



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: MARAGA, MUSINGA, MURGOR JJ,A)**

**CRIMINAL APPEAL NO. 140 OF 2011**

**BETWEEN**

**KEBBY CHIVOLI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Eldoret ( J.R. Karanja, J.) dated 12<sup>th</sup> May, 2011*

in

**H.C.CR.A. NO. 13 OF 2011)**

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**JUDGMENT OF THE COURT**

The appellant, **Kebby Chivoli**, was charged in the Chief Magistrates’ Court at Eldoret with the offence of defilement contrary to **section 8 (1)** as read with **section 8(4)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on diverse dates of 15<sup>th</sup> and 16<sup>th</sup> of August 2009 in Uasin Gishu District within the former Rift Valley Province, the appellant intentionally and unlawfully caused the penetration of his genital organ into the genital organ (vagina) of **CO, PW 2 the complainant**, a girl aged 11 years.

He also faced an alternative charge of indecent act contrary to **section 11(1)** of the **Sexual Offences Act**, the particulars of which were that on the same day and place he intentionally and unlawfully committed an act of indecent assault by touching CO’s genital organ (vagina).

The appellant denied the offence.

The facts are that on the night of 15<sup>th</sup> August 2009 while CO was asleep in their room with her brother, the appellant opened the door and entered the room. He gagged CO with a T-shirt and a long trouser, removed her shirt and underpants, lay on top of her, and defiled her. On the night of 16<sup>th</sup> August 2009, he returned to CO’s room and again defiled her. Upon his return home on 18<sup>th</sup> August 2009, CO reported the assault to her father, **J (PW 3)**, and named the appellant as the defiler. J in turn reported the matter to the police and the appellant was arrested. **Dr. Paul Kipkorir Rono, (PW1)** examined CO at Moi Teaching and Referral Hospital, and concluded that she had been defiled.

After the hearing of the case, the trial magistrate having found that the main charge was proved, convicted and sentenced the appellant to life imprisonment. Dissatisfied with that decision, the appellant appealed to the High Court that upheld the trial court's decision.

The appellant now brings this appeal to this Court. In the grounds of appeal he complained that the charge sheet was defective as the evidence was at variance with the charge; that the offence was not proved beyond reasonable doubt; and finally that the High Court failed to evaluate the evidence which was full of inconsistencies and contradictions.

**Mr Adambi**, who appeared with **Mr. Keter** for the appellant, abandoned the grounds in respect of the defective charge sheet, but argued the rest of the grounds together.

It was their submission that the High Court failed to appreciate that the evidence was contradictory as PW5 stated that their father was present when CO was defiled, yet this was denied by the appellant when he testified. In addition, CO had testified that neither her father nor her uncle Simon were present when the defilement occurred. It was also the counsel's submission that the appellant was not subjected to a medical examination, and neither were the minor's clothing produced in court. Counsel argued that the offence took place at midnight when there were many people in the house and so he was not positively identified.

**Mr. Omwega**, learned Assistant Deputy Public Prosecutor, conceded the appeal as it was his submission that CO was not able to identify the appellant owing to the unfavourable conditions.

On the issue of the medical examination, counsel submitted that there is no requirement that the appellant be subjected to a medical examination. Counsel further submitted that **section 124** of the **Evidence Act** specifies that the evidence of a child victim of a sexual assault need not be corroborated, provided that the court is satisfied with such evidence.

We have considered the record of appeal and the submissions and find that the issues that we are required to address are whether the appellant was properly identified; whether the offence was proved beyond reasonable doubt; and finally whether the High Court properly evaluated the evidence.

On the identity of the defiler, the appellant contends that since the incident took place at night, and there were other persons in the house, it was not possible for CO to have positively identified him as the defiler.

The trial court and the High Court considered the evidence of identification, and were satisfied that CO identified the appellant as the person who defiled her.

