



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BOMET**

**CRIMINAL APPEAL NO 6 OF 2019**

**BENSON KIPKURUI KORIR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal against the conviction and sentence by Hon. B.K Kiptoo in Sotik SRM's Court Sexual Offences Case No. 13 of 2018)***

**JUDGMENT**

1. Benson Kipkurui Korir (the Appellant) was charged with the offence of defilement contrary to Section 8 (i) as read with Section 8 (2) of the Sexual Offences Act (SOA) Act No. 3 of 2006. The particulars of the offence were that on the 12<sup>th</sup> day of June 2018 at an unknown time between 1:00 pm and 2:00 pm at Taboina location in Konoin Sub-county within Bomet County intentionally caused his penis to penetrate the vagina of MC a child aged 2 years 10 months.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

3. The prosecution called 7 witnesses whose testimony I summarize as follows: The victim's mother CM testified as PW1 and also in her capacity as intermediary for the victim who testified as PW2. She narrated how she had left her children including the victim at home in the care of her niece one M on 11<sup>th</sup> June, 2018. She received a strange call from the Accused on 12<sup>th</sup> June, 2018 and being alarmed she called her niece and asked her to examine the child. M (PW4) examined the child and saw that she was bleeding from her private parts and could not walk properly. PW4 called the victim's father one WK (PW3). Together they took the child to Cheptalal dispensary from where she was referred to Koiwa hospital. The victim was examined by Francis Cheres (PW5) a clinical officer at Koiwo hospital who formed the opinion that she had been defiled. The Investigating Officer PC Joan Jepchirchir (PW7) wrapped up the evidence of the witnesses and testified that she was satisfied with the evidence and charged the Appellant.

4. The Appellant was put on his defence. He stated that he was arrested after a child was brought to his house and he was asked where one Bernard was. He said that he was taken to hospital and when examined nothing abnormal was noted.

5. In its Judgment dated 27<sup>th</sup> February 2019, the trial court found the Appellant guilty, convicted and sentenced him to serve life imprisonment.

6. The Appellant was aggrieved and filed the present appeal against both conviction and sentence. In the petition dated 8<sup>th</sup> March 2019, filed by P. Sang and Company Advocates, the Appellant lists 15 grounds which can be summarized into four as follows:-

***(i) That the charge was defective and the evidence did not support the charge.***

***(ii) That the case was not proved beyond reasonable doubt.***

***(iii) That the Appellant was not properly identified.***

***(iv) That the sentence was inconsiderate, harsh and excessive.***

7. The appeal proceeded by way of written submissions. The Appellant's submissions are dated 1<sup>st</sup> July 2020 while the Respondent's are dated 10<sup>th</sup> November 2020.

8. The Appellant framed three issues in his submissions namely: whether the prosecution established a *prima facie* case; whether the prosecution proved its case beyond reasonable doubt, and failure by the prosecution to call key witnesses. It was the Appellant's submission

that the case against the Appellant was not proved beyond reasonable doubt. That the third ingredient of the offence being the positive identification of the Appellant was not proved beyond reasonable doubt and that there was no medical evidence to link the Appellant to the offence. The Appellant submitted that the circumstantial evidence was too weak to link the Appellant to the offence. That the prosecution failed to call all the key witnesses and also failed to investigate the presence of one Bernard who lived with the complainant's family and may have had a role in the defilement. The Appellant's counsel concluded his submissions in a rather strange fashion by likening the trial of the Appellant to the biblical trial of Jesus and stated thus:-

***“Turning to the case at hand, the trial court is the equivalent of Pontius Pilate and the Prosecution, the Sanhedrin Jewish Council. My Lord the Appellant herein was convicted despite the fact that the prosecution failed to establish a link between the Appellant and the alleged offence hence failing flatly short of the required standard of proof in criminal cases.”***

9. The Respondent submitted that the three ingredients of the offence were proved beyond reasonable doubt. That the age of the victim was proved by evidence of the mother (PW2) and that medical evidence was produced by PW6 which proved penetration. On the identification of the Appellant, the Respondent submitted that the Appellant was well known to PW1, PW3 and PW4 and he was placed at the scene of crime. The Respondent further submitted that the prosecution was not obliged to call a superfluous number of witnesses whose testimony was immaterial to the case.

10. On sentencing, the Respondents submitted that the trial court exercised its discretion and that the appellate court should not interfere with the sentence unless it found that the sentence was manifestly excessive or that the trial court acted on the wrong principles. The Respondents further submitted that the sentence was just and lawful.

11. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on evidence that is on record. See ***Okeno Vs. Republic (1997) EA 320.***

12. I have considered the grounds of appeal, the submissions of the parties and the entire trial record. This appeal turns on whether or not there was positive identification of the Appellant as the person who defiled the minor victim.

13. An evaluation of evidence on appeal in a defilement case must necessarily entail a consideration of the three elements of the offence being proof of the age of the complainant or victim, proof of penetration and the positive identification of the perpetrator. See ***Samson Mumbaa Murigi .V. Republic (2020) eKLR; Republic Vs. Mohamed Abdulahi Doyo 2020 eKLR.***

14. Proof of the age of a victim or complainant in a sexual offence is important because by definition defilement can only be committed against a person below 18 years of age. Secondly, the Sexual Offences Act provides graduated sentences for the offence.

(See ***Moses Nato Raphael v Republic (2015)eKLR***; See also ***Mohamed Abdullahi Doyo V. Republic (2020)eKLR***). It has also been held that in defilement cases the age of a victim can be proved by medical evidence, birth certificate, hospital documents or oral evidence of the parent. See ***Thomas Mwambu Wenyi V. Republic 2017 eKLR.***

15. In this case the age of the victim has not been challenged by the Appellant. In the trial court, the victim's mother (PW1) testified that the child was 2 years 10 months and produced a birth notification card (P-Exhibit1) which shows that she was born at Cheptalal Sub-county hospital on 28<sup>th</sup> August 2015 which puts her age at the time of the offence on 12<sup>th</sup> June 2018 at 2 years and 10 months. I also observe that the trial court found the child too young to testify on her own, declared her a vulnerable witness and directed that her testimony be taken through an intermediary. I am therefore satisfied that the first ingredient of the offence was proved beyond reasonable doubt.

16. The second element of the offence of defilement is penetration. Penetration is proved by the oral evidence of the victim which is corroborated by medical evidence (See ***Dominic Kibet Mwareng Vs. Republic (2013) eKLR.*** In this case PW6 the clinical officer who examined the victim found that her hymen was torn and she had bruises in the labia. The vaginal swab showed presence of spermatozoa. He also observed that the child was traumatized. PW6 produced the treatment notes (P-exhibit 2), lab test Report (P-exhibit 3) together with the Post Rape Care Form (Exhibit 4) and P3 (Exhibit 5). This evidence is unassailable and proved beyond reasonable doubt that MC an infant barely out of diapers was defiled by a grown man.

17. The third critical element of the offence of defilement is the positive identification of the perpetrator. As stated earlier in this Judgment, this is the main issue on which this appeal turns. I must therefore critically examine the evidence tendered in the trial court, as stated by the court of appeal in ***Francis Kariuki Njiru & 7 Others Vs. Republic (2001) eKLR*** (cited to me by the Appellant's counsel), that:-

***“The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered .....”***

18. In this case the Appellant's counsel has argued that there was no evidence linking the Appellant to the offence. They submitted that no witness placed the appellant at the scene of crime and that the evidence showed that there was another person named Bernard who was not investigated. Further the Appellant's counsel submitted that the medical evidence was not conclusive as no DNA was extracted from the Appellant to link him to the offence. On this issue, counsel cited Section 36 (i) of the Sexual Offences Act 2006 which provides:-

***“...where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the***

*accused person committed an offence.*

19. In the circumstances of this case, I agree with the Appellant's counsel that a DNA test should have been conducted. As the evidence shows, PW6 the clinical officer took a vaginal swab from the victim and found the presence of spermatozoa. The evidence of the victim's father (PW3) and the Investigating officer (PW7) also shows that the Appellant upon being arrested was taken to the hospital for medical examination. Unfortunately, his DNA was not taken for purposes of matching with the spermatozoa found in the victim. This to my mind was a missed opportunity to deploy forensic evidence in the case.

20. The question therefore is whether failure to extract DNA from the Appellant fatally wounded the prosecution's case.

21. To answer the above question, one must look at the wording of section 36(1) and case law which clearly shows that DNA testing is not mandatory. In *Tyson Mudola & 2 Others V. Republic (2019) eKLR*, the court cited the court of Appeal in *Robert Mutingi Mumbi Vs. R* Malindi Criminal Appeal No. 52 of 2014 and stated:-

***“Section 36 (i) empowers court to direct a person charged with an offence under the Act to provide samples for tests including DNA testing to establish linkage between the Accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence of which commission of a sexual offence may be proved.”***

22. The evidence in this case has shown that there was no eye witness. However, there was circumstantial evidence from various witnesses to consider. In the case of *Erick Odhiambo Okumu v Republic Criminal Appeal No. 84 of 2014 [2015] eKLR* the Court of Appeal stated with respect to acceptability of circumstantial evidence that:-

***“It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in MUSILI TULO V. REPUBLIC (supra): “Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics”.***

23. The principles upon which circumstantial evidence must be considered were clearly laid out by the predecessor court of appeal in the case of *R. v. Kipkering Arap Koske & Another*, 16 EACA 135 as follows:-

***‘(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***

***(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***

***(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.’***

24. The same principles were restated in *Sawe v Republic Criminal Appeal No. Case No. 2 of 2002*, where the Court of Appeal stated thus:-

***“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”***

25. The victim's mother (PW1) testified that she had left her children in the care of her sister (PW2) when she travelled on 11<sup>th</sup> June, 2018. While still away on 12<sup>th</sup> June 2018, she received a telephone call from the Appellant and when she inquired of her child (the victim) and requested to speak to her, the Appellant initially told her that the child was sleeping. Upon her insistence, he passed her the phone but the child could not talk on the phone. PW1 called PW2 who rushed home only to find the child bleeding and unable to walk. According to PW2 the child told her that it was “toondet” meaning the visitor who had “done that to her” meaning penetrated her. PW2 further stated that the child told her that the perpetrator was sleeping.

