



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 105 OF 2013.

DANIEL ARASA ::::::::::::::::::::::::::::::::::: APPELLANT.

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::: RESPONDENT.

(Being an appeal from the original conviction and sentence of J.M. Nang'ea – SPM. in Criminal Case No. 764 of 2011 delivered on 17th September, 2013 at Kitale.)

J U D G M E N T.

The appellant, **Daniel Arasa**, appeared before the Senior Principal Magistrate at Kitale charged with defilement contrary to section 8 (1) read with section 8 (3) of the Sexual Offences Act, in that on the 1st April, 2011, in Trans Nzoia County, defiled M M H, a child aged fourteen (14) years.

After a full trial, the appellant was convicted and sentenced to serve twenty (20) years imprisonment but being dissatisfied, he preferred the present appeal on the basis of the grounds in the petition of appeal filed herein on 30th September, 2013, by the firm of **David Ingosi & Co. Advocates**.

There are twelve (12) grounds of appeal which were argued together at the hearing of the appeal by the appellant's learned counsel, **Mr. Ingosi**.

Learned counsel submitted that penetration is defined under section 2 (1) of the Sexual Offences Act and in this case the evidence by the complainant (PW1) did not show that there was penetration as she merely stated that the appellant did bad manners to her.

Learned counsel contended that what is bad manners to one person may not be likewise to another person and therefore the complainant did not clearly state what bad manners ("**Tabia Mbaya**") meant.

Learned counsel submitted that the trial court erred by concluding that "**Tabia Mbaya**" meant sexual intercourse as it (court) found that medical evidence did not prove that the penetration was caused by sexual intercourse. That, a broken hymen did not connote that there was penetration by a sexual organ since penetration could be by any other object.

Learned counsel contended that the failure to prove penetration rendered the failure of the prosecution case. That, the complainant's evidence was not even corroborated as the trial court found that there was uncertainty as to whether penetration was due to sexual intercourse.

The learned counsel submitted that the trial court failed to warn itself before convicting the appellant and that there was no evidence as to why the trial court believed that the complainant told the truth.

Learned counsel submitted that the judgment of the trial court was not in compliance with section 169 of the CPC and contended that the appellant's conclusion was therefore fatal and ought to be set aside.

In response to the foregoing and in opposing the appeal, the learned prosecution counsel, **M/s. Kiigi**, submitted that the appellant was properly convicted and sentenced. That, the evidence against him was sufficient as he was clearly implicated by the complainant (PW1). That, he was a known shopkeeper as confirmed by PW4. That, on two occasions he (appellant) did “**Tabia Mbaya**” to the complainant.

Learned Prosecution Counsel contended that “**Tabia Mbaya**” implied sexual intercourse which was duly confirmed by the clinical officer(PW2) who indeed confirmed that there was penetration. That, the mandate of the prosecution was discharged and therefore any contradictions noted in its case were insignificant to interfere with the conviction of the appellant.

Learned prosecution counsel contended that the sentence was proper and lawful and urged this court to dismiss the appeal.

The duty of this court after having considered the appeal in the light of the rival submissions by both the appellant and the state respondent, 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.

In that regard, this court has considered the evidence forming the prosecution case being the evidence of the complainant, **M M (PW1)**, the clinical officer, **Linus Ligale (PW2)**, the complainant's grandmother, **F N (PW4)**, a dentist **Dr. Kiprop Jonathan (PW3)**, a chief, **Silvester Momanyi (PW5)** and the investigations officer, **P.C. Paul Kamau Mwangi (PW6)**.

The evidence of the appellant in his defence has also been given due consideration by the court.

From all that evidence, it was apparent to this court that the fact of defilement was not actually disputed during the trial. The dispute mainly centred on whether the appellant was the person responsible for the offence.

In any event, the evidence by the complainant (PW1) as duly corroborated by the clinical officer (PW2) credibly established that indeed the complainant was defiled in as much as there was penetration of her vagina by a male sexual organ. The clinical officer's evidence indicated that the numerous epithelial cells found in the complainant's vagina was evidence of human spermatozoa in the vaginal walls. The penetration could not have been by any other object as submitted herein by the appellant's counsel.

It is common knowledge in this country and the court may thus take judicial notice that the words “**Tabia Mbaya**” i.e. bad manners coming from a young girl who has been a victim of sexual violence connotes nothing but sexual intercourse. Children in particular would always refer to sexual intercourse as “**Tabia Mbaya**” perhaps due to shyness or they may not know what description to give to such act.

Suffice to hold that “**Tabia Mbaya**” is euphemism for sexual intercourse in sexual offences. The evidence by the complainant (PW1) and the clinical officer (PW2) was sufficient, corroborative and credible enough to establish the offence of defilement.

The learned trial magistrate was therefore correct in his finding that penetration as defined by the Sexual Offences Act was proved.

With regard to the identification of the offender, the appellant denied responsibility for the offence and implied that he was therefore implicated without good cause.

However, there was sufficient and credible evidence from the complainant (PW1), the complainant's grandmother (PW4) and the chief (PW5), showing that the appellant was a known person in the area. He was not a stranger to the complainant and perhaps that is why she trusted that he meant no harm when he asked her to enter in a room behind his shop where there was a bed. The room later proved to be a den of

inequity as that was where the complainant was defiled.

The appellant was well known to all and sundry as a local shopkeeper. His defence was very much discredited by the evidence against him which cogently and credibly showed that he was the person responsible for defiling the complainant. The charge was thus not fabricated as alleged.

The appellant's conviction by the learned trial magistrate was sound and proper and is hereby upheld.

The sentence imposed by the learned trial magistrate was lawful.

The judgment of the trial court was at most in compliance with the provisions of section 169 of the CPC.

In sum, this appeal is lacking in merit and is hereby dismissed.

[Delivered and signed this 5th day of August, 2014.]

J.R. KARANJA.

JUDGE.