REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 76 OF 2010.

KEVIN WAKOLI SIMIYU :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(*(Being an appeal from the original conviction and sentence of E.N. Maina– CM in Criminal Case No. 4298/2009 delivered on 8th July, 2010 at Kitale)*

J U D G M E N T.

This appeal by **Kevin Wakoli Simiyu (the appellant),** arrives from the decision and judgment of the Chief Magistrate at Kitale in which the appellant was convicted and sentenced to serve twenty (20) years imprisonment for the offence of defilement contrary to section 8(1) read with section 8 (3) of the Sexual Offences Act.

It was alleged that on the 9th December, 2009 at ***[particulars withheld]*** in Kwanza District, the appellant defiled M N, a girl aged thirteen (13) years. There was an alternative count of indecent act contrary to section 11 of the Sexual Offences Act but the appellant was convicted on the main count of defilement.

Being dissatisfied with the conviction and sentence, the appellant filed the present appeal on the basis of the grounds contained in his petition of appeal filed herein on 20th July, 2010. He appeared in person at the hearing of the appeal and presented written submissions in support of his appeal.

The learned prosecution counsel **M/s. Limo**, appeared for the sate/respondent.

In opposing the appeal, the state submitted that the prosecution case against the appellant was proved beyond reasonable doubt thereby making his conviction proper. That, the failure to call as a witness a person called Hassan was not fatal as there was sufficient evidence from other witnesses. That, the age of the complainant was confirmed as 14 years and that her evidence was corroborated by that of PW3.

The state further submitted that there was no contradiction in the prosecution case and that the prosecution evidence was cogent and credible.

With regard to the appellant's defence, the state submitted that it only referred to a grudge between the appellant and a brother to PW3. That, the need for an eye-witness did not arise as the complainant was found to be a credible witness. That, it was unnecessary for the appellant to be subjected to medical examination when the same was vital in relation to the complainant only. That, the appellant's defence was considered by the trial court and found to be unreliable. Therefore, this appeal should be dismissed.

This is a first appeal. The role of this court is to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness.

In that regard, the prosecution case was briefly that on the material date at about 4.30 p.m., the complainant **M N (PW2)**, a minor aged about 13 years had accompanied her father to their "shamba" (farm) but on her way home she was alone when she was stopped and greeted by the appellant who was herding cattle at a nearby farm. He then held her by shoulders and knocked her down. He completed his ill intention by raping her. Thereafter, he was found wearing his trousers by a person called Hassan before a person called N appeared at the scene and whipped him (appellant). She went home and reported the matter to her mother.

The complainant's father, **S O (PW1)**, was still at their shamba when he was approached by N and informed that the complainant had been defiled by a person said to be the appellant whom he saw after his arrest.

The appellant's employer, **J B W (PW3),** had on the material date instructed the appellant to drive back a herd of cattle before they could go for a lunch break but he did not return. He (PW3) went to look for the appellant and found him with two people and a girl aged between 13 and 14 years. They appeared to be quarrelling and when he (PW3) enquired, the girl told him that she had been defiled by the appellant. He advised the girl to go home and later reported the matter to her parents who asked him to produce the appellant and he did so by handing him over to the police at Endebess.

A clinical officer at Kitale District hospital, **Francis Barchebo (PW4),** examined the complainant and completed the necessary report (PW3 form) confirming that she had been defiled.

Cpl. Jerida Mutimba (PW5), of Endebess Police station investigated the case and thereafter preferred the present charge against the appellant.

In his defence, the appellant simply stated that he hailed from a place called Kamukuywa and worked in Endebess. His mother became mentally ill and he had to take care of his siblings if the court forgave him. He denied in cross-examination that he knew the complainant and implied that he was framed because of a grudge existing between him and a brother to J (PW3) over some maize.

The appellant in essence denied the offence.

Having carefully considered the grounds of appeal and the submissions in support thereof and opposition thereto by the appellant and the state respectively in the light of the evidence availed in court, it is the opinion of this court that the occurrence of the offence was not disputed. Indeed, the complainant (PW2) credibly indicated that she was defiled and the fact was medically confirmed by the clinical officer (PW4).

With regard to age of the complainant, it was indicated by her father (PW1) that she was 13 years old although he was not certain as he stated that she was born either in the year 1992 or 1995 which indicated that she was either 17 years or 14 years old at the time of the offence. She herself indicated that she was 13 years old and a standard six (6) pupil at ***[particulars withheld]*** Primary School.

J (PW3) estimated her age to be either 13 years or 14 years while the clinical officer placed her age at 12 ½ years.

The foregoing notwithstanding, it was evident that at the time of the offence the complainant was a minor aged between 12 ½ and 14 years but certainly not 17 years.

In any event, the complainant's estimated age of 13 years was not a disputable fact in the trial.

By and large, the fact which was disputed and which fell for determination by the court was the alleged responsibility of the appellant in the offence.

The defence raised by the appellant was a lukewarm denial of the offence. However, the evidence by the complainant and to some extent by J (PW3) implicating him was sufficient and credible enough for a finding of fact that he was responsible for the offence even though the prosecution would have fortified the evidence by calling as its witnesses the two people who found the appellant immediately after having offended the complainant i.e. the person known as Hassan and the person known as Nyongesa.

The absence of the said two people in the trial did not however water down the prosecution's case against the appellant special regard being given to the fact that the learned trial magistrate found the complainant's evidence to be cogent and credible. This court would have no reason to fault that finding and section 124 of the Evidence Act is quite clear that in sexual offences corroboration of a complainant's evidence is not a necessity if the evidence is truthful.

In the upshot, it is the view of this court that the appellant's conviction by the learned trial magistrate was sound and proper in so far as it was mostly based on the complainant's credible evidence which directly implicated the appellant with the offence. The resultant sentence of twenty (20) years imprisonment was lawful.

This appeal is therefore dismissed in its entirety.

[Delivered and signed this 2nd day of October, 2013.]

J.R. KARANJA.

JUDGE.