**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 122 OF 2015**

**SHADRACK KOSGEI KEMBOI ………………......………………… APPELLANT**

**VERSUS**

**REPUBLIC ………………………………………....................... RESPONDENT**

***(An Appeal from the Judgment of the Senior Resident Magistrate Honourable G. Adhiambo in Kapsabet Criminal Case No. 537 of 2015, dated 4th December, 2013)***

**JUDGMENT**

1. The appellant was tried and convicted of the offence of defilement Contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act.* He was sentenced to life imprisonment.

2. The particulars of the offence allege that on the 3rd day of in Nandi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of *F.C* (Name withheld) a child aged 10 years.

3. The appellant was dissatisfied with his conviction and sentence hence this appeal. The complaints in his amended grounds of appeal are not quite clear but his main grievance appears to be that the prosecution did not prove the charges against him beyond any reasonable doubt as the complainant's age was not strictly proved through an age assessment report and the medical evidence did not prove that the injuries noted on the complainant's private part were sustained at the time the offence was allegedly committed.

4. When prosecuting his appeal, the appellant relied on written submissions filed on 21st April, 2016 and brief oral submissions made during the hearing of the appeal. In his oral submissions, the appellant claimed that the charges were a fabrication by the complainant's parents with whom he had a land dispute.

5. The state contests the appeal. On behalf of the state, learned prosecuting counsel *Ms. Oduor* submitted that the appeal had no merit as in her view, the prosecution had proved every element of the offence beyond any reasonable doubt including the element of penetration; that the appellant was the complainant's uncle and he was positively identified as the person who sexually assaulted her at the material time.

6. This being a first appeal to the High Court, I am duty bound to revisit the evidence presented to the trial court and to draw my own independent conclusions on the validity or otherwise of the appellant's conviction.

In undertaking this task, I should be careful to remember that unlike the learned trial magistrate, I did not

have the benefit of seeing or hearing the witnesses and give due allowance to that disadvantage.

See: ***Simiyu & Another V Republic (2005)1 KLR 192; Okeno V Republic (1972) EA 32.***

7. I have carefully considered all the evidence on record, the rival submissions made by the appellant and the state as well as the judgment of the learned trial magistrate. I note that of the five witnesses who testified in support of the prosecution case, only two witnesses gave relevant and material evidence for the prosecution. These are the complainant and the clinical officer who testified as PW4. The other witnesses gave what is akin to hearsay evidence since they did not witness commission of the offence but merely narrated what the complainant had allegedly told them.

8. On my own evaluation of the evidence, I find that the prosecution case had serious gaps. To start with, there is evidence to show that the complainant was at the time of the alleged offence aged 10 years old and was a pupil in standard 4 at Kipkimba primary school. She claimed that on the material date, she went to the appellant's house, and after borrowing ten shillings from him, he sent her to take to him his mobile phone; that after taking the phone, the appellant pulled her to his bedroom, defiled her then released her. She immediately walked back to school where she remained until 5.30 p.m. She did not report the matter to her mother that evening when she went back home and she continued going to school normally thereafter.

9. I find it difficult to believe that a child of about 10 years who had been defiled by an adult like the appellant in the manner that she described in her evidence could simply wake up and go about her business as if nothing had happened and would continue going to school for over 5 days without displaying any symptoms of ill health or of injury to her private parts. This is very unusual for a child who had undergone such a traumatizing ordeal like the one the complainant claims to have gone through. It is also interesting to note that the complainant did not report the incident to either her guardian (PW2) or her teachers though her alleged assailant was her uncle and she had to be prodded to do so about six days later. All these facts put together creates some doubt regarding the veracity of her testimony.

10. Turning to the medical evidence, PW4 testified that he examined the complainant on 9th February, 2015. According to PW4, PW1 was carrying the under pant she had worn at the time the offence was allegedly committed. He noted that it was soiled with dry blood stains. Upon examination of the complainant, he noted that her hymen was freshly raptured with reddening and swelling around the labia minora. He concluded that this was evidence of penetration. On being cross examined, PW4 insisted that the hymen was freshly torn and there were no signs of healing.

11. I find PW4's evidence hard to reconcile with the rest of the prosecution case. If the offence had been committed on 3rd February, 2015 as stated in the charge sheet, the injuries on PW1's genitalia should have been six days old at the time she was examined by PW4. Yet according to PW4's evidence, the injuries at the time of examination had been freshly inflicted. They showed no sign of healing. I am unable to understand how the injuries could have been about one week old and fresh at the same time.

Given this evidence, the question that immediately comes to mind is this – is it possible that the said injuries could have remained fresh for six days or is it possible that they could have been sustained on subsequent dates through other means other than defilement of the minor? It is my finding that PW4's evidence instead of aiding the prosecution case served only to create doubt whether the appellant had committed the offence as alleged.

12. Lastly, though PW4 claimed that he was shown a soiled underpant which PW1 had allegedly worn when the offence was committed, the said under pant was apparently not handed over to the investigating officer (PW5) since she did not allude to it in her evidence. The same was also not identified in court by PW1 and it was not produced in evidence as an exhibit. The prosecution did not offer any explanation why the said underpant was not availed in court as an exhibit yet it was an important piece of evidence which would have materially supported its case.

13. The learned trial magistrate in her judgment gave undue weight to the evidence of PW2 and PW3

which in my view did not have much probative value. These witnesses just narrated what they claimed the complainant had told them. It is the credibility of the complainant that was of paramount importance in this case. The learned trial magistrate does not appear to have sufficiently interrogated the evidence of the complainant in order to make findings regarding her credibility or otherwise. On my part, having evaluated her evidence alongside the evidence of PW4, I am not entirely certain that PW1 was a credible witness.

14. The appellant denied having committed the offence throughout the trial. The law on the burden of proof is clear and well settled. The burden of proof lies on the prosecution to prove all elements of a criminal charge against an accused person beyond any reasonable doubt. The burden does not shift to an accused person. An accused person does not have any obligation to prove his innocence.

> ***See: Kiarie V Republic (1984) KLR 739, Bhatt V Republic (1957)EA 332 at 334, Abdalla Bin Wendo and another V Republic (1953) EACA 166.***

15. Given the inconsistencies in the prosecution case as illustrated above and considering the appellant's defence that the charges were a fabrication by the complainant's parents owing to a land dispute, I find that the evidence considered as a whole creates reasonable doubt whether the appellant indeed committed the offence as alleged. The learned trial magistrate failed to thoroughly evaluate the evidence in its entirety and thereby arrived at the erroneous finding that the prosecution had proved its case against the appellant beyond any reasonable doubt.

16. In the circumstances, it is my finding that the appellant's conviction was unsafe. It cannot be sustained. Consequently, I find merit in the appeal and it is accordingly allowed. The appellant's conviction is hereby quashed and the sentence set aside. He is to be released forthwith unless otherwise lawfully held.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED** and **DELIVERED** at **ELDORET** this 16th day of November, 2016

In the presence of:

Appellant

Ms Oduor for the state

Naomi Chonde court clerk