26. PW2's evidence respecting the identification of the perpetrator would have been hearsay as she was relying on what the child told her. However, she found the Appellant sleeping as stated by the child. She called the victim's father who came home and the Appellant was arrested while still sleeping. He was escorted to the police station then to the hospital where he was examined as earlier stated.

27. The Appellant's counsel submitted that the victim only stated that the defiler was “toondet” meaning a visitor. That reference to a visitor did not point to the Appellant. My appreciation of the evidence is that the Appellant was known to the child. He lived in the rental room adjacent to the victim's home and was referred to as ‘visitor’ because according to the evidence of PW1 and PW3, he was new in the compound and had not lived there for a long period.

28. The Appellant stated in his defence that there was a person named Bernard who was the brother of the victim's mother (PW1) who was not investigated. I have looked at the record. Both PW1, PW3 and PW4 admit that they had a relative by the name Bernard. However, they said that Bernard had left the victim's home the day before to proceed to his work place and had not returned to the victim's home. It is my conclusion that the said Bernard was well known to the victim and she would have named him if he was responsible. I find therefore that the

circumstantial evidence shown above, pointed to the Appellant as the person who defiled the Victim (MC). He was identified by the victim and was placed at the scene of the offence by PW1 whom he called on phone from their shared compound, and PW3 who went and found the victim in the same compound who immediately pointed to the Appellant as the person who had defiled her. The Appellant was arrested while still sleeping in the place where the victim had stated that he was.

29. I must hasten to add that the Appellant was not required to prove his innocence. However, having been placed at the scene he bore a statutory burden to discharge a rebuttable presumption created by Section 111 (1) and 119 of the Evidence Act. He was the only person in the compound with the minor and he had the duty to explain what happened to her. He had the opportunity to do so through cross-examination of the prosecution witnesses and also through his defence. He failed to do so. As stated in **Rafaeli Munya alias Rafaeli Kibuka .V. Reginam (1953) 20 EACA 226** cited in **Republic –V- Nicholas Ngugi Bangwa (2015) eKLR:-**

***“The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.”***

30. From my analysis of the circumstantial evidence above, I have come to the conclusion that the Appellant was properly identified. He was the person who recently moved into the room next to the victim’s home hence referenced “toondet” meaning visitor. The victim also identified the perpetrator as the person sleeping next door and the same perpetrator was arrested while still sleeping in his room. Besides, the court record shows that the victim was visibly traumatized when she saw the appellant in court and when asked to identify him.

31. I have considered the Appellant’s defence. He stated in his defence that he did not commit the offence. That at the time he was arrested a child was brought and he did not know what had transpired. He said that he told the people who arrested him that the brother of the victim’s mother had ran away and had been taken by his people to the Estate camp. That no one bothered to look for him.

32. The Appellant’s defence does not ring true. He does not deny that he was alone with the child in the compound when PW2 left her briefly to go and buy vegetables. He does not also deny that he called the victim’s mother, which call led to the discovery that the child had been defiled. His defence does not cast any doubt on the prosecution case. I dismiss the same as untrue.

33. In the final analysis, I find the prosecution case proved beyond reasonable doubt. I confirm the conviction.

34. I have considered the Appellant’s submission that the sentence was harsh and excessive. It is now trite following the Supreme Court decision in **Francis Karioko Muruatetu & Another, Supreme Court Petition No.15 of 2015 (2017) eKLR** and several decisions of the court of appeal that the mandatory nature of the sentences in the Sexual Offences Act was unconstitutional. In Muruatetu (*Supra*) the court held that:-

***“It is during mitigation, after conviction and before sentencing, that the offender’s version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness”.***

35. A trial court is therefore obligated to take into consideration any mitigating circumstances when sentencing. The minimum sentences however remain lawful and may be imposed in an appropriate case.

36. In this case, the trial court had heard mitigation but nonetheless sentenced the Appellant to the mandatory sentence. In this appeal I have considered the mitigation offered by the Appellant both in the trial court and on appeal. In this appeal he still maintained that he did not commit the offence. He also submitted that the sentence was harsh and unlawful. I have reconsidered the sentence to see if there were any mitigating circumstances which would earn the Appellant a lesser sentence and I have found none.

37. The victim was a child of tender years aged 2 years 8 months. The defilement ruptured her hymen and ripped her genitals apart. She could not walk. It is not known whether she will ever get out of the physiological and psychological trauma. I consider these to be aggravating circumstances which attract the maximum penalty. I find the life sentence imposed on the Appellant to be both lawful and just and I affirm it.

38. The appeal against both conviction and sentence is dismissed. The Appellant has 14 days right of appeal.

39. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF JANUARY, 2021.**

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**R. LAGAT-KORIR**

**JUDGE**

**Judgment delivered in the presence of the Accused, Defence Counsel Mr. Mugumya, Mureithi for the DPP and Kiprotich (Court Assistant).**