



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. E007 OF 2020

VICTOR CHEPKWONY KIBET.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Original Judgment of Hon. E. W. KARANI (RM)

in Kericho CR. Case No. 1 of 2018 delivered on 11/3/2020)

JUDGMENT

1. The Appellant was convicted with the offence of Defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act (SOA) No.3 of 2006 and he was sentenced to 10 years imprisonment on 11/3/2020.
2. The particulars of the charge were that on 28/12/2017 within Londiani Sub County, the Appellant intentionally caused his penis to penetrate the vagina of the complainant (**name withheld**), a child aged 14 years.
3. The Appellant pleaded not guilty to the charge. The prosecution called five witnesses in support of the prosecution case.
4. PW1 (the complainant) said that on 28/12/2017 at around 12 noon, she was at the dispensary where she was sent by her mother to pick maize for her.
5. The complainant (PW1) said that Alice Chepkurui (PW3) a nurse at Kimugul Dispensary took her to an uncompleted building at the Dispensary where she had stored the maize and left her winnowing the maize.
6. PW1 said as she was winnowing the maize the Appellant went and held her from the back and dragged her to the toilets inside an uncomplete building where he removed her panty and biker and defiled her.
7. PW1 said the Appellant ran away after the incident. She heard an old lady call him by the name Victor as he was running away.
8. PW1 went and reported to Hellen Chepkemoi Rono (PW2) who was a nurse at **KIMUGUL** Dispensary and she was treated.
9. The matter was reported to the chief and the chief notified the police at **CHEPSEON** police station. The Appellant was arrested at an initiation ceremony the same day at 2pm.
10. **PW4 P C ROSELYNE NANJAL** of Chepseon Police Station escorted the complainant to Kericho County Referral hospital where she was examined by PW5, Robert Kipyegon Langat, a Clinical Officer attached to Kericho County Referral Hospitals.
11. PW5 said upon examining the complainant, on 29/12/2017 he found her genitalia normal. He said her labia minora and labia majora were epidemic meaning that they had increased blood flow showing there was sexual activity.
12. PW5 also said the complainant's hymen was broken with old breach with no per vaginal bleeding or discharge. PW5 also said a lab test had been done and high vaginal swap showed numerous pus cells, numerous epithelial cells and spermatozoa or blood cells.
13. The Appellant called two witnesses. He said on the material day he did not go to **KIMUGUL** Dispensary. He left his home at around 10am and went to **KIMUGUL** centre where he stayed until 11am and went to the home of mzee Madil where one Grace had invited him for

a ceremony.

14. DW2 Samwel Yegon said on the material day he was at his home where the ceremony was held. He said the Appellant was asked to pray for the children and after prayers someone held his hand and led him away.

15. DW3 Josephat Kirui said he was at the ceremony and the Appellant arrived at 11:40am and was assigned prayers but before he could finish the prayers he was led away.

16. The trial court found the Appellant guilty as charged and he was sentenced to 10 years imprisonment. The Appellant has appealed to this court against both conviction and sentence on the following grounds;

(i) That the prosecution was allowed to amend the charge under section 214 of the Criminal Procedure Code yet no Kipsigis interpreter was availed and therefore his fundamental rights were infringed.

(ii) That the Appellant was held in custody for more than 4 days contrary to Article 49 (f) (i) & (ii) of the Constitution of Kenya 2010.

(iii) That the prosecution did not prove penetration and identification of the Appellant and further that the soiled clothes were not produced as exhibits.

(iv) That the age of the complainant was not proved and further, the chief was not called as a witness to establish the truth of the prosecution case.

17. The parties filed written submissions which I have duly considered. The appellant submitted that article 49 (1) (a) of the constitution was violated as the court record did not indicate that the substance of the charge was read and explained to the appellant in Kipsigis language and in turn the appellant replied in Kipsigis, thereby violating his constitutional right to a fair trial. He also submitted that Article 49 (f) (i) and (ii) of the constitution was violated as he was arrested on the 28th of December 2017 and was arraigned in court on the 2nd of January 2018, occasioning a delay of 4 days, in violation of his constitutional rights.

18. The appellant further submitted that the evidence of the witnesses was highly inconsistent and uncorroborated and that the prosecution did not prove penetration, as the appellant should have been examined by a medical officer.

19. The appellant also submitted that the prosecution witnesses were not consistent on the identification of the appellant and the prosecution did not produce the clothes of the complainant as exhibit and also that the age of the complainant was not proved.

20. The respondent in turn, submitted that the appellant was properly convicted and sentenced as the trial was conducted in a fair manner and the appellant was accorded all his constitutional guarantees.

21. The respondent further submitted that the evidence of the complainant was satisfactory and sufficient as it was confirmed, supported and corroborated by all the witnesses in the matter.

22. The respondent also submitted that the evidence by the prosecution was consistent and there were no irregularities and that the prosecution therefore proved beyond reasonable doubt that the appellant committed the offence by proving the key ingredients of the offence of defilement.

23. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced at the trial and to arrive at my own conclusion as to whether or not to support the findings of the trial court while bearing in mind that the trial court had the advantage of seeing the witnesses.

24. In the often-cited case of ***Okeno versus Republic (1972) EA 32***, the court of appeal set out the duty of the first appellate court as follows: ***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”***

25. There are three elements that must be proved by the prosecution for the offence of defilement to be established, these are the age of the complainant, proof of penetration and the positive identification of the assailant.

26. The court of appeal in ***Mwaore Munga Janji versus Republic (2021) eKLR*** stated as follows: ***“The key ingredients of the offence of defilement are proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence.”***

27. On the issue of identification of the Appellant, the complainant said she was able to identify the Appellant. The incident occurred in broad daylight and the complainant had the opportunity to see the Appellant. When the Appellant was running away, the complainant heard someone call him “Victor”.

28. There is also evidence that upon arrest, the Appellant asked the Complainant to forgive him.

29. On the issue of the age of the complainant, the immunization card for the Appellant was produced which showed that she was born on 16/9/2003 and therefore she was 14years old at the time of the offence.

30. The high court in *Fapyyton Mutuku Ngui versus Republic, (2012) eKLR* stated as follows: ***“I would be prepared to clarify that “conclusive” proof of age in cases under Sexual Offences Act does not necessarily mean that there has to be a formal age assessment report or the production of a birth certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.”***

31. The complainant was 14 years old at the time of the offence. She was therefore a child in accordance with the children act since she was less than 18 years old.

32. In the current case, I find that there is also evidence of penetration. The complainant said the Appellant defiled her. The medical officer who testified as PW5 also said there was penetration. I find that the testimony of the Complainant was corroborated by that of PW2 who first examined her at the Dispensary and also that of the medical officer (PW5).

33. I find that the appeal herein lacks in merit and the same is dismissed and both the conviction and sentence accordingly upheld.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 19TH DAY OF NOVEMBER 2021.

A. N. ONGERI

JUDGE