IN THE COURT OF APPEAL

AT KISUMU

[CORAM: OKWENGU, WARSAME AND GATEMBU, JJA]

CRIMINAL APPEAL NO. 148 OF 2015

BETWEEN

CHARLES KIBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at Kisii (C.B Nagillah J.) dated 13th *February, 2015 in* **KISII H.C.CR.A. No. 177 of 2012)**

****

JUDGMENT OF THE COURT

1. This is a second appeal against the judgment of Nagillah J. delivered on 13th February 2013, where the court upheld the conviction and sentence of the appellant.

2. Briefly, the background of this appeal is that the appellant, **Charles Kibe** was charged with the offence of defilement contrary to ***Section 8(1)*** as read with ***Section 8(4)*** of the ***Sexual Offences Act.*** The particulars of the offence were that on 22nd November 2010 in Kisii Central District within Kisii County intentionally and unlawfully caused his penis to penetrate the vagina of **LRM** [Name Withheld], a child aged 6 years. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**.

3. The evidence of the complainant is that on the material day, the appellant removed her biker and inserted his penis into her vagina. She felt pain, which made her cry loudly. The complainant also said that the appellant repeated the defilement many times.

4. **Alfred Maroko (PW6)**, was the first person to respond to the screams of the complainant as he was outside the house where the appellant and complainant were. He testified that he heard the child scream and immediately went into the house to find out what was happening. On entering, he found that it was the complainant who was crying and she was not walking properly. He inquired about what had transpired and the appellant told him that he was seized by temptation. **PW6** then called the minor's sister, **JM (PW4)** to question the minor and she admitted that the appellant had raped her. PW6 then called the child's father (**PW3**) and informed him of the incident. Her father arrived home, detained the appellant and took the child to Kisii Level 5 hospital.

5. The minor was examined by **Denis Omurwa**, a clinical officer at Kisii Level 5 hospital who concluded that there was evidence of penetrative sexual assault. The minor had a torn hymen, there were bruises on her labia minora and a whitish discharge which in his opinion was not normal for a 6 year old. Furthermore, lab results indicated there were sperm cells and pus cells which were a sign of infection. The clinical officer also examined the appellant and observed that that he had no injuries on his genitalia and lab results showed that he had no STI's. The appellant was thereafter taken to the police station and charged accordingly.

6. The appellant gave unsworn testimony and denied the charges leveled against him. The substance of his defence was that on the material day he was on his way home when people sent by the complainant's father tied him up, put him in a vehicle and took him to the police station where he was charged with the offences before the court. He alleged that the complainant's father had a grudge against him because he had reported him to the chief when he failed to pay him after painting his house.

7. The trial court having considered the evidence, found that the prosecution had proved its case beyond reasonable doubt, convicted the appellant on the main count and sentenced him to life imprisonment. Aggrieved, the appellant filed an appeal contesting his conviction and the sentence meted against him. The High Court (**Nagillah, J**) considered the appeal and upon a re-evaluation of the evidence tendered before the trial court as required of a first appellate court, concluded that the conviction and sentence was rightly arrived at. Consequently,

the learned Judge dismissed the appeal and upheld the appellant's conviction and the sentence.

8. Dissatisfied with this decision, the appellant is now before us on second appeal. He relied on his memorandum of appeal and written submissions in which he urged that there was insufficient evidence to convict him; that the witness statements were contradictory, unsafe and unreliable; that the medical evidence did not establish that he committed the alleged offence, that the testimony of the witnesses on date of his arrest contradicted the charge sheet rendering it defective and that the respondent had not proved its case beyond reasonable doubt.

9. Being a second appeal, this court is enjoined by law to only consider issues of law**.** As was cited by this court in ***M'Riungu vs. Republic***

[1983] KLR, 455**:**

> **"Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law and it should not interfere with the decision of the trial court or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."**

10. The appellant's allegation that there was insufficient evidence to warrant his conviction is not borne out by the record. On the contrary, the complainant knew the appellant by name, recognized him as a neighbor who often visited their home and gave a clear detailed description to the court on how he defiled her. The trial court after conducting a *voir dire* examination found the minor to be a credible and reliable witness. Also, the issue of mistaken identity could not have arisen because **PW6** who responded to the screams of the complainant found the appellant standing next to her after the alleged defilement. He then called **PW4** to interrogate her and the complainant promptly disclosed to her sister what had happened. Furthermore, PW6 testified that the appellant confessed that he had been seized with temptation and that the minor could not walk properly and had to be carried by PW4 who testified that the complainant stated that she was in pain and upon looking at her private parts she saw a whitish substance. The testimony of PW6 and PW4 squarely place the appellant at the scene of the crime.

11. In addition, the testimony of the clinical officer, **Denis Omurwa** corroborated the complainant's evidence and sealed the fate of the appellant. In his opinion there was penetrative sexual assault given that the minor had bruises on her genitalia, a torn hymen and sperm and pus cells were seen. For these reasons, we agree with the respondent that there was overwhelming evidence against the appellant and reject the appellant's assertion on the insufficiency of the convicting evidence.

12. It is clear that the trial court correctly analyzed the evidence tendered by the prosecution in a manner to persuade us that the conviction was warranted. The trial court believed the evidence of the minor and found her to be truthful and coherent. Under **Section 124** of the **Evidence Act,** the Court is entitled to base its conviction on the evidence of the minor provided that for reasons recorded, it is believed that the complainant is telling the truth. In this case the trial court followed the correct procedure and arrived at a decision that the testimony of the child was cogent, clear and reflective of what happened. There were no gaps, inconsistencies and contradiction in the evidence of the complainant. On our part, we agree that the complainant was telling the truth. The inconsistencies and contradictions raised by the appellant such as, whether it was PW4 or PW6 who informed the minor's father of the incident or the contrasting dates of when the incident was reported were not material. They did not impeach the credibility of the witnesses and did not go to the root of the prosecution's case.

13. It is evident that the minor had been left in the care and company of the appellant on the material day. The appellant was placed squarely at the scene of the crime by the complainant's uncle who left the child with the appellant in good health before going to check on the rafters outside the house. The appellant took advantage of this trust and took the opportunity of their solitude to commit a heinous crime against the child. Upon the uncle's return, he found the child in pain and in tears. Indeed, mere opportunity alone does not amount to corroboration and as was stated in ***R vs Erusani Sekni*** **& Another (1947) EACA** 74:

> **"This idea has been expressed in the Scottish case Dawson vs Mckenzie 45 SLR page 474 by Lord Dunedin, where he says "mere opportunity alone does not amount to corroboration, but two things may be said about it. One is that the opportunity may be of such a character to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves amount to corroboration."**

14. We are satisfied that the evidence tendered by the prosecution creates no doubt in our mind that the appellant is the one who defiled the complainant, therefore we are satisfied that the prosecution case was proved beyond any reasonable doubt.

15. On sentence, we find no basis to interfere with the legal sentence imposed by the trial court. The trial court properly exercised its discretion, taking into account the trauma and effect the action of the appellant had on the child by subjecting her to gruesome and degrading circumstances.

16. In the end, we have come to the conclusion that the learned Judge of the High Court did not err in upholding the conviction and sentence of the appellant. Accordingly, we find no merit in this appeal and dismiss in its entirety.

Dated and delivered at Nairobi this 24*th* day of July, 2020.

HANNAH OKWENGU

……..

JUDGE OF APPEAL

M. WARSAME

…….

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY **REGISTRAR**