REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 141 OF 2010

COLLINS AKALA LUSAYI……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(BEING AN APPEAL FROM THE ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 2024OF 2010 REPUBLIC VS COLLINS AKALALUSASIIN THE RESIDENT MAGISTRATE'S COURT AT KAPSABET BY G. MUTISORESIDENT MAGISTRATE ON 10TH SEPTEMBER 2010)

JUDGMENT

1. The appellant was convicted for the offence of defilement of a child aged nine years contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to life imprisonment. The appellant has appealed against his conviction and sentence. The petition of appeal was filed in Court on 23rd September 2010. There are five grounds of appeal. First, that the charge was not proved beyond reasonable doubt; secondly, that there was no clear medical evidence to connect the accused with the offence;thirdly, that critical witnesses were not called and that police investigations were incomplete or shoddy; fourthly, that the court disregarded the appellant's defence; and lastly, that the trial court did not give reasons for convicting the appellant. The appellant has filed written submissions in support of the appeal. At the hearing of the appeal, the appellant stated that he would rely wholly on those submissions.
2. The appeal is contested by the State. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses. See *Njoroge v Republic* [1987] KLR 99, *Okeno v Republic* [1972] EA 32, *KariukiKaranja v Republic* [1986] KLR 190.
3. When the charges were first read out to the accused on 19th May 2010, the appellant pleaded guilty. A plea of guilty was entered. He was remanded awaiting the facts of the charge. On 7th June 2010, the charges were read afresh. He changed his mind and pleaded not guilty. The case was fixed for hearing on 10th September 2010. On that date, the complainant (PW1), his mother (PW2) and one other witness (PW3) testified. In a nutshell, their evidence was that the appellant defiled the complainant on the night of 15th May 2010 by inserting his penis in the complainant's anus. The complainant was a boy aged nine. This was clear from the mother's evidence, the P3 form (exhibit 1) and the child's immunization form (exhibit 2). The offence occurred at about 8.00 p.m on the material day at [particulars withheld] Nandi North District. The appellant was a *shamba* boy employed by the complainant's mother. He had been employed only three days earlier. He had lured the boy to sleep with him in the kitchen. The appellant did *not* cross-examine any of the witnesses.

4. After the testimony of the three witnesses, the appellant changed his mind again. He informed the court that he now wished to plead guilty. The charge was read over again in *Kiswahili*. He pleaded guilty. The prosecutor relied on the facts as pleaded by PW1, the complainant. The accused confirmed those facts were true. The accused was then convicted on his *own* plea of guilty.
5. I find that the appellant's plea of guilty was unequivocal. The appellant submitted that he was not warned of the consequences of pleading guilty. From the lengthy history of the trial, that allegation is without foundation. His further submission that the plea was involuntary is clearly an afterthought. It follows that the argument that the evidence was insufficient, or that police investigations were incomplete or that certain witnesses were not called is all water under the bridge. It is to turn logic onto its head for the appellant to now state that his *defence* was not considered by the trial court. The appellant opted to concede *unequivocally* to the charge after hearing the clear testimony of three witnesses.
6. One ground put forth by the appellant is that the charge was *defective*. In the appellant's view, he should have been charged with an offence against the order of nature under section 162 of the Penal Code. That is a misreading of the Sexual Offences Act. Section 8 of the sexual offences Act deals with defilement of*any* child. The sex does not truly matter. A child under the Act has the meaning ascribed to it by the Children Act, which means, one below 18 years. The charge sheet contains the details of the offence, the penal section, the particulars, the date of offence and the names of the appellant and complainant. I have not found anything capable of impeaching the charge sheet.
7. The appellant submitted that the sentence was manifestly excessive. The prosecution confirmed that theappellant was a first offender. The appellant did not offer *any* mitigation to the trial Court. He is trying to reopen the matter on appeal. It is a little wee late. Furthermore, under section 8(2) of the Sexual Offences Act, defilement of a child below eleven years attracts imprisonment for life. The complainant was nine years. He was in class one. This is a grave offence perpetrated against a defenceless child. The complainant is a vulnerable person as defined in section 2 of the Sexual Offences Act. He will carry the scars for life. It is thus fitting that the appellant spends the rest of his life in jail. In the end I uphold the conviction and sentence imposed by the learned trial Magistrate. This appeal is accordingly dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 25th day of October 2013

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of Mr……for the appellant.

Mr……for the State.

Mr. P. Ekitela, Court Clerk.

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