



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 80 OF 2015

BETWEEN

DANIEL ARASA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from the judgment of the High Court of Kenya*

*at Kitale, (J. R. Karanja, J.) dated 5<sup>th</sup> August, 2014*

in

HCCRA NO. 105 OF 2013

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**JUDGMENT OF THE COURT**

[1] The appellant was convicted by the Senior Principal Magistrate, Kitale, of the offence of defilement of a child contrary to **section 8 (1)** as read with **section 8 (3)** of the **Sexual Offences Act** and sentenced to 20 years imprisonment. His appeal to the High Court against the conviction and sentence was dismissed. He now appeals to this Court against the judgment of the High Court.

[2] The prosecution called six witnesses at the trial in support of the charge namely; (MM) (*name withheld*) (PW 1) the complainant; Linus Ligale (PW 2), a clinical officer at Kitale District Hospital who examined the complainant; Dr. Kiprop Jonathan (PW 3) who assessed the age of the complainant; F N (PW 4), (N), who is the grandmother of the complainant; Silvester Momanyi (PW 5) (Momanyi), Chief of Milimani Location, to whom the complaint was made and who arrested the appellant and PC Paul Kamau (PW 6) of Kitale Police Station who investigated the case.

[3] The prosecution case was briefly as follows:

The complainant and her sister, one M were staying with their grandmother. The complainant was at the material time a standard three pupil aged 14 years.

On 1<sup>st</sup> April, 2011, at about 7.00p.m. N sent the complainant and M to the nearby market to buy vegetables. As the complainant and her sister M were going to the market, they met the appellant at the shopping centre. The appellant had a shop and was living in a room behind the shop. The appellant told the complainant to pass at the shop on her way from the market and they exchanged slippers. After the complainant and M bought the vegetables, they stopped at the shop of the appellant. The complainant gave the vegetables to M to take home and she remained behind. The appellant took the complainant to his room behind the shop where she stayed for two days. The appellant defiled the complainant in the course of the two days several times. On the night of the second day which was a Sunday, the appellant told the complainant to go home as the following day was a Monday - a school day.

[4] The complainant went home and told N what had happened, and N took complainant to Momanyi, the area Chief, reported the incident and gave the name of the appellant as the perpetrator. The appellant was arrested by the Chief. N also took the complainant to Kitale Police

Station, where she reported the incident. Linus Ligale, the clinical officer examined the complainant and concluded that she had been defiled.

Dr. Kiprop Jonathan assessed the age of the complainant as 14 years.

[5] The appellant who was represented by a counsel at the trial gave sworn evidence. He denied meeting the complainant on 1<sup>st</sup> April, 2011, or exchanging slippers with her. He also denied that he had sexual intercourse with her.

[6] The trial magistrate considered the evidence. He found that there was variance between the evidence and the charge regarding the date of the commission of the offence but made a finding that the variance was not material. He also made a finding that the complainant's hymen was broken and that there was penetration. Ultimately, the trial magistrate made a finding thus:

**“The complainant in my view gave truthful evidence which has not been shaken or discredited by the defence. That the accused confirms that he was arrested at his shop corroborates the evidence of the complainant and PW4 that he was known to them as a shop keeper in the area.”**

[7] At the hearing of the appeal in the High Court, the appellant was represented by a different counsel who argued the appeal on his behalf.

The High Court re-considered and re-valuated the evidence and made a finding that the evidence of the complainant and of the clinical officer was sufficient, corroborative and credible enough to establish the offence of defilement. Regarding the defence of the appellant, the High Court said in part:

**“With regard to the identification of the offender the appellant denied responsibility for the offence and implied that he was therefore implicated without 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 into a room behind the shop where there was a bed. The room later proved to be a den of iniquity as that is where the complainant was defiled.**

**The appellant was well known to all and sundry as a local shopkeeper. His defence was discredited by the evidence against him which cogently and credibly showed that he was the person responsible for defiling the complainant”.**

[8] The first set of the grounds of appeal filed by the appellant relates to sufficiency of evidence. He essence states that the charge was fabricated and that the evidence did not prove the charge. The second set of the grounds of appeal in the supplementary memorandum of appeal relate to defect in the charge, procedural irregularities and the failure to consider that sexual intercourse was consensual.

The appellant has filed written submissions in support of those grounds. Firstly, the grounds relating to the defect of the charge and procedural irregularities were not raised in the High Court. The petition which was filed in the High Court does not contain those grounds and the High court did not determine them.

Secondly, the grounds have no merit. The issue of variance of the date in the charge sheet and in the evidence relating to the date of the commission of the offence was considered by the trial magistrate who correctly found that the variance was not material as section 214 of the Criminal Procedure Code so provides. The charge sheet stated that the offence was committed on 1<sup>st</sup> April, 2011. The complainant testified that the appellant defiled her on the night of 1<sup>st</sup> April, 2011 and continued to do so on the following day.

It is true that the prosecution indicated that it would substitute the charge apparently to charge the appellant with several counts of defilement. That was not done. The original charge remained alleging that the appellant committed defilement on 1<sup>st</sup> April, 2011. That is the charge that the appellant was convicted for.

The charge as framed was not duplex. It is not a requirement to state in the charge that the act committed by the appellant was unlawful. Defilement is unlawful. All that the charge should state is that there was an act which caused penetration to a child. The fact that the complainant “consented” is immaterial because the law assumes that a child cannot give an intelligent consent.

The record shows that a second magistrate took over the trial after the complainant had testified. It is true that on 29<sup>th</sup> March, 2012, the appellant's counsel did not attend the trial. On that date the magistrate explained the provisions of section 200 of the Criminal Procedure Code to the appellant who elected that the case starts *de novo*.

The hearing was adjourned to 30<sup>th</sup> May, 2012. Both the appellant and his counsel appeared. On that occasion the appellant's counsel indicated that the trial should continue from where it had stopped. The appellant complains that he was not consulted by the trial magistrate.

The appellant's counsel must have consulted the appellant. The record does not show that the appellant objected. There was sufficient compliance with the law and the appellant does not state that he suffered any prejudice.

[9] On the ground of the insufficiency of the evidence, the complainant testified that she had known the appellant since 2009 and even knew his name which she gave to her grandmother. The complainant described in great details what happened in the two days she was with the appellant. The two courts below made a finding that she was a credible witness and that she was in fact defiled.

The two courts below also made a finding that the prosecution case was credible and rejected the defence of the appellant. It is also clear from the judgment of the High Court that the court performed its duty as a first appellate court by exhaustively re-considering and re-evaluating the evidence.

A second appellate court will not normally interfere with those findings of fact which are based on the credibility of witnesses and also with concurrent findings of fact unless based on no evidence or if no other reasonable tribunal could have made the findings. We are satisfied that the appellant was convicted on overwhelming and credible evidence and that the appeal has no merit.

[10] For the above reasons the appeal is dismissed in its entirety.

**DATED and delivered in Eldoret this 22<sup>nd</sup> day of March, 2018.**

**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.**