



**IN THE COURT OF APPEAL OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL 8 OF 2007**

**LAZARO KUNDU SIMIYU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Kitale (Karanja, J) dated 2<sup>nd</sup> March, 2007*

**in**

**H.C. CR.A. NO.63 OF 2006)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is the second and last appeal by **Lazaro Kundu Simiyu** (hereinafter “*the appellant*”) who faced a charge of defilement of a girl contrary to **section 145(1)** of the Penal Code before Kitale Principal Magistrate, Mrs. C. Chepseba. It had been alleged that on the 12<sup>th</sup> day of January, 2003 at Trans Nzoia District in Rift Valley Province, he unlawfully had carnal knowledge of **EM**, a girl under the age of fourteen years. After a full trial, the learned Magistrate did not find the charge of defilement proved but held that he was guilty of the lesser offence of attempted defilement. He was sentenced to serve 20 years in prison with hard labour. The appellant was dissatisfied with the conviction and sentence and so appealed to the superior court. Upon reviewing and re-evaluating the evidence on record, the superior court (Karanja, J.) held that the offence of defilement was committed and she altered the conviction accordingly. The sentence meted out by the trial Magistrate was however upheld. The appellant now comes before us in this last appeal in which we may only consider points of law - see **section 361** of the Criminal Procedure Code.

In his memorandum of appeal, drawn in person, the appellant puts forward the following issues:-

“*The courts below erred in law and fact in –*

- *holding that the state had proved their case beyond all reasonable doubts without observing the enormous contradictions and discrepancies which cause doubt to their case.*

- *relying on the evidence of PW1 and PW4 to uphold the conviction without observing that no laboratory test was undertaken upon the allegation of rape (sic) to prove that there was intercourse.*
- *the P3 form exhibit adduced by PW4 in support of the evidence of PW1 is fatal in that PW4 did not fill section C (5) of the form to confirm whether any laboratory tests were undertaken.*
- *there was no prompt and cogent first report of the alleged incident put to the authority in support of the alleged offence.*
- *failing to observe that the failure to avail the much mentioned mother of the subject to give evidence in the matter was fatal to the state case.*
- *this case was not investigated as the law enjoins in such a serious charge since nobody gave evidence as to the investigations carried out.*
- *failed to attach any due weight to my defence statement and the need to outline cogent reasons before making a decision to reject the same since burden of proof was shifted upon me.*
- *The sentence imposed upon me is harsh and excessive.”*

What were the facts established by the two courts below?

EV (PW1) (**EV**), was a 12-year old standard 5 pupil in T. Primary School in Kitale. The appellant is her paternal uncle as he was the son of **EV**'s father's sister. He had stayed with the family for two months and he was working as a matatu tout in Kitale town. On Sunday 12<sup>th</sup> of January 2003, **EV**'s mother left for church while her father, **SM** (PW2) left to attend the funeral of his cousin. They left their three children under the care of the appellant. At about 2 p.m, **EV**, the eldest of the children, was lying on her bed in the kitchen listening to the radio. The appellant was also sitting on the same bed repairing the radio. Then **EV** fell asleep. Suddenly she felt some weight on top of her and pain in her private parts. She woke up. She saw the appellant jump off the bed without his trousers and only a vest on. She screamed but no one responded. The appellant had pushed her party to the side without **EV** feeling it. She got off the bed and started crying, telling the appellant that she would report him to her father. He pleaded with her not to report him and promised to give her 200/= . She went to the main house and the appellant took a bath and disappeared.

At 7 p.m. her parents arrived home and she told them what the appellant had done to her. The matter was reported to Kitale Police Station and **EV** was referred to Kitale District Hospital for medical examination. **Peter Jimmy Simiyu** (PW4), a clinical officer at the hospital examined **EV** the day following the incident and confirmed that **EV** had laceration of the labia minora and had a fresh perforation of the hymen. She also had slight bleeding. He took a high vaginal swab (HVS) to the laboratory and dead spermatozoa were seen. The conclusion of the clinical officer was that sexual intercourse took place and there was penetration.

Meanwhile the appellant was not found since his disappearance from **SM**'s home on 12<sup>th</sup> January, 2003 until 23<sup>rd</sup> January, 2003, when **SM** found him at Kitale bus stage touting for matatus and arrested him. He took him to **Pc. James Rutto** of Kitale Police Station who was at the report office on 23<sup>rd</sup> January, 2003, and the appellant was rearrested and charged with the offence of defilement.

In his unsworn defence, the appellant confirmed that he was **SM**'s cousin and therefore **EV**'s uncle, and that he was a matatu conductor living with the family. In his evidence, he had lived with the family since 1998, and in that period he had given

**SM** some Kshs.16,800/= to bank for him. On the day in issue, 12<sup>th</sup> January, 2003, the appellant asked **SM** to give him his money but **SM** was rude to him. **SM** wished the appellant's mother was dead so that their relationship could end. That is when **SM** left the house and left the appellant repairing the radio. He was also left with the three children in the family who later accompanied him to collect water from the river for the cattle. After that he washed his clothes and left for town. He did not return but instead went to stay with his employer's sister at Matano estate in Kitale as he carried on his matatu conductor business. That is where **SM** found him and lured him to Kitale Police Station where he was arrested and charged with an offence he knew nothing about. He protested his innocence and asserted that **EV's** father, **SM**, had framed him with the offence after he demanded his money from him.

In her evaluation of the evidence, the learned trial magistrate found the prosecution case proved save for the allegation that there was defilement of the complainant **EV**. In her view, penetration was not achieved and therefore only the offence of attempted defilement was proved. In arriving at this conclusion the learned magistrate discounted the evidence of the clinical officer because, in her view, the medical examination of **EV** was made four days after the incident and the observations made by the clinical officer were therefore unreliable. The superior court however found, and correctly so, that the learned magistrate misdirected herself on the date of examination of the complainant and completion of the P3 form. The examination and the completion of the form were done on different days, but the operative date was the date of the medical examination. In this case it was one day after the incident while the P3 form was completed four days later. In the end, the learned Judge believed the evidence of the clinical officer that sexual intercourse had taken place and penetration had been achieved, with the result that the offence of defilement was committed.

There were concurrent findings on the identity of the appellant in reliance on **EV's** testimony. The learned trial magistrate who had the advantage of seeing her testify found that she was a truthful witness, even in the absence of corroborative evidence. The magistrate referred to **section 124** of the Evidence Act as amended by **Legal Notice No. 5/03** and stated:

**“She was consistent, credible and convincing in her testimony on how the attempted defilement took place where and by whom. The medical document (P3) is corroborative enough of the defilement or attempted defilement. She was alone in the kitchen with accused and of course there is no other eye witness to the offence. This court believes her evidence therefore.”**

And later:

**“The complainant's testimony was elaborate and clear and her demeanor was not that of a coached witness without feelings. Or a conscience at all(sic). She appeared traumatized indeed as she recalled what had happened to her in January, 2003, as she testified in November 2003. The accused did not satisfy court that any sane man can coach his young child to stage an act of defilement.”**

The superior court found no reason to differ with that assessment. Both courts below also analysed the defence put forward by the appellant and dismissed it as *“of no consequence”* since it could not displace the strong prosecution case. In the end the superior court concluded: -

**“The act of defilement was actually not disputed. The complainant was indeed defiled on 12/1/2003. This was confirmed by the P3 form produced in evidence by PW 4. I have observed from the proceedings in the trial court that the trial magistrate did consider the defence offered by the appellant herein. She disbelieved it. I am also of the same view. The complainant was not party to any money transactions between her father and the appellant, she had no reason therefore to fabricate the case against the appellant who was her uncle. As noted earlier, they had stayed**

together for a long time. She could not mistake him for any other person. The fact that he moved out of PW2's home that same day without even saying goodbye after living with the family for a long time is in itself quite telling. That was the conduct of a guilty person."

As stated earlier, several grounds have been put forward to challenge the findings of the two courts below, but the appellant did not address us specifically on those grounds. He simply put them forward for our consideration. On the whole the grounds question concurrent findings of fact made by the two courts below, but we are not at liberty to indulge in fresh evaluation of the evidence unless those findings are based on no evidence at all or on a misapprehension of the evidence – see **M'Riungu v Republic [1983] KLR 455**. We have observed that there was a misdirection by the trial magistrate who misconstrued the medical evidence of the clinical officer but that error was corrected by the superior court. We agree with the superior court in that regard. We do not find, as contended in the memorandum of appeal, any other material "*contradictions and discrepancies*"; identification of the appellant in the act was wholly dependent on the credibility of the complainant which we have no reason to doubt; and the defence of the appellant was duly considered and rejected. The appeal on conviction, as correctly submitted by learned Senior Principal State counsel, Mr. Omutelema, was unmeritorious and we reject it.

The appellant however complains that the sentence imposed on him was harsh and excessive. That ground of appeal would have been summarily rejected since, on the face of it, relates to severity of sentence and therefore a factual matter. But the issue has caused us some anxiety and concern because it is not clear to us that the principles of sentencing that obtained when the offence was committed were applied in sentencing the appellant or, as it seems to us, different considerations influenced the sentencing. In that event the lawfulness of the sentence would invite this court's intervention under **section 361 (1) (b)** of the Criminal Procedure Code.

The offence herein was committed on 12<sup>th</sup> January, 2003. This was long before the amendment to **section 145 (1)** of the Penal Code by **Legal Notice No. 5/03** to increase the age of the girl-child from 14 to 16 years and to provide life imprisonment with hard labour. It was also long before the **Sexual Offences Act 2006** came into force to provide for minimum sentences for several offences including defilement under **section 8**. The section now provides in part:

**"8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

**(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**

**(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term or not less than fifteen years."**

Those are minimum sentences and Parliament appears to give no discretion to the courts to impose sentences below those minimum sentences. The provisions accord with the prime objective of the Act, which are "*prevention and protection of all persons from harm from unlawful sexual acts.*" Those provisions, however, could not have been applied in the trial of the appellant. **Section 145 (1)** of the Penal Code under which he was charged provided for a maximum term of imprisonment of 14 years together with corporal punishment. It also gives judicial discretion in sentencing depending on the circumstances of each particular case. An accused person under those provisions was "*liable to imprisonment with hard labour for fourteen years together with corporal punishment*". In **Fred Michael Bwayo v Republic Cr. appeal No. 130/07**, (unreported), this Court discussed at some length, a similar issue and came to the conclusion that the principles of sentencing were erroneously applied, and reduced the sentence. In this case the sentence meted out on the appellant was clearly unlawful. We must therefore set aside the sentence of 20 years imprisonment with hard labour. We substitute therefor a sentence of 10 years

imprisonment with hard labour, from the date of conviction of the appellant by the trial court i.e 22<sup>nd</sup> June, 2006. To that extent only shall we interfere. The appeal is otherwise dismissed.

***Dated and delivered at Eldoret this 29<sup>th</sup> day of May, 2009.***

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**