



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & MURGOR JJ.A)

CRIMINAL APPEAL NO. 74 OF 2011

BETWEEN

J S B.....APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kitale (Ombija, J.) dated 4th April, 2011

in

H.C.CR.A. No. 22 OF 2008)

JUDGMENT OF THE COURT

1. **J S B**, the appellant herein, was charged with the offence of incest by a male person contrary to **Section 20(1)** of the Sexual Offences Act. The particulars of the offence were that on 10th and 11th June 2007 at *[particulars withheld]* Endebes in the then Trans Nzoia District of Rift Valley Province, using his genital organ, the appellant penetrated the genital organ of D.N.S, a girl aged six years old who was, to the knowledge of the appellant, his daughter.
2. The appellant pleaded not guilty but upon trial before the Chief Magistrate at Kitale, he was convicted and sentenced to life imprisonment. His appeal to the High Court having been dismissed, he has now come to this Court on a second appeal.
3. In both his original and supplementary memoranda of appeal, the appellant complained that had the learned Judge of the High Court properly and exhaustively re-evaluated the evidence on record as he was obliged to, he would have found: that the police had poorly investigated the case hence there was no sufficient evidence to sustain the appellant's conviction; that the appellant's conviction on the uncorroborated evidence of the complainant could not be sustained; and that the appellant's prosecution was a frame-up due to the grudge the *[particulars withheld]* Manager held against him.
4. Presenting the appeal before us, Mr. Mutai, learned counsel for the appellant, submitted that although the child was medically examined on the day of the appellant's arrest, the P3 form was

not completed until three days later. And despite finding that the complainant's hymen had been torn, the report on the P3 Form did not state that there was penetration. Regarding the rapture of the child's hymen, counsel contended that a female's hymen can be torn by even mere friction. In conclusion, counsel argued that the police poorly investigated the case and failed to place before court sufficient evidence to support the appellant's conviction. He therefore urged us to allow this appeal.

5. Mr. Omwenga, learned Assistant DPP, submitted that failure to visit the scene of crime did not affect the prosecution case. Besides the child's evidence, which, under **Section 124** of the Evidence Act, was sufficient to found the appellant's conviction, there was corroboration from the medical evidence on record. In the circumstances he urged us to dismiss this appeal.
6. We have considered these submissions and carefully read the record of appeal. It is not in dispute that the child, PW1, was a daughter of the appellant. Though she was a child of tender years, the record shows that after *voire dire* enquiry, the trial court found that she understood the duty of telling the truth and that she gave a simple but frank account of how the appellant defiled her.
7. We concur with the concurrent findings of the two courts below that the child was indeed "*a credible witness*" who could not have been coached to tell the story she narrated to both the police and the Clinical Officer, PW3, who examined her and corroborated her testimony. It would be the height of incredulity to accept the appellant's claim, which, at any rate had no basis at all, that his prosecution was a frame-up founded on a grudge the *[particulars withheld]* manager harboured against him. There was no evidence of the manager knowing of the child's defilement leave alone having any grudge against the appellant.
8. In the circumstances, we are satisfied that the appellant's conviction was founded on overwhelming evidence. We therefore find no merit in this appeal and we accordingly dismiss it.

DATED and delivered this 10th day of December, 2015.

D. K. MARAGA

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR