



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CRIMINAL APPEAL NO. 78 OF 2015

BETWEEN

JOHN OTIRA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kitale, (Karanja, J.) dated 13th November, 2013

in

HCCRA NO. 53 OF 2011)

JUDGMENT OF THE COURT

1. The appellant was charged with the offence of defilement contrary to **section 8 (1)** as read with **section 8 (2)** of the **Sexual Offences Act**. The particulars were that on 2nd July, 2010 in Trans-Nzoia District, he defiled **D N**, a child aged 10 years.
2. After a full trial before the Chief Magistrate's Court at Kitale, the appellant was convicted and sentenced to life imprisonment. His first appeal to the High Court of Kenya at Kitale was unsuccessful, hence this second appeal.
3. In his memorandum of appeal, the appellant argued that he was convicted on uncorroborated evidence; that he was not subjected to any medical examination to prove that he had defiled the complainant; and that the prosecution evidence was unreliable. The appellant made brief submissions in support of those grounds of appeal.
4. **Mr. Omwenga**, Senior Assistant Deputy Public Prosecutor, opposed the appeal. He submitted that the prosecution evidence was cogent; that the appellant was clearly known to the complainant; and that there was no doubt that he was the one who had defiled the complainant.
5. Before we determine the aforesaid grounds of appeal, it is important that we briefly set out the evidence that was adduced before the trial court. The complainant testified that on the material day at

about 5.00p.m., she met the appellant, who she had known before. The appellant attempted to lure her with an avocado. The appellant then grabbed the child and forcefully took her to a house of one Komen, his employer, where he defiled her.

6. After the incident the complainant reported the same to her grandmother, PW 2, who in turn notified the village elder, PW 3. The appellant was then arrested and the complainant was taken to Kitale District Hospital where she was examined. The medical examination showed that there was evidence of defilement.

7. In its judgment, the trial court was satisfied that the appellant was well known to the complainant. The court further held that the demeanor of the complainant and her grandmother, PW 2, was impressive.

8. Regarding some contradictory evidence by the complainant, as to where the offence was committed at, the trial court held that although her statement showed that it was on the grass, a careful examination of her evidence revealed that she was defiled in a house. The P3 form that was filled on the same day indicated that she told the police that the scene was in a house. The court attributed the minor contradiction to the child's tender age.

9. As to whether the complainant had actually been defiled, PW 2 said that she saw some discharge on the complainant's private parts and the Clinical Officer who examined her concluded that her hymen had been broken. This being a second appeal that is confined to questions of law, an appellate court has loyalty to adopt the findings of the lower courts on facts, unless it is apparent that on the evidence no reasonable court or tribunal could have arrived at the conclusion. See **M'RIUNGU V REPUBLIC [1983] KLR 455**.

10. Applying the aforesaid facts to the grounds of appeal, there is no basis of finding that the appellant was convicted on uncorroborated prosecution evidence. The complainant's evidence was well corroborated by PW 2 and PW 5, the Clinical Officer. The appellant's first ground of appeal must therefore fail.

11. Turning to the second ground of appeal, although the appellant was not medically examined with a view to linking him to the commission of the offence, the complainant's evidence that she had known him prior to the incident; and that the appellant defiled her in broad daylight; was sufficient evidence that he was the one who had defiled her. The complainant told her grandmother that it was **Mzee John** who was living at Komen's house who had defiled her. When PW 2 went to Komen's house in the company of the village elder and the complainant, they found the appellant in the said house. The appellant is known as **John Otira Tara**. There can be no dispute that this was a case of recognition of an assailant in circumstances that were favourable for a positive recognition.

12. In view of the foregoing, even in the absence of any medical examination, we are satisfied that the appellant's conviction was safe.

13. In conclusion, we find this Appeal lacking in merit and dismiss it in its entirety.

DATED and Delivered at Eldoret this 24th day of March, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDFGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.