IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 378 OF 2011

BETWEEN

PETER LOMOKETILO LOBASU.....APPELLANT

AND

REPUBLIC…….....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kitale (Muketi, J. (as she then was)) dated 20th December 2011,

in

H.C.CRA Case No. 77 of 2010)

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JUDGMENT OF THE COURT

This is a second appeal from the conviction and sentence of ***Peter Lomoketilo Losabu, the appellant***, for the offence of defilement contrary to ***section 8(3)*** of the ***Sexual Offences Act No. 3 of 2006,*** in which it was alleged that on 28th March 2010 in North Pokot District within the Rift Valley Province, the appellant penetrated into the vagina of ***MCK, (the complainant)*** a girl aged 12 years.

The brief facts of the case were that on the evening of 28th March 2010 at Kodich Centre, the appellant waylaid MCK whilst she was on her way to her grandmother's home. The appellant grabbed her and pushed her into a thicket where he defiled her threatening to kill her if she reported the matter. Despite that threat, MCK reported the assault to her grandmother who in turn reported the same to the Kacheliba Police. MCK was treated at Kacheliba District Hospital and was issued with P3 form that showed her hymen had been perforated.

The appellant was later charged with the said offence. Before the plea was taken, the substance and every element of the charge was stated to the appellant by the Court in a language that he understood, whereupon the appellant, when called upon, to plead replied:-

"True I penetrated the sexual organ of C aged 12 years".

Following this admission, the appellant was convicted and sentenced to 18 years. Being dissatisfied with

the decision of the trial court, the appellant appealed to the High Court which dismissed his appeal and upheld the conviction and sentence.

The appellant was further aggrieved by the decision of the High Court and filed this second appeal which is before us. In his grounds of appeal and submissions, the appellant contended that the charge sheet was defective as it omitted to include the words "…***section 8 (1)*** of the ***Sexual Offences Act No. 3 of 2006*** as read with…" and instead, reference was only made to ***section 8(3)*** of the ***Sexual Offences Act***; that during plea taking, the charge was not explained to him; that he had been intimidated by the police to make a confession and to admit the charges which confession was inadmissible; that the evidence before the court was inconsistent with the identity of the perpetrator of the offence; and that the High Court erred in failing to order a retrial.

Learned Prosecution Counsel, ***Mr. Mulati,*** opposed the appeal and submitted that it is evident from the record that the trial court explained each stage of the proceedings to the appellant. Counsel further submitted that the appellant could not be heard to complain that the plea was hurriedly taken for if he required more time to reconsider his position, he ought to have brought this to the attention of the court.

It is apparent that no reference was made in the charge sheet to ***section 8 (1)*** of the ***Sexual Offences Act.*** However, we find that no prejudice was suffered by the appellant as the charge sheet made it abundantly clear that he was facing the offence of defilement of a child between the age of twelve and fifteen years under ***section 8(3)*** of the ***Sexual Offences Act.*** The omission from the charge sheet of subsection (i) is curable under section 382 of the Criminal Procedure Code. Accordingly, we find that this ground is devoid of merit.

As concerns the complaint that the charge was not explained to the appellant, the proceedings were carried on in Kiswahili, a language the appellant understood. Further the trial court explained each stage of the proceedings to the appellant where he fully participated. We find this ground to be an afterthought and it therefore fails.

As to the contention that he was intimidated by the police and forced to make a confession, there is nothing in the proceedings before the trial court that can support this allegation. As a result, we must dismiss this ground.

On the issue that the P3 form did not disclose his identity, as Mr. Mulati rightly submitted, the P3 form was not intended to provide incriminating evidence against the appellant, but sought to demonstrate that the complainant had been sexually assaulted. In any event, the appellant having pleaded guilty to the charges, the question of his identity was not at any time in contention. Consequently, this ground also fails.

On the appellant's complaint that he was entitled to a retrial, there is nothing to show that the plea taken by the trial court was unlawful or irregular. The charges were read out and explained to the appellant in Kiswahili; a language that he understood. The appellant pleaded guilty, and as a result, he was convicted and sentenced as by law prescribed. We can find no basis upon which to interfere with the appellant's conviction and sentence. As a consequence, this appeal must fail, and it therefore dismissed.

It is so ordered.

DATED and DELIVERED at Eldoret this 10th day of December, 2015.

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