IN THE COURT OF APPEAL

AT ELDORET

(Coram: Mwera, Ouko & Mohammed, Jj.A)

CRIMINAL APPEAL NO. 67 OF 2011

BETWEEN

SULEIMAN EDUNG …..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(*APPEAL FROM THE JUDGMENT OF THE HIGH COURT OF KENYA AT KITALE (OMBIJA, J) DATED 4TH APRIL 2011*

IN

HCCRA NO. 24 OF 2010

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JUDGMENT OF THE COURT

The appellant, who was an assistant chief of [particulars withheld] Sub-Location in the former Turkana South District was charged under **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act** with the offence of defilement of a girl aged 15 years. It was the prosecution case that on the day in question, the complainant, who was a neighbour of the appellant went to the appellant's home with the latter's daughter, her foster parents having gone to church that morning. When they returned home later in the day, the complainant was not at home. They went to the appellant's home to look for her. As the complainant was being hidden in the appellant's home, they returned without her. It was not until 10pm when the complainant came back. After being beaten by her foster father, she disclosed she had been with the appellant who she said was treating her as his wife. She further explained that besides that particular day (4th January, 2009) she had sex with the appellant in the past since August 2008.

The matter was reported to the police and the complainant examined by a clinical officer, who found that her hymen was broken and that she was pregnant thereby leading the clinical officer to the conclusion that she had sexual contact.

For his part in defence, the appellant called evidence that although the complainant was at his home on the day under review, she had gone there without his invitation; that she left her with his daughter while he went to resolve a local dispute over a bull. That upon returning home, the complainant had not returned to her home, and was hiding in his mother's house when the complainant's mother came

looking for her.

After a full trial, in which 6 prosecution and 5 defence witnesses testified, the trial court (T. Nzyoki, SRM) found the charge proved beyond reasonable doubt and upon conviction sentenced the appellant to 20 years imprisonment. The appellant being aggrieved by that moved to the High Court where he challenged the decision of the trial court. The High Court after re-evaluating the evidence on record found no basis to disturb the decision of the trial court, prompting this appeal.

Before this Court the appellant has listed in his home-made *"Grounds of Appeal"* 7 grounds which were condensed as follows:-

i) that the charge was defective

ii) that the medical officer who completed the P3 form did not testify

iii) that there was no proof of the complainant's age

iv) that the prosecution case was contradictory

v) that the appellant's defence was ignored.

Before us, the appellant who was unrepresented, in arguing these grounds urged us to find that there was no evidence linking him with the defilement of the complainant; that it was possible to ascertain if he was responsible for the complainant's pregnancy by subjecting the complainant's new born baby to a DNA examination. He emphasized that both courts below ignored his evidence that the complainant was infact 18 years at the time of the alleged offence hence the charge of defilment was inapropriate.

Mr. Mutuku, learned counsel for the respondent, opposed the appeal on the grounds that the evidence the appellant intended to rely on in proof of the complainant's age was not admitted in the proceedings; that there was no attempt to re-introduce that evidence in the first appellate court. Regarding the evidence of defilement, counsel submitted that the appellant was not charged with impregnating the complainant but with an act of defilement which was proved by the prosecution to have taken place on 4th January 2009.

We have carefully considered these arguments together with the records of both courts below. No authority is required for the statement that this being the second appeal, only matters of law ought to be considered and that this Court will be slow to interfere with concurrent findings of fact of the two courts below unless the findings were based on no evidence at all or on a perverted appreciation of the facts.

The concurrent findings of fact made by the two courts were that the complainant was 15 years at the time she was defiled; that on the material day the complainant was at the appellant's home the whole day and only returned to her foster parent's home at 10pm. The courts also found that the appellant was pregnant at the time but had also been defiled on that day. Both courts considered and dismissed the appellant's defence, first that the whole day he was at a *baraza* resolving a dispute between two residents of his sub-location who had disagreed over a bull, and secondly that the offence of defilement was not proved on account of the complainant's age which, according to him, was 18 years.

On our own assessment, these findings of fact challenged by the appellant were made on sound evidence and we find no merit in the grounds raised regarding then. Regarding the P3 form, we are satisfied that it was completed by the officer who presented it at the trial, PW3, Bernard Bundotich. The age assessment report, on the other hand, although to our naked eyes appears to be in the same handwriting as the writing in the P3 form, bears the name Michael Roposh Sirgor. The report was however produced along with P3 form by PW3, Bernard Bundotich, in accordance with **Section 77** of the Evidence Act. No issue turns on this ground.

Further we are in no doubt that in totality there was overwhelming evidence linking the appellant

with the offence of defilement of the complainant. As the law requires in **Section 124** of the Evidence Act, where in sexual offences the only evidence is that of the victim, the trial court can nonetheless convict on that evidence if for reasons to be recorded, the trial court is satisfied that the alleged victim is a witness of truth. It is apparent from the record that the learned trial magistrate was alive to this duty and in relying on the complainant's evidence, he said:-

> **"PW2 R. in evidence implicated the accused person a local administrator as the man who defiled her. She was not under any threat or fear during the proceedings held in camera. Her evidence in chief and during cross-examination was consistent. Both the accused person and the complainant PW2 R. were persons well-known to one another. I have weighed the evidence of the complainant against that of the accused person. In the circumstances of this case and in the absence of any other evidence to the contrary, I find no reason to doubt the testimony of PW2 R. that on the material day she was defiled by the accused person who was at home between 6.30pm – 10.00pm when the offence was committed."**

The appellant had the opportunity to commit the offence either before or after the *baraza.* The complainant instantly gave his name to her parents and upon being examined by the clinical officer was found to have had sexual contact. She explained that she had engaged in sexual intercourse with the appellant for about seven months before the date in question. Although there was no forensic evidence linking the appellant with the complainant's pregnancy, the circumstances of the case were such that that could not be ruled out. Perhaps that is why the complainant thought the appellant was treating her as his wife.

In the result, we find no basis to interfere with the decision of the High Court and accordingly dismiss the appeal in its entirety.

Dated at Eldoret this 17th day of October 2013.

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

DEPUTY REGISTRAR