



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT LODWAR**

**LODWAR HIGH COURT CRIMINAL APPEAL NO. 69 OF 2016**

**EDAN EDIT.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from conviction and sentence from original Lodwar PMCR 309/2012 delivered on 23/4/2013 by H.O Barasa Acting Principal Magistrate)**

**J U D G M E N T**

The appellant was charged in the amended charge with the offence of defilement contrary to section **8(1) (4) of the Sexual Offences Act**. The particulars of the offence are that on the 2<sup>nd</sup> day of April 2012 in Turkana Central within the Turkana County intentionally caused his penis to penetrate the vagina of R E, a child aged 17 years. He also faced an alternative charge of committing an indecent act with a child **C/s 11(1) of the sexual offences Act**. The particulars of the offence are that on the 2<sup>nd</sup> day of April, 2012 in Turkana Central District within Turkana County touched the breast of **R E** a child aged 17 years with his hands.

After full trial where five witnesses testified for the prosecution and the appellant gave sworn testimony, the appellant was convicted on the main charge and sentenced to serve fifteen (15) years imprisonment. He was dissatisfied with the conviction and sentence and filed this appeal.

The appellant in his grounds of appeal faulted the trial magistrate for convicting him yet no exhibits were produced in court, relying on the contradictory evidence of the complainant and the medical evidence he relied on the evidence **PW1, PW2 and PW3** who were all family members; that the persons who arrested him were not called to testify and finally that the trial magistrate convicted him and rejected his defence without giving reasons.

The appellant filed written submission in support of his grounds of appeal. He submitted that the charge sheet is defective and the amendments done or substitution made were unlawful; that the crucial witnesses Akaskan and Akeno did not testify, that the prosecution witnesses were all family members and inspired; there was no corroboration of the complainant's evidence the age assessment report of the complainant was erroneous, and that there were material contradictions in the prosecution evidence.

Mr. Kimanthi learned prosecuting counsel for the respondent opposed the appeal. He submitted that the appellant was initially charged with rape which was however substituted with defilement. He submitted that although the offence was committed at night, the complainant positively identified the appellant as the person who defiled her; and finally that the sentence meted out was in his view a lenient one.

This is a first appeal. The duty of the first appellate court is to re-examine and re assess the evidence and arrive at its own conclusions but all the time bearing in mind that it did not hear or see the witnesses testify (**Eneno – v – Republic 1972 EA 32**). The evidence before the trial court was that on 2/4/2012, the complainant R E was from 'Edonga' the Turkana traditional dance going home at 2.301m when he met four men. She was alone. They joined her and started walking together. Then 3 men remained behind and one of them went to where she was, held her and threw her on the ground, he then had sexual intercourse with her. After he was done, he left her and went to join the other men. She stated that on the material day she was not wearing any pants and that the man inserted his penis into her vagina. She knew the person to be the appellant as he was their neighbor.

The other men were Akaskout, Akeno and Icholar who only watched from a distance. After the act she went home and informed her brother. People came to their homestead including the appellant who when asked denied committing the offence. The next day the matter was reported to police. **PW6 Julius Choruba** a clinical officer at Lodwar District hospital examined the complainant on 10/4/2012 and found that there was a tear at the lateral wall of the vagina and presence of a whitish discharge which signified presence of an infection. **PW5 Michael Lopocho Engore** examined the complainant for purposes of age assessment and from her dental examination found she was 17 years old.

The appellant in his defence testified that he is a herdsman and denied that he committed the offence.

The main grounds raised by the appellant in this appeal is that he is not the one who committed the offence and the trial court was therefore in error when it found that he was positively identified. Positive identification of the accused as the person who committed the act of penetration on the complainant is an important element the prosecution must prove in defilement casasa in **Wamunga – v – Republic (1989) KLR 424 the court of appeal stated.**

**1. Where the only evidence against a ..... is evidence is evidence of identification or recognition the trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make in a basis of a conviction.**

**2. Recognition may be more reliable than identification existed will consider such factors as whether the accused was known to the identifying witness at the time of the offence; the length of time the witness took to identify the accused; the distance from which the witness identified the accused and the source of light that was available at the material time ( see Etudebo & others – vs – Uganda 2009 1 EA 132).**

There is no doubt that the incident occurred at night. The complainant stated that it was about 2.30a.m. There is no indication from her evidence whether there was light either from the moon or otherwise to enable her recognize the appellant in fact during cross-examination by the appellant the complainant stated

**“I have told this court the truth. You covered my mouth and then entered between my thighs. I fainted when you covered my mouth. You did the act when I fainted. I regained my senses and found you in the act. I had regained my senses when you started ejaculating”. That is how I knew you ejaculated four times”**

From her evidence it is apparent therefore that when the person held her mouth she became unconscious, which implies that she had no capacity to observe him. She only came to when he was in the act. The trial magistrate on this issue in his judgment stated

**“In her evidence in chief it is clear that PW1 was aware that the accused and his colleagues whom she mentioned by name were the ones walking behind her. She knew the accused well since he was his neighbor. The accused ejaculated four times during the intercourse and this only means that the time accused took was enough for the complainant to properly confirm that he was actually the one. Even though she was silent on whether there was moonlight or not, her evidence leaves no doubt that she was not mistaken as to the person who had sexual intercourse with her”**

The learned trial magistrate appreciated correctly in my view that there was no evidence of source of light; which would have enabled the complainant identify or visually recognize the appellant as the person who was having sexual intercourse with her. There is no evidence that the complainant recognized the appellant by voice recognition; there is no evidence that they had a conversation to enable her recognize his voice; no evidence that she had seen the appellant at the dance and when she was leaving followed her; in my view, there was no evidence before the trial magistrate to show that the appellant was positively identified. The court should have considered her evidence more carefully more particularly as this was identification or and/or to recognition by a single identifying witness.

I have considered this appeal, I am satisfied that the circumstances in this case were not conducive for positive identification/or recognition. I am therefore satisfied that the appellant was not positively identified and the prosecution did not therefore prove its case against the appellant for the offence of defilement. I therefore allow the appeal, quash the conviction and set aside the sentence of fifteen years imprisonment imposed. The appellant Edan Edit to be set at liberty unless otherwise lawfully detained.

**Dated at Lodwar this 27<sup>th</sup> day of December, 2016.**

**S N RIECHI**

**JUDGE**

**Court** – judgment read over and delivered in open court in the presence of the appellant, Mr. Kimanthi for the state, Araki interpretation English/Turkana this 11<sup>th</sup> day of January, 2017.

**S N RIECHI**

**JUDGE**