IN THE COURT OF APPEAL

AT ELDORET

CORAM: ONYANGO OTIENO, KARANJA & KOOME, JJ.A

CRIMINAL APPEAL NO. 71 OF 2011

WELLINGTON WANYONYI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kitale (Ombija, J) dated 7th April, 2011

in

H.C.CR.A. NO. 46 OF 2009)

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JUDGMENT OF THE COURT

The appellant in this second appeal, ***WELLINGTON WANYONYI***, was charged in the Chief Magistrate's Court at Kitale with the offence of Defilement of a child contrary to ***Section 8(1)*** as read with ***Section 8(4)*** of the Sexual Offences Act – Act NO. 3 of 2006. The particulars of that offence were that:-

"On the diverse dates between 8th December, 2006 and 10th March, 2007 Trans-Nzoia District within the Rift Valley Province, by use of your (sic) genital organ caused penetration into genital organ of CN a child aged 15 years."

There was alternative charge of indecent assault to a child contrary to ***Section 11(1)*** of the Sexual Offences Act – Act No. 3 of 2006. He denied both the main charge and the alternative but after hearing six prosecution witnesses, the learned Principal Magistrate (P.N. Gichohi) found that a *prima facie* case had been established and put him to his defence. Thereafter, the rest of the case was heard by Ochenja, Acting Principal Magistrate who took over the case having duly complied with the provisions of ***Section 200*** of the Criminal Procedure Code. The appellant gave his unsworn statement in defence. On 27th August, 2009, the learned Acting Principal Magistrate delivered a judgment in which the appellant was found guilty as charged in the main charge and after considering the mitigating circumstances by the appellant, he was sentenced to imprisonment for a term of 15 years.

The appellant felt dissatisfied with the conviction and sentence. He appealed against both to the High Court at Kitale. That appeal was heard by *Ombija, J.* who dismissed it in a judgment dated 4th April, 2011 but delivered by another Judge on 7th April, 2011. In dismissing the appeal, the learned Judge

stated inter alia as follows;-

"Even in the absence of an eye witness, I am persuaded that the injuries to the genitals of the complainant, as disclosed by medical evidence, corroborates the fact of penetration as defined in *Section 2* ***of the*** *Sexual Offences Act, NO. 3 of 2006.*

The complainant was positive that it was the appellant who severally defiled her. The complainant's evidence was straight forward, consistent and unshaken in cross-examination.

The complainant's age was confirmed by medical exhibit evidence as 15 years. This is supported by the evidence of PW2 and PW3 who were her parents. ….....

Against that backdrop of evidence, I find that the prosecution had fully discharged its burden under the law. The appellant was properly convicted. The case was proved beyond any reasonable doubt.

On sentence the appellant was given 15 years imprisonment. The maximum allowed under the law is 20 years. In my view the sentence was not excessive. It was reasonable given all the circumstances of that case.

For the above reasons the appeal against both conviction and sentence is dismissed."

Undeterred, the appellant has moved to this Court challenging that decision. He filed six grounds of appeal which were in summary that the prosecution case was not proved beyond reasonable doubt; that that evidence of the complainant should not have been relied upon in the absence of an eye witness to the incident; that evidence of the Clinical Officer who found that complainant was HIV negative and was not pregnant should have been considered in favour of the appellant by the High Court; that as he was examined and found to be HIV positive, it should have been considered that the appellant could have been infected if she had been defiled as she alleged and lastly that the learned Judge erred in rejecting his appeal.

The appellant had a posho mill situated about 50 metres from the house of ***PWS***. The evidence on record was that he was the one working at that Posho Mill most of the time although sometimes his wife would operate the mill in his absence. ***CN (PW1)*** was niece to ***EN (PW3)*** wife of P. She was living with P and E and had lived with them since her early childhood to the extent that she was for all intents and purposes treated as their daughter. She said during *voire dire* that she was 14 years old and was born in 1992, but her aunt E gave her age as about 15 years old and was in Std 5 at W Primary School. Sometime in the month of December, 2006, E sent her to mill maize at the appellant's Posho mill nearby. She obliged. Once at the Posho mill C said in evidence that although she was there before others, and should have been attended to earlier, the appellant who was the one operating the mill that day made sure that her maize was the last to be ground and that was after the other customers had left. He then gave the complainant mandazi and two sweets just before milling her maize. C thereafter returned home. The following day C was sent to the Posho mill again with maize for milling. He found the appellant who milled her maize. There were no other customers. The appellant then asked her to pay for the sweets and mandazi he had given her the previous day. She was surprised for she was not aware that they were to be paid for. The appellant hid her flour and then pulled her towards the mill, removed her pant and defiled her. She tried to scream but he threatened to cut her with a panga if she screamed. After he was through, he left her to go home. She took her maize flour and went home. She did not tell anyone. On another day, thereafter, the appellant again defiled her at a corner of the Posho mill. He then promised to take care of the child if she got pregnant. Thereafter it was a routine habit and C continued going to the posho mill from time to time and would be defiled by the appellant. This continued for about three (3) months and despite the promises made to her, the appellant did not take her. She developed fear of being infected with AIDS or being made pregnant. She then reported the incidents to P and E who organized a meeting with the appellant in the presence of a village Elder (Mukasa). That meeting did not yield much for at first the appellant had admitted that C report was true. Later he became hostile and walked out of the meeting never to return. A report was made to the Police and C was given P3 by the Police. ***Linus Ligale (PW4)*** a Clinical Officer at Kitale District Hospital examined the complainant and confirmed that she was about

15 years of age; had torn hymen and formed the opinion that some form of sexual harassment had been done on her that had torn her private parts. She was found to be HIV negative and was not pregnant. The appellant was arrested and taken to Nyayo Police Patrol Base and was later was handed over to Kitale Police Station. ***PC(W) Lilian Wekesa (PW6)*** investigated the case after the arrest of the appellant. The appellant was taken to Kitale District Hospital where ***Reuben Bunyasi (PW5)*** a Clinical Officer examined him and found that he was HIV positive. The appellant was thereafter charged as stated hereinabove. When put on his defence, the appellant said that on 17th March, 2006 (sic) he was summoned to a meeting by a village elder on grounds that it was alleged he had made a certain girl pregnant. He answered the summons from the village Elder. He thereafter went home where he stayed for two (2) weeks. He was arrested and sent for HIV test. C was summoned to the Police station but as she failed to respond, the appellant was released on Police bond. After two days, he went to court. He denied ever committing the offence.

Before us, the appellant conducted his own appeal. He put in written submissions which we have perused and considered fully.

This is a second appeal and that being so, by dint of the provisions of ***Section 361(1)(a)*** of the Criminal Procedure Code, only matters of law come up for consideration. The appellant's Posho mill and shop are only 50 metres away from the home belonging to P and E where the complainant lived. The complainant was sent to that Posho mill on many occasions. The appellant was most of the time working at the Posho mill and was thus milling complainant's maize. The complainant, at the commencement of her evidence clearly identified the appellant. We have no doubt in our minds, like the trial court and the first appellate court that the complainant properly identified the appellant as the person who molested her on all those occasions. In fact they even discussed the fate of the complainant during those occasions when he defiled her. The Clinical Officer's evidence was clear that the complainant was defiled and her hymen was torn. There was no suggestion at any stage that any other person could have been responsible for that act that resulted into the complaint's hymen being torn.

The appellant makes heavy weather of the finding by Linus that the complainant was HIV negative while Reuben, another Clinical officer tested him and found him HIV positive. His view was that if he had defiled the complainant, then she would have been infected. In our considered view, nothing turns on those two findings by the Clinical Officers. First, it is not a must that where an HIV positive person has carnal knowledge of an HIV negative person then the HIV negative person must be infected. All we know is that whereas it is likely that such a scenario may ensue, it is not a must and there must be several occasions when infection may not be the consequence of sexual intercourse between the two. Secondly, and in any case there are cases of discordant couples. These are situations where one HIV positive person can live with another who is HIV negative person and yet no infection takes place. We thus do not attach any importance to that piece of medical evidence.

Lastly while on the conviction, the appellant submits that the evidence of the complainant should not have been relied on as there was, according to him no proper corroboration of that evidence. The Clinical Officer's evidence on the findings of torn hymen clearly corroborates the complainant's evidence coupled with the fact that when she suspected that the appellant might make her pregnant or infect her with AIDS she reported to her aunt and uncle what the appellant had all along done to her. We do not assign any weight to the allegations that the appellant admitted before P, E and the complainant that the complainant's report was true, as in law that was not admissible, nonetheless, the complainant's reporting to her guardians what had been happening to her to a large extent confirms that she was speaking the truth for there was no evidence that she was prompted by anybody into offering that information.

Having considered all aspects of the appeal, we are not persuaded to accept that it is merited as far as conviction is concerned.

On the sentence, we agree with the High Court that considering that the maximum sentence provided by law is 20 years and that the appellant took advantage of the complainant who was a child in school and violated her several times over a period, the sentence of 15 years imprisonment cannot be said to be excessive. In any event as this is a second appeal, we have no jurisdiction to consider the severity of

sentence as that is treated as a matter of fact. See ***Section 361(1)(a).***

In conclusion, this appeal lacks merit. It is dismissed in its entirety.

DATED and DELIVERED at ELDORET this 30th day of January, 2013.

J.W. ONYANGO OTIENO
….....
JUDGE OF APPEAL

W. KARANJA
….....
JUDGE OF APPEAL

M.K. KOOME
….....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR