REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO.22 OF 2014

ERICK IDDI SHATALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(**Being an appeal from the original conviction and sentence in Kakamega Chief Magistrate's**

Court criminal case no.28 of 2012 delivered by Kendagor Ag. SRM on 19/12/13)

J U D G M E N T

Introduction

1. The appellant was charged with defilement of a girl contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that on diverse dates of 20th of May 2012 and 22nd May 2012 in Kakamega District within Western Province, he unlawfully and intentionally caused his genital organ namely penis to penetrate the genetal organ namely Vagina of L.V a girl aged 14 years. In the alternative, he was charged with committing an indecent Act with a child contrary to Section 11 (1) of the Sexual Offences Act Nol.3 of 2006. The particulars of the offence were that on diverse dates between 20/05/2012 and 22/05/2012 in Kakamega District within Western province the appellant unlawfully and intentionally contacted with his genital organ (penis) onto the genital organ namely (vagina) of L.V a girl aged 14 years. He denied both the main charge and the alternative charge but after a full trial he was convicted on the main count and sentenced to twenty (20) years imprisonment.

The Appeal

2. The appellant was dissatisfied with both conviction and sentence of the Ag. Senior Resident Magistrate Hon. C. Kendagor hence this appeal through his Counsel Phoebe Munihu Muleshe. He has raised the following grounds in the appeal.

1. The learned Trial Magistrate erred in law and fact by convicting the appellant against the weight of evidence on record.

2. The Learned Trial magistrate erred in law and fact in convicting the appellant when the evidence by the Prosecution was full of material contradictions.

3. The Learned Trial Magistrate erred in law and in fact in convicting the appellant when the

prosecution had not proved its case beyond reasonable doubt.

4. The learned Trial magistrate erred in law and in fact in awarding the petitioner excessive sentence.

5. The Learned Trial magistrate erred in law and fact in rejecting the Appellant's defence.

3. At the hearing of the appeal on the 23/07/2015 learned Counsel for the appellant Mrs. Muleshe submitted in support of the appeal. Mr. Omwenga learned Prosecution Counsel opposed the appeal

The Prosecution Case

4. The Prosecution called 8 witnesses through whose testimony it sought to convince the Court that the appellant herein defiled the complainant, L.V who testified as PW1. L.V stated that she was born on 05/12/1997 as per PExhibit 1 which was her birth certificate C.No.[particulars withheld]. Her testimony was that on 20/05/2012 at about 7.00p.m, her mother sent her to the nearby market to buy shortcakes. On her way to the shop, she met with her friend by the name S (PW5) and also met the appellant who was on a motorbike. That the appellant was L.V's friend though not her boyfriend. The appellant offered L.V a lift to the shops, but instead of stopping at the shops, the appellant took L.V to a house at [particulars withheld], a house owned by G (not called as a witness) L.V and the appellant slept together that night also accompanied by G and she had sex with the appellant three times that night. PW1 stated that thought it was the first time she was having sex with the appellant, she had already had sex with her boyfriend by the name E who was a Form 2 student. PW1 stated that on each occasion when she had sex with the appellant, he used TRUST condom.

5. PW1 also stated that on the morning of 22/05/2012 the appellant left early in the morning saying he was going home to his wife. On that day, she was given tea by the wife to G brother and spent the rest of the day at the said house. In the night, the appellant returned to G house, but was drunk. He then went away, telling L.V that he was going to sleep with his wife. L.V spent the night on the floor at G house while G slept on the bed. The appellant returned in the morning on 22/05/2012 at about 11.00am and took L.V to a video show at Handidi and left her there with a promise that he was going home to chase his wife away. Later the same day, the appellant returned to Handidi at the video show and told L.V that his wife would move out of the home the following day and then he went away leaving her behind again for the third night. The appellant took L.V to the house of one A . Then the appellant left together with Allan at around 7.00pm. This was on 22/05/2012.

6. L.V further testified that as the appellant and A walked away, they met with her uncle T and S. Allan rushed back to the house and told L.V that the appellant was talking to her uncle T and S. Allan then left. Later that night alone at A house, L.V heard some knocks on the door and she opened the door. She saw the appellant her uncle T and her friend S who had encouraged her to take on the appellant as a friend so he could give her (L.V) money. Some AP's were together with the appellant T and S. The Police took her and the appellant to the Police station until the next day when she was taken to Kakamega Provincial General Hospital for treatment.

7. At the hospital, L.V was examined by Patrick Mambili, a Senior Clinical Officer. This was some 2 days after the alleged defilement. Patrick Mambili who testified as PW8 stated that L.V.'s hymen was missing and that there were no [vaginal] injuries, though the laboratory tests revealed the presence of sperm cells and epitethelial cells. PW8 produced the results of the laboratory tests – Pexhibit 3, while the treatment notes and tests were produced as P Exhibit 2(a) and (b). The P3 form was produced as PExhibit 6. The P3 form for the appellant was produced as PExhibit 5, while the appellant's treatment notes and laboratory results were produced as PExhibit 4a and b.

8. PW2, M.L.W is mother to L.V and wife of E.M.O PW3. She recalled that on 20/05/2012 at about 3.00pm she sent her daughter L.V to the shops to buy shortcake for sale, but by 7.00pm she had not come back. For the next 2 days, PW2 looked for L.V without success until she was informed that her daughter had been seen with her friend S. At about 7.00pm on the third day, her brother in law Timothy

telephoned her and informed her that her daughter had been traced and found at a place called Shimalabandu. On the next day, PW2 went to the police station and later to the hospital with L.V though she was not present when L.V was treated. L.V told her that the appellant used to give her a lift on his motor bike.

9. PW3, E.M.O the Assistant Chief of Shichirai sub location corroborated the testimony given by his wife PW2. He confirmed that L.V was born on 05/12/1997. S (S) Khaemba a 15 year old testified as PW5. She narrated how on Sunday 20/05/2012 she met with her friend L.V and later the two of them met with the appellant. The appellant carried L.V on his motor bike. A day later, PW2 questioned her on L.V.'s whereabouts and finally they traced L.V to the appellant's friend's house in Handidi. She also testified during cross examination that the appellant used to carry L.V from school on his motor bike. PW5 stated that she knew the appellant well and that the appellant also knew her home as well as her parents.

10. PW6 was No.78532 Senior Private Timothy Rapando Ongayo of Kenya Rifles Nanyuko Garrison. He stated that while he was on leave on 21/05/2012 he learnt of the disappearance of L.V from home. He stated that after some investigations, he was able to trace the whereabouts of her niece, L.V. During those investigations, PW6 stated that he established that L.V used to get regular lifts from the appellant on his motor bike. He stated that after tracing L.V at the appellant's friend's home, he took both of them to the police.

11. Number 83775 Police Constable Lilian Achieng testified as PW7. She testified that on 22/05/2012 while on duty at Kakamega Police station she received a report of a defilement case involving L.V. By that time both L.V and the appellant were in police cells. PW7 produced L.V's birth certificate as PExhibit 1. The Prosecution then closed its case.

The Defence Case

12. When put on his defence, the appellant gave unsworn evidence and denied that he committed the offence. He stated that while he was at home with his mother on the evening of 22/05/2012 some two young men went to the house and asked him to accompany them without being told why. He was taken to the AP camp at Lurambi and later, after being roughed up, he was escorted to a home in Lubao area from where they took L.V. He testified that he did not know L.V. He also stated that after 2 days at Kakamega Police station he was forced to sign some statements before being taken to Court.

Judgment of the Trial Court

13. After carefully considering all the evidence that was placed before it, the learned trial Court was satisfied that the Prosecution had proved its case beyond reasonable doubt on the main count and proceeded to convict the appellant of the same and to sentence him to 20 years imprisonment as prescribed by law. The trial Court was satisfied that PW1 was aged 14 years 5 months at the material time and that medical evidence fully corroborated PW1's testimony that she was defiled by the appellant. The trial Court also made a finding that the appellant's defence that L.V could have been over 18 years was not available to him and further that at her age, L.V was not capable of giving her consent to the sexual exploits of the appellant.

Duty of this Court

14. This is a first appeal and on this appeal I am duty bound to rehear the appellant's case by reconsidering and evaluating the evidence afresh, while bearing in mind the fact that this Court has no opportunity of seeing and hearing the witnesses. Generally see **Okeno –vs- Republic [1972] EA 32**.

Issues for Determination

15. I have carefully reconsidered and evaluated the evidence afresh. The entire Prosecution evidence and the testimony of the appellant is set out above. From the said evidence, the following issues arise for determination.

a. Whether the age of the complainant was proved;

b. Whether there was penetration and

c. Whether through the conduct of the complainant the appellant believed that she was over 18 years of age?

d. Did any sexual encounter take place between the appellant and the complainant

e. Was the sentence excessive in the circumstances?

Analysis and Findings

16. In criminal cases, the burden of proof is always on the Prosecution. See the persuasive English authority in the case of **Woolmington –vs- DPP [1932] AC 462**. Regarding the first issue, there is no doubt in the mind of this Court that the complainant's age was proved. PExhibit 1 being the birth certificate in respect of the complainant showed that she was born on 05/12/1997 so that as at 20/05/2012. The complainant was 15 years 5 months old. The P3 form – Pexhibit 3 also gave the complainant's age as approximately 15 years. Proof of age in sexual offences is critical because the offences under the Sexual Offences Act No.3 of 2006 are strict offences. The sentences imposed by Courts are determined by the age of the victim.

17. Having reached the conclusion that the complainant herein was 15 years and 5 months old at the material time, the next issue for determination is whether were was penetration. Without proof of penetration a defilement charge cannot stand. The medical evidence given by PW8 shows that though the complainant's hymen was missing there was no laceration and no blood stains. The P3 form also shows that there was spermatozoa and pus cells; that the latter was a sure sign that there was penetration.

