



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 26 OF 2014.

DAVID WEKOYE KULOBA ALIAS KUKAA ::::::::::::::: APPELLANT.

VERSUS

REPUBLIC :::::::::::::::RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. S.K. Ngetich – RM in Criminal Case No. 3135 of 2012 delivered on 14th February, 2014 at Kitale.)

J U D G M E N T.

The appellant, **David Wekoye Kuloba**, appeared before the Senior Resident Magistrate at Kitale facing a charge of defilement contrary to section 8 (1) read with section 8 (3) of the Sexual Offences Act, in that on the 28th November, 2012 in Trans Nzoia County, defiled S E K, a child aged twelve (12) years.

In the alternative, the appellant was charged with committing an indecent act with the said child contrary to section 11 (1) of the Sexual Offences Act.

Following a full trial, the appellant was convicted on the main charge and sentenced to imprisonment for a period of twenty (20) years.

Being aggrieved by the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds in his petition of appeal filed herein on 19th February, 2014 in which he generally complains that the prosecution evidence against him was insufficient, inconsistent and contradictory and that his defence was never given any consideration by the Learned trial magistrate.

At the hearing of the appeal, the appellant appeared in person and presented written submissions which he relied on in support of his case.

The Learned Prosecution Counsel, **M/s. Kiigi**, appeared for the state/respondent and opposed the appeal by submitting that the evidence against the appellant was sufficient. That, the complainant aged twelve (12) years (i.e. PW1) clearly narrated how she was tricked by the appellant and defiled.

That, her evidence was corroborated by other witnesses and that the sentence imposed by the trial court was lawful.

The Learned Prosecution Counsel called for the dismissal of this appeal.

In his oral rejoinder, the appellant submitted that the complainant's elder brother was not called as a witness yet the offence occurred at 1.00 p.m. That, the complainant did not inform her mother after the fact and had to wait until 8.00 p.m. That, he (appellant) was arrested by a police reservist who did not testify in court. That, the medical officer (PW5) carried out a medical examination on the complainant and not himself (appellant) and that the investigations officer (PW6) did not visit the scene to confirm what he was told.

After due consideration of the grounds in support of the appeal and the submissions by both sides, the duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

Briefly, the case for the prosecution was that on the material date at about 1.00 p.m., the complainant **SE (PW1)**, was at home playing outside their house with her sister when she was called by the appellant whom she knew by the name "Kukaa". He asked her to assist him retrieve a hen from a hole at a place where he was burning bricks. He then sent her sister to the house to bring him drinking water and thereafter told her (complainant's sister) to go and play. He remained with the complainant and in the process defiled her. She later reported the incident to her mother, **AD A (PW2)**, who examined her and noted that she had been sexually assaulted.

The mother reported the matter to the police and later took the complainant to Kitale District hospital for necessary examination.

APC Isaac Luvisi (PW3), caused the arrest of the appellant by a police reservist after receiving necessary information from Kitale Police station.

At the Kitale District Hospital, the complainant was examined by a clinical officer, **Linus Ligare (PW5)**, who confirmed that the complainant was indeed defiled and compiled the necessary P3 form (P. Exh. 1)

A dentist at the same hospital, **Dr. Ken Ndege (PW4)**, examined the complainant and assessed that she was aged twelve (12) years. He compiled the necessary report (P. Exh. 2).

P.C. Caleb Yator (PW6), investigated the case and preferred the present charge against the appellant.

In his defence, the appellant denied the charge and indicated that he was arrested on 19th December, 2012, when he left his home and went to charge his phone. Two people attacked and arrested him. They firstly took him to a nearby AP camp and thereafter, to Kitale police station. He indicated that the complainant's mother held a grudge against him after she failed to re-pay money he had lent her and claimed that her children had been damaging his household items.

After considering all the foregoing evidential facts, the Learned trial magistrate concluded that the case against the appellant had been proved beyond any reasonable doubt. The Learned trial magistrate in arriving at that conclusion stated that:-

"The evidence of penetration was given by the alleged victim, her guardian and the clinical officer. The alleged victim described to the court step by step how the accused tricked her to a place where he was burning bricks and thereafter undressed her and penetrated his penis to her vagina. The alleged victim

unequivocally described the genital organ of the accused and her genital organ as to cause no doubt that she knew what she was talking about.

I note that immediately she met her guardian she reported the incident and named the accused.

The accused was a person known to her as he was their neighbour hence there is no issue arising as to the identity of the person. The evidence of her guardian also offers a strong corroboration to the

alleged victim's evidence. She checked at the girl's vagina immediately she received the report and made

an observation that the vaginal opening was wide open and there were sperms spread all over around the vagina.”

This court's own assessment of the evidence is that there was no particular dispute that indeed the complainant was defiled and that the only issue for determination was the appellant's identification as the offender.

Evidence led by the complainant (PW1) and her mother (PW2) clearly indicated that the appellant was a person known to them. He was not a stranger to them and he confirmed as much in his defence.

The incident as per the complainant's evidence occurred in broad daylight at about 1.00 p.m. This made it easy for the complainant to see and identify by recognition her tormentor whom she said was the appellant. His defence that he did not commit the offence was therefore unsustainable and his allegation that the complainant's mother bore a grudge against him was clearly an afterthought.

Even if there was a grudge between the complainant's mother and the appellant it could not be said that the same extended to the complainant such that she found it fit to implicate the appellant without any reason.

The complainant's evidence was found by the trial court to be quite credible and could therefore even stand on its own in establishing that the appellant was indeed responsible for defiling the complainant.

The finding of the learned trial magistrate quoted hereinabove was correct and proper in as much as it was based on cogent and credible evidence adduced against the appellant.

Consequently, this appeal is without merit and is hereby dismissed.

[Delivered and signed this 10th day of June, 2014.]

J.R. KARANJA.

JUDGE.