The trial court in particular sought to determine if indeed the appellant was identified as the defiler and stated thus;

***“According to the evidence of the complainant's father and uncle, it was the accused herein and the children who remained in the house on the nights of 15<sup>th</sup> and 16<sup>th</sup> August 2009. The testimonies of these two witnesses (PW 3 and PW4) appeared to be quite credible and corroborative in fact the accused in his sworn testimony admitted that he did spend the night in the complainant's home on 16/8/09 and stated that he slept in the sitting room. This therefore corroborates the evidence of the complainant, her father and uncle regarding the issue of accused having spent the night at the home of the complainant. ”***

Having placed the appellant at the scene on the two nights, the trial court went on to consider whether the appellant entered CO's room, and concluded thus;

***“The complainant was consistent in her testimony as to the identity of the accused as she had known him from the time he started coaching them by offering tuition to her and her younger brother. Infact it was the accused who used to escort them to school daily for tuition and later spent time with them in the evenings. Furthermore it was only the accused who remained alone***

***in the house with the two children since the uncle had gone to sleep elsewhere and the father failed to turn up on the two days. It was highly unlikely for a stranger to enter the home in the night and attack the complainant. The complainant was consistent in her testimony and was not shaken at all. ”***

Joseph testified that both his wife and himself were not at home on the 15<sup>th</sup> and 16<sup>th</sup> August 2009, and that, he returned to his home on 17<sup>th</sup> August 2009. During the period, he was away, the appellant slept in the sitting room, while Simon slept elsewhere. Simon testified that on the two nights in question he slept out of the house, while the appellant remained in the house with the children.

In his defence, the appellant stated that CO's mother arrived on the 14<sup>th</sup> August 2009, and that she left on the 16<sup>th</sup> August 2009. He stated that on the 15<sup>th</sup> August 2009 he left the house at about 7.30 p.m. to watch a football match, and later spent the night at one Ashley's house. The next day which was the 16<sup>th</sup> August, CO's mother travelled upcountry, and that evening Simon left the house, and he slept in the sitting room while Joseph slept in his room.

Our reanalysis of the evidence shows that the appellant claimed to have been away from the house on the night of 15<sup>th</sup> August 2009. The record shows that ***PC Stanley Keisier, (PW 5)***, the investigating officer, did not check out the appellant's alibi, to confirm his whereabouts that night. For this reason, we would be prepared to give the appellant the benefit of the doubt that he was not in the house on the night of the 15<sup>th</sup> August 2009.

Needless to say, CO testified that she was defiled on the night of 16<sup>th</sup> August, 2009. When this is considered in the light of the appellant's defence in which he admitted that he was in the house on the night of the 16<sup>th</sup> August 2009, the only conclusion that can be reached is that he was the person who entered CO's room and defiled her. We say this because the evidence shows that he was alone in the house with the children as Joseph, his wife and Simon were not at home. If the defiler was an intruder, the appellant would have seen or heard him. In addition, CO reported the incident to ***J***, her father, and severally named the appellant as the defiler. Both courts below found her evidence as a single identifying witness to be cogent, truthful and believable. When this evidence is considered in its totality, contrary to Mr. Omwega's contention, we too are satisfied that the appellant was positively identified as the person who defiled CO.

As to whether the offence was proved beyond reasonable doubt, we have dealt extensively with the issue of identification of the appellant. The other ingredients that remain to be addressed are whether the offence was proved and whether CO's age was ascertained.

Dr. Rono, who conducted the medical examination, found that her hymen was torn and there was redness around her vaginal infortus. He concluded that she had been defiled. When this evidence is considered in the light of CO's testimony, we find that the offence was proved beyond doubt.

The charge sheet specified CO's age as 11 years. The birth certificate that was produced in court showed that CO was 9 years of age. The appellant was charged under ***Section 8 (1)*** of the ***Act*** which appertains to the defilement of a child under 11 years. As observed by the trial court, and upheld by the High Court, CO's age having been ascertained at under 11 years meant the sentence of life imprisonment imposed was lawful.

In sum, we find that the appellant's appeal is without merit, and we order that the same be and is hereby dismissed in its entirety.

It is so ordered.

***DATED and delivered at ELDORET this 28<sup>th</sup> day of October, 2016.***

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE 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**