18. The defence has taken issue with the evidence of PW8. Counsel submitted that there could have been no sperm cells if as the complainant says the appellant used condom each of the three times he had sex with the complainant on the night of 20/05/2012. Counsel also contends that the missing hymen cannot be attributed to the appellant since admittedly he complainant had had previous sexual exploits with one E. I must point out here that the fact alone that L.V had had sex before does not mean that the appellant did not defile her.

19. In my considered view, the assertions by Counsel are not medically proved especially the assertion that because of the use of condom, there can be no spermatozoa. Nor can it be assumed that the TRUST condoms or any type of condom for that matter was capable of sieving all the spermatozoa from the fluid discharged into the complainant's vagina by the complainant. It is my finding that the three sexual intercourses on the night of 20/0/2012 between the appellant and the complainant resulted in sufficient deposit of sperm cells into the complainant's vagina and that on 23/05/2015 when PW8 examined her proof of the presence of such cells was there: pus cells. The medical examination took place within the 72-hour window when any sperm cells are expected to be still alive and visible under a microscope. I am therefore satisfied that sexual intercourse took place between the appellant and the complainant and as a result of such intercourse, there was penetration. In my considered view, the defence insistence that the complainant behaved as if she was 18 years old and above goes some way in supporting the evidence of both PW1 and PW8 that sexual intercourse took place between the appellant and the complainant.

20. On the issue of the missing hymen, I do agree with the appellant's contention that the hymen was not broken on 20/05/2012 since the complainant had already slept with her boyfriend E on some other occasion prior to that date.

21. The issue for determination is whether the appellant has an excuse in this case. Argument has been made on behalf of the appellant that L.V accepted to sleep with the appellant in exchange for money, and that such a scenario suggests that L.V was capable of giving consent and behaved to the appellant in a way to suggest that she was of age and could give free consent. I do not think that this argument has any

merit. It is my considered view that the complainant and her friend S belong to that group of misguided young girls who do not know what they are about in this life. S own evidence tells it all and there is every likelihood that she wanted L.V to joining her group of young girls who lack guidance and are in need of care. In S own testimony she stated in part:-

"I left school about one year ago. I used to be in standard 6. I am a resident of Shinyalu. Our home is at Shitakho, just around Shinyalu bar area. I know L. She is my friend. She met me at Shinyalu bar area. Then in cross-examination she said, "You used to pick L from school with your motorbike….."

22. It is my considered view that foolishness cannot be equated with consent. Infact, the appellant knew that he was up to mischief when he started giving the complainant free rides from school for quite a while before the material day. I therefore do find as the trial Court did that the defence of mistaken belief that the complainant was over 18 years is not available to the appellant.

23. There is also one small issue regarding the testimony of the complainant and that is that he learned trial Court fell into error when it failed to record in its proceedings that the child appreciated the necessity of telling the truth. Before PW1 testified the trail Court conducted the following voir dire examination: "I am in standard 7. I go to church ……..I know the bible. It is the word of God. I know what it is to take the oath. I am ready to do so. I will tell the truth" and immediately thereafter the Court noted, "witness understands nature of oath." In my humble view, understanding the nature of oath according to the complainant was to "tell the truth." I therefore do not find any merit in the appellant's complaint that the trial Court failed to comply with the provisions of Section 124 of the Evidence Act, Cap 80 Laws of Kenya.

24. The appellant also complained in ground 5 of appeal that the learned trial Magistrate erred in law and in fact in rejecting the appellant's defence. Even if that were so, which I find not to be the case, I have myself carefully evaluated the appellant's unsworn statement in defence in which he denied knowing the complainant. I find the said defence to be scandalous because there is overwhelming evidence showing that the appellant knew the complainant well and that for a considerable period of time, he had been ferrying her from school on his motorbike. In my humble view, the defence by the appellant did not in any way shake the Prosecution's case against him. I equally reject the defence as being of no probative value.

25. The final issue for determination is whether the sentence meted out to the appellant by the trial Court was excessive in the circumstances. In my considered view that complaint is unwarranted. Section 8(3) of the Sexual Offences Act reads as follows:-

> **"8(3) 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 of not less than twenty years."**

In light of the above, the sentence meted out to the appellant by the trial Court was thus legal and lawful and there is nothing excessive about it.

Conclusion

26. In conclusion, I agree with Prosecution Counsel that the Prosecution evidence against the appellant was overwhelming watertight and consistent. Thorough investigations were carried out by the family, especially through PW6, until the appellant was traced to his home and thereafter led the Police to A house where he had gone to hide the complaint with a view to marrying her. I also find that the defence did not shake the Prosecution case against the appellant. I also find that the sentence meted out to the appellant was neither harsh nor excessive.

27. In the premises the appellant's appeal on both conviction and sentence lacks merit and is accordingly dismissed in its entirety. I confirm this judgment of the learned trial Magistrate on both conviction and sentence.

28. It is so ordered.

Judgment delivered, dated and signed in open Court at Kakamega this 14th day of October 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Anziya h/b for Mrs Muleshe for Appellant

Mr. Omwenga (present)for Respondent

Mr. Solomon Lagat - Court Assistant