REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 78 OF 2019

CHRISTOPHER ESEVWE SUMBA ....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment by Hon. R. K. Langat, Chief Magistrate in Migori Chief Magistrate's Court Criminal Case No. 18 of 2019 delivered on 28/11/2019).

JUDGMENT

Christopher Esevwe Sumba, the appellant was found guilty and convicted for the offence of defilement contrary to Section 8(1) & (3) of the Sexual Offences Act by Hon. Onyango Chief Magistrate, on 25/11/2019.

The particulars of the charge were that on 21/9/2018 at [Particulars Withheld] area, Kakrao Lower Location within Migori County, intentionally caused his male genital organ namely penis to penetrate the female organ, namely vagina, of A. A. a child aged fifteen (15) years old.

The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act in that he intentionally touched the female genital organ of the child A.A. Upon conviction, he was sentenced to serve fifteen (15) years imprisonment. No finding was made on the alternative charge.

Being dissatisfied with both the conviction and sentence, the appellant preferred this appeal. The petition of appeal only contained two (2) grounds, that the offence of defilement was not proved to the required standard and that the defence was not considered.

The Court gave directions that the appeal be canvassed by way of written submissions. The appellant filed his submissions on 10/11/2020.

Mr. Kimanthi, Learned Counsel for the State made oral submissions. This being a first appeal, it behoves this court to review all the evidence that was tendered before the trial court, analyze it and arrive at its own findings. Of course the court has to take into account the fact it did not have the opportunity to see or hear the witnesses testify, an advantage that the lower court had. I am guided by the Court of Appeal decision in **Okeno vs Republic (1973)EA 32.**

The Prosecution Case.

The prosecution called a total of four (4) witnesses in support of its case. PW1, A.A., the complainant, testified that on 21/8/2018

about 1:00 p.m, she was going home from school when Osembo (appellant) came out of the sugarcane, got hold of her, pulled her into the sugar cane planation, removed her pant as he held her neck with the elbow as he threatened her not to make noise. The appellant also removed his pant and inserted his penis in her vagina forcefully as a result of which she felt pain and bled.

PW1's mother **PW2 LA** was away and when she returned on Saturday, PW1 informed her what had happened and they reported the matter at Migori police station where they were issued with a P3 Form that was filled by a Doctor. PW1 also stated that a boy by the name Meja who was up on avocado tree saw accused pull her to the sugarcane plantation and shouted; that the same boy reported to her teachers on Monday. PW1 said that she had known accused who lived in the home of one of their female teachers since 2017. In cross examination, she denied that she had a relationship with the appellant before that date. She identified her clothes and torn pant that were produced as exhibits.

PW2 recalled that she was away from her home on 21/9/2018 but returned on 22/9/2018 when PW1 reported to her that she had been defiled by Osembo Osevwe, the appellant. Being a Saturday, she was advised to take PW1 to the clinic on Monday where she was examined and they then reported to Migori Police Station and were referred to Migori Referral Hospital. PW2 knew the appellant before.

PW3 Moindi Justus Mageta, a Clinical Officer based at Migori Referral Hospital examined PW1 on 1/8/2018. He did not find any bruises on the genitalia and she had no hymen. High vaginal swab revealed that she had a sexually transmitted disease.

PW4 PC Ann Nishoree of Migori Police Station issued PW1 with a P3 Form on 27/9/2018 following an earlier report of defilement. She re-arrested the appellant on 17/2/2019 after being arrested by Administration police officers.

Defence Case

In his defence, the appellant only talked of his arrest on 17/3/2019. He denied the offence and alleged that a grudge existed between him and one Irene Ayiego whose dog bit his wife and also over a piece of land she had leased.

Appellants Submissions

In his submissions, the appellant stated his right to be informed of the charge in a language he understood was infringed; that he was not given a fair trial; that he was not informed of his right to be represented by an advocate and have one assigned to him; that the complainant was not taken to hospital immediately and in any case, she had had intercourse with other partners before; that though the complainant complained to have had tears, the doctor did not find any and therefore, there was no proof of penetration.

Respondent's submissions.

The State opposed the appeal. Mr. Kimanthi submitted that the offence was committed in broad day light at 1:00 p.m, that PW1'S evidence was corroborated by that of PW2. PW1's age was confirmed to be fifteen (15) years and the sentence was proper. As to corroboration, counsel urged that Section 124 of the Evidence Act allows the court to convict on uncorroborated evidence of the victim.

I have considered the appeal and the oral submissions of the parties. I will first address the allegations that the appellant rights were infringed.

