 was found after one week. She recalled that she was shown where PW 1 had been for one week and indeed met the appellant's mother who told her that they had told the child to go home. It is the child's aunt who found PW 1 when she came to her home and alerted PW 2 to come and collect her. After she had been found, she was taken for examination and treatment. PW 1's father, PW 3 also testified that the child had been missing and when she was found, he reported the matter to the police and took her to hospital for examination and treatment.

6. PW 4, the Clinical Officer at Vihiga District Hospital, examined PW 1 on 20th April 2012. confirmed penetration and produced the P3 form for PW 1. He observed that there were no bruises or injuries on the vagina, there was no foul smell and all the essential tests were negative. The investigating officer, PW 5, recalled that on 19th April 2012, PW 2 and PW 3 came to report that PW 1 had been sexually assaulted after she had been taken by a man. He recorded witness statements and decided to charge the appellant.

7. In this defence, the appellant gave an account of his arrest on 21st April 2012 but denied the charge.

8. In order to prove defilement, the prosecution must establish that the appellant did an act that caused penetration to a child. **Section 2** of the **Act** means, “*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*”

9. The evidence against the appellant depends on the credibility of the testimony PW 1 who gave a detailed narration of how the appellant sexually assaulted her. She explained how she was taken to the appellant’s home by his co-accused and stayed there for three days when during that time the appellant had sexual intercourse with her. Under **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and allows the court to convict an accused where the trial court on the basis of the evidence of the victim without corroboration, if for reasons to be recorded, the court believes the child was saying the truth. The trial magistrate found PW 1’s testimony clear and unequivocal.

10. I have looked at the evidence on record, it is detailed, consistent and credible. And remained unshaken even in cross-examination. I have no reason to depart from the findings of the trial magistrate. This finding notwithstanding, there is sufficient corroborative evidence from the testimony of PW 2 and PW 3 which confirms that on the days PW 1 was with the appellant, she had been missing from home and they had made efforts to look for her. In addition, the medical testimony of PW 4 indicated that there had been penetration. When the appellant’s defence is considered alongside the credible testimony of PW 1, it sinks on quicksand.

11. There is no doubt that PW 1 was below 18 years old and therefore child hence the offence of defilement was committed and I affirm the conviction. As regards the sentence, it was proved through the testimony of PW 2 and PW 3 that the complainant was 13 years old. The sentence of 20 years’ imprisonment is the statutory minimum under **section 8(4)** of the **Act** hence the sentence is hereby affirmed.

12. Appeal is dismissed

DATED and DELIVERED at KAKAMEGA this 4th day of April 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Ng’etich, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent