IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, H. OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 149 OF 2014

BETWEEN

EUGINE LUMUMBA SHIKWENYI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from the Conviction/Judgment/Decree/Order of the High Court of Kenya at Kakamega (**Chitembwe, J**.) delivered on 26th, June 2012*

in

H.C. CR. A. NO. 148 OF 2012)

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JUDGMENT OF THE COURT

[**1**] The appellant was convicted by the Senior Principal Magistrate at Hamisi for the offence of **defilement** contrary to **section 8(1) as read with section 8(2) of the Sexual Offences Act** and sentenced to life imprisonment. He appealed to the High Court at Kakamega but his appeal was dismissed in its entirety. He now appeals to this Court against the conviction and sentence.

[**2**] The particulars of the charge alleged in essence that on 1st September 2010 the appellant defiled IM (name withheld) (the complainant) a girl aged 10 years. The prosecution at the trial called five witnesses namely; the complainant, ***FA*** (PW2), the complainant's mother, ***John Bizenjwa*** (PW3) the village elder to whom the report was made and who later arrested the appellant, ***PC Joseph Chepsoi*** (PW4), a police officer at Serem Police station and ***Charles Lepamnjo*** (PW5) a clinical officer who examined the complainant

[**3**] The evidence of the witnesses was briefly as follows:

On 1st September, 2010, ***FA*** sent the complainant to the river to fetch water and she went out to look for food. The complainant who was a class IV pupil at [particulars withheld] Primary School went to the river and filled her jerrican. As she was going home, the appellant who was a neighbour held her hand and took her to a bush. The appellant put the complainant down, removed her clothes and defiled her twice. Some people came to the scene and the appellant ran away. The complainant's genital organs were injured. The appellant went home and reported to her mother and gave the name of the appellant to her mother.

FA noticed that the complainant's neck and lips were swollen and some substance was coming from the complainant's private parts. The complainant's mother reported to ***John Bizengwa*** who went to see the complainant. He later went to the house of the appellant but the appellant ran away when he saw the village elder and the people in his company. The complainant was taken to Mbale District Hospital. On 2nd September 2010, she was examined by ***Charles Lepamnjo***. He estimated her age to be 10 years. He noticed that the complainant's *labia minora* was bruised and there was some bleeding. He concluded that the complainant had been defiled. The appellant was arrested on 14th October, 2010 and taken to the police station on 15th October, 2010.

[**4**] The trial magistrate made findings that there was no reason to doubt the evidence of the complainant; the age of the complainant was confirmed by the mother and by medical documents; that the complainant was well known to the appellant; that the incident happened during the day and there was no problem with identification; that there were bruises and bleeding on complainant's genitals; that the appellant's conduct of running away pointed to his guilt and that there was no reason to doubt the prosecution evidence.

[**5**] The High Court considered the proviso to **section 124** of the **Evidence Act** which permits a court to convict solely on the evidence of a victim of sexual offence, if satisfied that the victim is telling the truth. The court re-evaluated the evidence and made findings that the complainant told the truth; the complainant was indeed defiled; the complainant knew the appellant before; the incident occurred at 5 p.m.; the appellant ran away; there was no evidence of a family dispute and the appellant did not mention any dispute; the complainant was under the age of 11 years; and that the case was proved beyond reasonable doubt.

[**6**] By the grounds in the memorandum of appeal, the appellant impugns the judgment of the High Court for, among other things, failure to re-evaluate the evidence afresh; failure to observe that there was no certificate of birth or age assessment; failure to find that penetration was not proved; accepting the P3 form when it was signed by a clinical officer before the date of issue and by failing to find that material witnesses were not called.

The appellant filed written submissions which he highlighted. ***Ms. Tumaini Wafula,*** an Assistant Director of Public Prosecution filed written submissions opposing the appeal.

[**8**] By **section 361** of the **Criminal Procedure Code**, a second appeal is confined to matters of law only. In **Karingo v Republic [1982] KLR 219**, this Court reiterated that a second appeal must be confined to points of law and the court will not interfere with concurrent findings of fact unless based on new evidence.

[**9**] In this case there was concurrent findings of fact that the complainant was defiled on the material day and that it was the appellant who defiled her. The concurrent findings of fact were based on the credibility of witness. An appellate court will not normally interfere with the findings of a trial court which are based on the credibility of witness unless a reasonable court would not have made such findings**. Republic v Oyier [1985] KLR 353**. The complainant knew the appellant before. She stated that he was a neighbour and is related to the appellant. The complainant reported the sexual assault to her mother and gave the name of the appellant. The village elder ***John Bizenjwa*** talked to the complainant and the complainant told him that it was the appellant who defiled her and gave the name of the appellant. The village elder testified that when he went to the house of the appellant, the appellant ran away and it was not until two weeks later when he was arrested. ***FA*** testified that the appellant was a neighbour and that they come from the same clan. She also testified that there was no dispute between her family and the appellant's family. The appellant did not in his unsworn statement mention any dispute. ***Charles Lepamnjo*** the clinical officer examined the complainant on 2nd September, 2010 and found bruises and bleeding in the complainant's genitalia. He concluded that she was in fact defiled.

It is true as the appellant submitted, that the P3 indicates 3rd September, 2010 as the date the complainant was sent to hospital for examination. However, the same P3 form indicates the date of examination as 2nd September, 2010. The same P3 form has the date of 2nd September, 2010 as the date when the P3 was filled by OCS Serem Police station. It is apparent that the date 3rd September, 2010, as the date when the complainant was sent to the clinical officer, was a clerical error which did not in any way discredit the evidence of the clinical officer who examined the complainant. Further, there was a concurrent finding of fact that the complainant was a credible witness and that the entire prosecution case was credible.

The conduct of the appellant was also considered and there were concurrent findings of fact that he disappeared from his home for two weeks.

[**10**] It is clear that the High Court re-evaluated and reconsidered the evidence and independently made similar findings of fact as the trial court. We are satisfied that the concurrent findings of fact were based on credible and sufficient evidence. We have come to the conclusion that the appeal against conviction has no merit.

[**11**] As regards the appeal against sentence, **section 8(2) of the Sexual Offences Act** provides for a mandatory life sentence where the victim is less than 11 years of age. The complainant did not state her age. The complainant's mother did not also state the age of the complainant and did not give the date of her birth. No personal documents to prove the age of the complainant were tendered in evidence. The clinical officer estimated the age of the complainant as 10 years but did not conduct a clinical age assessment. By **section 8(3)** of the **Sexual Offences Act**, if the age of the victim of the sexual offence is between 12 and 15 years the mandatory sentence is 20 years. In this case, the prosecution failed to prove by acceptable evidence that the complainant was below the age of 11 years at the time of commission of the offence. There was doubt whether or not she was below the age of 11 years. The complainant should have been considered as falling within the age bracket in **section 8(3)** of the Sexual Offences Act where the mandatory sentence is 20 years.

[**12**] For the foregoing reasons, the appeal against conviction is dismissed. However, the appeal against sentence is allowed to the extent that the sentence of life imprisonment is reduced to 20 years imprisonment to take effect from 20th June 2012 when he was sentenced.

We so order.

Dated and delivered at Kisumu this 27th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.