IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH

OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 100 OF 2015

BETWEEN

LOKUDAN LOTENG.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against a Judgment from the High Court of Kenya

at Kitale, (J. R. Karanja, J) dated 30th May, 2014

in

HCCCRA. NO. 98 OF 2012)

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JUDGEMENT OF THE COURT

[1] This is an appeal from the Judgment of the High Court, ***(J. R. Karanja, J.)*** dismissing the appellant's appeal against conviction and sentence.

[2] The appellant was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offfences Act**.** He was also charged with an alternative charge of committing an indecent act contrary to **section 11 (1)** of the Sexual Offences Act. The trial magistrate convicted the appellant of both offences and sentenced him to life imprisonment in the 1st count. He was not sentenced in respect to 2nd count but the trial magistrate ordered that the sentence to remain in abeyance. As the High Court correctly found it was erroneous to convict the appellant on both the main and alternative count.

[3] The appellant was alleged to have defiled a child aged 10 years on 3rd December, 2011. The child testified at the trial as follows. She was a school girl aged 11 years. On 3rd December, 2015 at about 5p.m, she went to fetch water. The appellant was employed by her parents as a shamba boy and herdsman followed her to the river. The appellant who pushed her to the forest, defiled her and run away.

She fetched water, and went home and reported to her mother.

[4] S B, the child's mother testified that the child reported the defilement to her and mentioned the appellant; that the child was walking with difficulties and was in pain, that they had employed the appellant as a herdsman and the appellant had worked for 3 days; that the applicant disappeared but was arrested on the following day and that she reported to police and took the child to hospital.

[5] P.C Paul Njiru, stationed at Kapenguria police station testified that the defilement was reported to him on 4th December, 2011; the P3 form was issued and that the child taken to the Doctor for examination who confirmed that the child had been defiled.

[6] Rotich Gerald, a clinical officer at Kapenguria District Hospital testified that he examined the child and filed the P3 form, that the child's clothes were soiled with blood that hymen was broken and that there was penetration.

[7] The appellant gave brief evidence at the trial. He testified that he was a herdsman, that he did not defile the complainant and that the witnesses lied to court.

[8] On appeal to the High Court, the High Court made findings of fact that the offence took place during the day; that the appellant was previously known to the complainant and that the identification of the appellant by the complainant was reliable.

As regard the defence of the appellant, the High Court stated:

> **"The defence raised by the appellant was unsustainable in view of the complainant's credible evidence against him and even though she was the only material witness to the offence and a victim, her evidence was found to be truthful by the trial court."**

[9] The appeal is based on three grounds viz, that the trial court erred in law in failing to inform the appellant of his right to representation under **Article 50(2) (g)** and **(h)** of the Constitution; that the age of the child was not proved and that the court did not exhaustively re-evaluate the evidence and failed to appreciate that the P3 form which did not bear police station stamp was not reliable.

[10] By **Article 50(2)** of the Constitution, an accused has a right to a fair trial which includes as **Article 50(2) (g)** provides, a right to choose and be represented by an advocate and to be informed of that right and further as Article **50(2) (h)** provides, to have an advocate assigned to him at State expense if substantial injustice would otherwise result and to be informed of that right.

The appellant submits that from the few questions he put to the witnesses in cross-examination, the trial court should have found that he was in need of assistance and inform him of the right to be represented.

This is a new ground of appeal. It was not raised in the first appellate court, either in the petition of appeal or in the extensive written submissions filed in the High Court. Thus, it did not form the basis of the determination by the High Court since the issues now raised were not before the High Court. We cannot fault the judgment of the High Court based on the new issue. In our view, it is too late to raise the constitutional issues now being raised.

[11] In support of the ground that the High Court failed to exhaustively re-evaluate the evidence, the appellant submitted that the High Court failed to appreciate that the P3 form had no police station rubber stamp to indicate its origin. The appellant contended that since the P3 form was not shown to be genuine, it should not have been relied on to convict the appellant. The appellant is contending that the P3 form relating to the examination of the child is not genuine. This ground of appeal was not raised in the High Court.

Secondly, the P3 form is signed and has a rubber stamp of the medical officer of Health, Kapenguria Hospital. **Rotich Gerald** who examined the child gave evidence of his findings upon the examination of the child and produced the P3 form as an exhibit which he himself filed. Thus, this ground of appeal has no merit.

[12] Although the appellant does not contend that the High Court did not re-evaluate the material evidence, we have considered the evidence which was adduced in support of the charge and how the two courts below treated the evidence.

Before the trial magistrate received the evidence of the child on oath, he conducted a *voire dire* examination of the child. The trial magistrate concluded that the child not only knew the nature of the oath but also possessed sufficient knowledge. The two courts below considered the evidence and made concurrent findings of fact that the child was defiled by the appellant.

[13] Although the evidence of the child as to the identity of the appellant was not corroborated, the proviso to **section 124** of the Evidence Act authorise a court to receive the evidence of a victim of a sexual offence and proceed to convict an accused person on such evidence if the court is satisfied that the victim is telling the truth.

There was concurrent finding of fact that the evidence of the child was credible. It is also evident that the complainant was below the age of 18 years. We are satisfied from the foregoing that the conviction was based on cogent and credible evidence.

[14] As regards the age of the child, the appellant submits that the age of the child was not proved by documents such as child immunization card, certificate of birth and age assessment report and that the doubt about her age should be resolved in his favour. Section 8 of the Sexual Offences Act provides various sentences for persons who commit defilement depending on the age of the victim. Where the child defiled is of eleven (11) years of age or less, section 8(2) prescribes a sentence of life imprisonment. Where the child defiled is of the age between twelve and fifteen years, **section 8(3)** prescribes a sentence of twenty (20) years imprisonment.

The Sexual Offences Act imports definition of a *"child"* in the Children Act which latter Act defines *"age"* thus:-

> **"Where actual age is not known means apparent age".**

[15] In this case, the charge sheet indicated that the child was aged 10 years by 3rd December, 2011 when the offence was committed. When the child gave evidence on oath on 26th June, 2012, she stated that she was 11 years. Her mother testified on the same day and said that the child was 10 years in the previous year.

At section 'C' of the P3 form which is filed by the professional who examines a victim of a Sexual offence, the clinical officer indicated that the estimated age of the child as on 4th December, 2011 was 10 years. The "*estimated age*" is the apparent age.

[16] From the foregoing, the only reasonable doubt which can arise is whether the child was aged 10 or 11 years at the time of the commission of the offence and not whether the child was over 12 years of age. However, whether the child was aged 10 or 11 years does not affect the sentence. It is only if the child was aged 12 years and above that the sentence would be affected. In the circumstances, there was no reasonable doubt that the child was aged 11 years and below.

[17] For the foregoing reasons, the appeal has no merit and is dismissed in its entirety.

Dated and delivered at Eldoret this 12th day of July, 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