



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tirigoi v Republic (Criminal Appeal 104 of 2018)  
[2022] KEHC 10040 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 10040 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL 104 OF 2018**

**LK KIMARU, J  
JULY 25, 2022**

**BETWEEN**

**SAMWEL YEGO TIRIGOI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising out of conviction and sentence of Hon. C.M. Kesse  
(Senior Resident Magistrate) in Kitale Chief Magistrate's Court  
Criminal Case (S.O) No. 42 of 2018 delivered on 14 th November 2016)*

**JUDGMENT**

1. Samwel Yego Tirigoi, the Appellant herein, was charged with the offence of defilement of a child contrary to Section 8 (1) as read together with Section 8 (4) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between December 15, 2015 and February 10, 2016 at [Particulars Withheld] village within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of ENN, a child aged sixteen (16) years old. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between December 15, 2015 and February 10, 2016 at [Particulars Withheld] village within Trans-Nzoia County, the Appellant intentionally caused the contact between his penis and the vagina of ENN, a child aged sixteen (16) years old. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted on the main charge and sentenced to serve fifteen (15) years imprisonment.
2. The Appellant was aggrieved by his conviction and sentence. His grounds of Appeal were that the trial court convicted him in the absence of the testimony of a key witness. He stated that the Prosecution failed to discharge its burden of proof to the required standard. He faulted the trial court for relying on the Complainant's incredible evidence. He lamented that his right to a fair trial was infringed in



- two ways; firstly, the trial court denied him an opportunity to have the case heard de novo. Secondly, he was not represented by an advocate. Finally, he faulted the trial court for rejecting his defence.
3. The Appeal was heard on the basis of the parties' rival written submissions. The Appellant submitted the age of the Complainant was not proved beyond any reasonable doubt since no documentary evidence was adduced to ascertain her age. He added that since the paternity of the Complainant's child was not established, doubt was cast as to whether the Appellant was the perpetrator. He submitted that it was critical for the trial court to analyze the conduct of the Complainant and her testimony. She only admitted the offence after it was discovered that she was pregnant. In his estimation, since the Complainant was five (5) months pregnant as at the time she was seen by PW3 on March 10, 2016, then she could only have conceived in October 2015 and not December 2015 as indicated in the charge sheet. He accused the trial court of infringing his constitutional rights since he was not informed of his right to legal representation. He lamented that the trial court ought to have afforded him an opportunity to have the trial proceed de novo on his request. In rejecting his defence, the Appellant suggested that the trial court ought to have furnished good reasons.
  4. Miss. Mumu, Learned Prosecutor for the State, submitted that all the ingredients to establish the charge of defilement had been sufficiently proved. She submitted that the trial court was right in rejecting the Appellant's defence since it was weak. She added that the evidence adduced was corroborated and consistent. She finally submitted that the sentence meted on the appellant was lawful. She urged the court to uphold the conviction and affirm the sentence that was imposed on the Appellant.
  5. The Prosecution called a total of four (4) witnesses in a bid to establish the charges preferred against the Appellant. The Complainant ENN was sixteen (16) years old at the time of the alleged offence. She dropped out of school after completing her primary education as she became pregnant. She recognized the Appellant as a sugar vendor. On December 15, 2015, the Appellant picked the Complainant from her homestead. She slept over and returned home the following morning. They had sexual intercourse. During her testimony, the trial court observed that the Complainant was smiling and went silent when asked questions. She testified that she would normally get her period on the 5<sup>th</sup> of every month. Following their sexual relations, she missed her period on December 30, 2015. That is how she discovered that she was pregnant. She gave birth on April 18, 2016. She testified that she informed the Appellant who agreed to raise the child.
  6. The Complainant was seen on March 10, 2016 at Kitale County Hospital by PW3 John Koima, a clinical officer. He observed that her hymen was torn. She was five (5) months pregnant. His conclusion was that there was evidence of defilement by way of penetration. He produced the treatment notes and P3 form in evidence as Prosecution Exhibits 2 and 1 respectively.
  7. The Complainant's age assessment was conducted by PW4 DR. Ogege Mengo, a dentist on 10<sup>th</sup> March 2016. He estimated the Complainant's age at the time of the alleged offence to be sixteen (16) years old. He produced his age assessment report in evidence as Prosecution Exhibit 3.
  8. The Complainant reported the incident on 10<sup>th</sup> March 2016 to SGT Felisty Rono, the investigating officer at Kitale Police Station. After collecting the evidence and recording the witness statements, the Appellant was arrested and charged with the present offence.
  9. After close of the Prosecution's case, the trial court found the Appellant had a case to answer. He was placed on his defence. The Appellant's unsworn testimony was that on March 12, 2016, three (3) people came to his house. They took him to the chief who had summoned him. At the meeting and in the presence of the Complainant, the Appellant denied knowing the Complainant, her mother or



her grandmother. He was then arrested and escorted to the police station. He was charged with the present offence. He denied committing the offence.

10. This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (See *Njoroge -vs Republic* [1986] KLR 19). In the present appeal, the issue for determination by this court is whether the Prosecution discharged its burden to the required standard of proof being beyond reasonable doubt, that the Appellant committed the offence that he was charged with.
11. In order to sustain a conviction on a charge of defilement, the Prosecution must establish all of the following three ingredients:
  1. Age of the Complainant
  2. Penetration
  3. Identification of the perpetrator
12. The first ingredient is that of the Complainant's age. PW4 observed in her estimation that the Complainant was sixteen (16) years at the time of the alleged offence. She produced her age assessment report in evidence on behalf of the prosecution. This court concludes that the age assessment report was sufficient to establish that the Complainant was a child within the meaning ascribed to the term under Section 2 of the *Children Act*. This court therefore holds that this the age of the complainant was established to the required standard of proof beyond a reasonable doubt.
13. The second ingredient is that of penetration. Section 2 (1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
14. The Complainant's testimony was that she had sexual intercourse on the night of December 15, 2015. The Complainant was seen on March 10, 2016 by PW3, a clinical officer. He observed that her hymen was torn. She was five (5) months pregnant. His conclusion was that there was evidence of defilement by way of penetration. The prosecution indeed established that penetration was proved beyond reasonable doubt in light of the above evidence.
15. Was the perpetrator positively identified? The Complainant testified that on December 15, 2015, she accompanied the Appellant to his home where they had sexual intercourse. In its findings, the trial court held that all Prosecution witnesses positively identified the appellant. The trial court further commented that the witness were consistent and credible. Consequently, she found in the affirmative that the Appellant was the perpetrator.
16. Having analyzed the evidence on record, this court respectfully so, disagrees with the trial court in its findings. There were material factual inaccuracies and inconsistencies that the trial court ought to have taken into consideration before arriving at its conclusion. Firstly, the Complainant in her testimony refused to answer questions. She was also smiling. It would have been critical for the court to interrogate the reasons behind her conduct. In this court's view, the Complainant's conduct during her testimony alludes to the fact that she was not telling the whole truth. Secondly, the Complainant was not a child of tender years. Consequently, she had the capacity to understand the importance of reporting such an incident as soon as possible to the nearest police station if she was indeed defiled by the appellant. One wonders why she took more than three (3) months to report the incident. The delay in lodging the



complaint with the police negatively impacted the credibility of the prosecution's case. Thirdly, this court finds that due to the time lapse of when the alleged offence occurred and when the report was made to the police, it was imperative for the Prosecution to conduct a paternity test to establish that the born child to the complainant was sired by the Appellant. Lastly, in her evidence, the Complainant told the court that she gave birth on April 18, 2016. She further testified that her menstrual cycle was regular. The conclusion that can be drawn is that the Complainant ought to have had a normal gestation period. As a result, if she gave birth on April 18, 2016, then it follows that her conception date was sometime in July 2015. However, the charge sheet reads that the Complainant was defiled between December 15, 2015 and February 10, 2016. The above inconsistencies at trial were so critical that reasonable doubt is raised whether the Appellant was indeed the perpetrator of the offence.

17. The upshot of the above reasons is that this court finds that the conviction of the Appellant was unsafe. The Prosecution failed to discharge its burden of proof to the required standard of proof beyond any reasonable doubt. Consequently, the Appeal succeeds. The trial court's conviction is hereby quashed and the custodial sentence set aside. The Appellant shall forthwith set at liberty and released from prison unless otherwise lawfully held.

It is so ordered.

**DATED AT KITALE THIS 25<sup>TH</sup> DAY OF JULY 2022**

**L KIMARU**

**JUDGE**

