IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MWERA, OUKO & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO.7 OF 2012

BETWEEN

SAMWEL OTIMBA ESHIWANI…….....APPELLANT

AND

REPUBLIC.....…….... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Eldoret (Azangalala, J.) dated 10th November, 2011

in

HC.CR.A. NO.204 OF 2009)

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JUDGMENT OF THE COURT

The appellant herein has come before us on a second appeal, the first having been dismissed by the High Court (Azangalala, J.) as he then was on 10th November, 2011.

The appellant was charged in the Chief Magistrate's Court at Eldoret with the offence of defilement of a child at ***[particulars withheld]***, Lugari contrary to ***Section 8(1)*** as read with ***Section 8(3) of the Sexual Offences Act*** (No.3/06). He faced an alternative charge of committing an indecent act with a child contrary to ***Section 11(1)*** of the said Act. After trial he was found guilty of the charge of defilement and sentenced to 20 years imprisonment with effect from 16th November, 2009.

His appeal to the High Court at Eldoret was heard and dismissed on 10th November, 2011 thereby confirming the conviction and sentence.

Arguing the present appeal in person, the appellant had five grounds, stating that the actual date of the alleged incident was not ascertained; there was no independent witness called to testify; the identity of the complainant was vague and ambiguous in that she called herself as ***M M*** while other witnesses referred to her as ***M S***. Further, that there was contradiction in the evidence touching on STD infection and finally that investigation in the whole case was casual.

Asked if the appellant had something to add orally to his grounds of appeal, he told us that he was never a carrier of any STD. He had had medical examinations that did not disclose such an infection. He

termed the evidence against him a fabrication by one ***D S***, stating that this person was not a relative of the complainant. The record revealed that such a person did not testify in the lower court. One ***F S*** did but the appellant did not appear to know him. The appellant pleaded that he was an old man, with poor sight and asked us to reduce his sentence or release him on probation.

Mr. N. Mutuku, the Learned Senior Assistant Deputy Prosecuting Counsel, opposed the appeal by stating that witnesses (PW2, 5) referred to the date – 29.5.09 in the charge sheet. There was no error in the date. It was not necessary to summon local elders as independent witnesses because the appellant was caught red-handed by his wife, when defiling the complainant. And that claiming that the appellant had grudges with some witnesses (PW2 or PW3) lacked basis since the appellant had cross-examined them on that and they had denied the same.

Coming to the issue of having the appellant medically examined, it was not done as it was not found necessary in the light of the evidence laid and the learned judge had resolved the issue of single identifying witness. In closing, counsel told us that the prison term handed down was lawful and the appellant could not be released by this Court on that basis.

This being the second appeal we are bound by the dictates of ***Section 361(1) of the Criminal Procedure Code*** (Cap 75):

> ***"361(1) A party to an appeal from a subordinate court may, subject to subsection 8, appeal against the decision of the High Court in its appellate jurisdiction as a matter of law, and the Court of Appeal shall not hear an appeal under this section -***
>
> ***(a) on a point of fact and severity of sentence is a matter of fact; or***
>
> ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under Section 7 to pass that sentence."***

This mandates that the Court of Appeal, hearing a second appeal, should only do so on a point of law. This has been reemphasized in many cases including the following:

In the case of ***Njoroge Vs Republic [1982] KLR 388*** it was stated:

> ***"On this second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence."***

And in ***M'Riungu V Republic [1983] KLR 455*** this Court said:

> ***"Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."***

Having the foregoing statutory provisions, case law, and the grounds of appeal placed before us, we are unable to agree or glean from the grounds presented that all or any of them constituted a point of law before us. From the decisions of the trial court and the High Court it is clear that the actual dates in the charge sheet or in the evidence were not contradictory or if they were, they did not cause an injustice against the appellant. There was no need to call elders as independent witnesses, the appellant having been found in an act of defiling the complainant by his own wife whereupon a bitter row developed thereby throwing the whole incident to the public. We also were satisfied that whatever minor discrepancies in the name of the complainant were not material and they had occasioned no injustice.

Both courts were clear that one and only victim – the complainant, was the subject of the act complained of. And indeed the case was not about STD infection. It was about defilement. The learned trial magistrate definitely having ***Section 124 of the Evidence Act*** in mind stated in his judgment that he believed the complainant because her evidence was corroborated by that of her father and the appellant's wife having been at the scene. Further that her pants were torn and the doctor certified that her hymen was torn, evidencing penetration.

Finally, it was placed before us that investigations were casual to the extent that both courts below came to decisions that were bad in law. Our view is that the conclusions were on proper grounds and credible evidence. The sentence was lawful. Both the courts below found that way and we have no basis to interfere.

Accordingly this appeal is dismissed.

Dated and Delivered at Eldoret this 11th day of April, 2014

J. W. MWERA

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JUDGE OF APPEAL

W. OUKO

….....

JUDGE OF APPEAL

J. MOHAMMED

….....

JUDGE OF APPEAL

I certify that this is

a true copy of the original

REGISTRAR

/jkc