REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 15 OF 2013

R A ALIAS K…….…… APELLANT

VERSUS

REPUBLIC ……..... RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate Honourable S. M. Soita in Kabarnet Criminal Case No. 558 of 2012, dated 25th January, 2013)

JUDGMENT

1. The appellant was convicted by the Senior Principal Magistrate's court at Kabarnet of the offence of defilement contrary to ***Section 8 (1)*** as read with ***Section 8 (3)*** of the ***Sexual offences Act*** particulars being that on the 9th day of September, 2012 at [Particulars Withheld] village of Churo sub location in East Pokot District of Baringo County, the appellant intentionally and unlawfully caused his male organ to penetrate the female organ of *CK* a girl aged 15 years.

He was sentenced to twenty years imprisonment.

2. The appellant was dissatisfied with his conviction and sentence hence this appeal. In the petition of appeal which he filed in person, the appellant complained that he had been wrongly convicted as he had been denied the right to access prosecution witness statements; that the evidence tendered by the prosecution was contradictory and that the learned trial magistrate dismissed his defence for no good reason.

3. In prosecuting his appeal, he relied on written submission which he presented to the court. In his written submissions, besides re-iterating some grounds raised in his petition of appeal, the appellant introduced new grounds not taken in the petition of appeal which were that the minor's age was not strictly proved to be 15 years; that no voire dire examination was conducted on the complainant and that the learned trial magistrate erred by not indicating under which law he had been convicted. He insisted that he was framed with the offence by PW2 and PW4 who were the complainant's parents.

4. The state contested the appeal. Learned prosecuting counsel *Ms. Mwaniki* submitted that the evidence tendered by the prosecution before the trial court was overwhelming; that the appellant was properly convicted and that the sentence imposed on him was lawful. She invited the court to dismiss the appeal for lack of merit.

5. This being a first appeal to the High Court, this court is duty bound to evaluate afresh the evidence

tendered before the trial court to draw its independent conclusions concerning the validity or otherwise of the conviction. In doing so, I must bear in mind that I did not see or hear the witnesses.

6. Briefly, the prosecution case is that the appellant was the complainant's *(C.K)* step- father. *C.K's* mother (PW2) had separated with *CK's* biological father (PW4). She was living with the appellant. *C.K* was married and lived separately.

On 9th September, 2012, the appellant had a quarrel with PW2 and PW2 in fear did not go back to their home. According to the evidence of *CK* who testified as PW1, on that day at around 10 p.m, the appellant found her in her house. She was able to see and identify him through light from a fire burning in the house. He frogmarched her to her mother's house together with her one week child.

7. On arrival in her mother's house, the appellant put the baby on the bed and asked her to lie on the same bed. After warning her against screaming, he defiled her and then released her to go back to her house. She started bleeding after her ordeal. PW2 found her *CK* in her house the following morning and she reported to her what had happened. PW2 then took her to a neighbour's house (PW3) to protect her from another attack by the appellant.

PW3 in turn reported the matter to PW1's biological father (PW4) who subsequently reported the matter to the area chief and took PW1 to Marigat hospital.

8. According to PW2, the appellant disappeared for three days after which he was arrested by members of the public. In the course of his arrest, he was beaten up by the arresting public as a result of which he sustained injuries. He was escorted to Churo D.O's office and later to Loruk police station where he was re-arrested by PW8.

PW7, *Leonard Chirchir* is the clinical officer who examined the minor on 17th September 2012. He noted that the hymen was broken; there was a scar on the left side of the vagina; both labia were swollen and tender; there were lacerations on the vaginal wall and blood spots. He completed and produced the P3 form in evidence as Exhibit 4.

9. In his defence, the appellant elected to give an unsworn statement and did not call witnesses. He denied having committed the offence as alleged claiming that PW2 framed him with the offence as she wanted to get him out of the way so that she could go back to her former husband (PW4).

10. I have considered the grounds of appeal, the submissions made by the appellant and the state as well as the evidence tendered before the trial court as summarized above.

I wish to start by quickly addressing the appellant's complaint that he was denied access to the prosecution witness statements.

I have perused the proceedings before the trial court. They do not show that

the appellant at any time during the trial requested for and was denied witness statements. There is therefore no substance in this ground of appeal.