Article 50(2) of the Constitution guarantees an accused person's right to fair trial. Under Article 50(2)(m) an accused is entitled to the assistance of an interpreter without payment by the accused where the accused person cannot understand the language used at the trial. The appellant contends that he did not understand the Kiswahili language used at the trial because he is a luhya. I have seen the record. Indeed the interpretation was English to Kiswhili from the date of plea. However, at the time did the appellant complain that he did not understand Kiswahili. He actively took part in the proceedings when he cross examined the witnesses and even gave his unsworn statement in Kiswahili. I find that the appellant did understand Kiswahili language and his right to an interpreter was not breached at all.

The right to representation is guaranteed under Article 50(2)(g) of the Constitution. There is no evidence that the appellant needed counsel and the court failed to allow him to represent him. As to the right to counsel availed by the State under Act 50(2)(h), so far the State has not made provision for counsel for persons accused of serious offences except murder.

In a charge of defilement under Section 8(1) of the Sexual Offences Act, the prosecution has to establish that the following ingredients exist.

1) **Penetration;**

2) Age of the victim;

3) Proof of identity of the perpetrator.

PW1 told the court that she was fourteen (14) years at the time of her testimony. She was subjected to an age assessment by Dr. Otieno, a Dental surgeon at Migori County Referral Hospital who assessed her age at fifteen (15) years. The assessment was done on 19/3/2019 and the offence had taken place in 21/9/2018. The Respondent was therefore about fourteen to fifteen (14-15) years of age at the time of the alleged offence and therefore a minor.

The accused was not a stranger to the complainant. PW2 corroborated PW1's testimony that the appellant lived in the neighbourhood. The offence occurred at 11:00 p.m. in broad daylight. There is no possibility of mistaken identity. PW1's defence was very unconvincing due to the inconsistencies therein. During cross examination of PW1, he alleged that there was a love affair between him and PW1 but PW1 denied it. Even if there had been a love affair, PW1 remains a minor and if they had engaged in sexual activity, the appellant would be guilty of defilement anyway.

Later in his defence, the appellant claimed that he was framed by one Irene Ayiego but he did not demonstrate how the said Irene Ayiego was related to PW1. Besides, he never raised these allegations of grudge when PW1 and 2 testified so that they could respond to the said allegations. The defence was an afterthought and untrue.

Penetration is defined in Section 2 of the Sexual Offence Act **" means the partial or complete insertion of the genitals organs of a person into the genital organs of another person."**

PW1 clearly explained that after she was pulled into the Sugarcane plantation, the appellant removed her biker and pant and inserted his penis in her vagina. She reported this incident to PW2 the next day when she returned home. It was a weekend and so on the next Monday, the matter was reported to the police and the complainant was taken for treatment in a local dispensary before she was seen and treated at Migori County Referral Hospital. Unfortunately, the medical records from the medical facility where PW1 was first seen were not availed in court. The complainant admitted that she had once engaged in a sexual activity with another boy. The period taken before PW1 was examined and the fact that she engaged in another sexual activity may explain why no injuries were found on her genitalia. However, the fact that PW1 may have been involved in other sexual activity with another man does not give licence to the appellant to do the same. PW1 is a minor and having sexual activity with a child is an offence of strict liability. It did not matter whether she consented. She had no capacity to consent

As to the allegation that there was no corroboration of PW1's Evidence, Section 124 of the Evidence Act does not require corroboration in sexual offences. It is sufficient if the court believes the victim and reasons are given for such belief The trial court gave reasons for its findings and I have no reason to differ from the said judgement. The conviction is sound and I hereby affirm it.

The appellant's contention that his defence was not considered is baseless. It is clear from the trial court's judgment that the Court considered and dismissed the defence that the appellant was framed.

The appellant was sentenced to fifteen (15) years imprisonment. The complainant was aged about fifteen years at the time of the offence and under Section 8(3), Sexual Offence Act, he should have been sentenced to not less than twenty (20) years. The sentence is not illegal. However, in exercise of my discretion, I hereby set aside the sentence of twenty (20) years and instead sentence the appellant to ten (10) years imprisonment. The sentence will run from the date the appellant was sentenced on 28/11/2019. The

appeal succeeds to that extent.

Dated, Signed and Delivered at Migori this 17th day of December, 2020

R. WENDOH

JUDGE

Judgment deliavered in open court and in the presence of: -

Mr. Kimanthi. State Counsel

Ms. Nyauke & Josephine Court Assistant

Appellant (virtually)