11. Regarding the complaint that the appellant was convicted on the basis of contradictory evidence, I wish to point out that the evidence on record does not reveal any contradictions in the prosecution case. Only PW1 gave direct evidence narrating how the appellant defiled her. All the other witnesses testified on how they learnt about PW1's sexual assault or how they participated in the appellant's arrest. Their evidence was clear, consistent and straight forward.

12. From the trial court's record, it is clear that the appellant's claim that the learned trial magistrate arbitrarily rejected his defence is not correct. The learned trial magistrate in his judgment reproduced the appellant's statement in defence after which he stated as follows:-

"I do not believe his defence that he was framed up so that PW4 could have PW2 back as a wife. I have paid particular attention to the evidence of PW3 who set the ball rolling. It was the testimony of the accused that it was PW3 who called him out before he was attacked. This issue was not brought up during cross examination of PW3. I dismiss this as an afterthought. I have no doubt in my mind that the accused defiled the complainant as alleged. I do find the accused person guilty of defilement contrary to Section 8(1) as read with Section 8(3) of the sexual offences Act and convict him accordingly".

The above leaves no doubt that the learned trial magistrate properly considered the appellant's defence and dismissed it as an afterthought. Nothing therefore turns on that ground of appeal.

13. Having made the above findings, the only issue that remains for my determination is whether the appellant was properly or wrongly convicted.

From the recorded evidence, it is not disputed that the appellant was PW1's step father. In his unsworn statement, the appellant admitted this fact and claimed that he had lived with PW2 and her children who included *CK* for six years. In the circumstances, PW1's identification of the appellant as her assailant is unassailable given that they had lived together in one house for several years. In fact, hers was a case of recognition as opposed to mere identification which is more reliable. In my view, there was no chance that she could have mistaken him for anybody else.

PW1's evidence was materially corroborated by the evidence of PW2 and PW3 who noted that she was bleeding profusely the following morning and by the evidence of PW7 who noted fresh injuries on PW1's genitalia when he examined her eight days later (See the medical evidence in the P3 form). He formed the opinion that PW1 had experienced forceful vaginal penetration. There is therefore no doubt that the complainant was defiled on the material date and that her assailant was the appellant.

14. In the charge sheet, the minor's age was indicated to be 15 years at the time the offence was committed. The same age is reflected in the P3 form. The appellant did not dispute the complainant's stated age in the course of the trial and even on appeal since he did not challenge it in his petition of appeal. As stated earlier, he purported to do so in his written submissions.

15. The law at ***Section 350*** of the ***Criminal Procedure Code*** is clear that an appellant cannot be permitted at the hearing of an appeal to rely on grounds other than those stated in the petition of appeal unless he had sought and obtained leave to amend his grounds of appeal. The appellant in this case did not obtain such leave. His attempt to raise new grounds in his written submissions is not permissible in law. I am therefore not legally obligated to consider the said new grounds of appeal.

16. Be that as it may, considering that the age of the complainant is an essential ingredient of the offence of defilement given that the sentencing regime under the ***Sexual Offences Act*** is dependent upon the age of the victim, I wish to quickly consider whether the complainant's age was established by the prosecution in this case.

As indicated earlier, *CK's* age was indicated to be 15 years in the particulars supporting the charge and the appellant did not dispute this age during the trial. The trial magistrate who saw her testify believed that she was 15 years old as can be discerned from his judgment and given that the said age was not disputed, I have no reason to doubt that she was that age. The fact that the complainant claimed that she was married and had a one week old baby does not raise any doubt regarding her stated age because it is not unusual in remote rural communities in Kenya such as the one *CK* hailed from to have girls married off at a very early age and thereafter have children.

17. In view of the foregoing, I am satisfied that the learned trial magistrate properly analysed the evidence before him and arrived at the correct conclusion that the prosecution had established the offence of defilement against the appellant beyond any reasonable doubt. I thus find that the appellant was properly convicted.

18. On sentence, ***Section 8 (3)*** of the ***Sexual Offences Act*** prescribes a minimum sentence of twenty (20) years imprisonment for a person convicted of defiling a minor aged between twelve and fifteen years. The age of the complainant in this case was fifteen years. The appellant was sentenced to twenty years imprisonment which is the mandatory minimum sentence allowed by the law. The sentence is therefore lawful. I cannot disturb it.

19. In the result, it is my finding that this appeal is not merited. I accordingly dismiss it in its entirety.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 15th day of October 2015

In the presence of:

The Appellant

Lesinge Court clerk

Miss Mwaniki for the Republic