



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.32 OF 2020**

**WALTER KITAWET KIBOI alias SABAOT.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the conviction and sentence by Hon. B. R. KEPYEGON (SRM) in KERICHO Cr. Case No.67 of 2019 delivered on 6/3/2020)***

**JUDGMENT**

1. The Appellant was sentenced to life imprisonment for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act (SOA) No.3 of 2006.
2. The particulars of the charge were that on 17/8/2019 at *[particulars withheld]* within Kericho County, the appellant unlawfully caused his penis to penetrate the vagina of LC, a child aged Seven (7) years. The Appellant was charged with an alternative Count of Indecent Act.
3. The prosecution called a total of 4 witnesses. PW.1, the biological mother of the Complainant said they used to live in *[particulars withheld]* as workers. On 17/8/2019 at 6 p.m, the Appellant who was PW.1's brother's friend went to her home.
4. PW.1 said she was washing clothes outside the house and she allowed the Appellant to go into her house to pick a matchbox in order to light his cigarette. PW.1 continued washing until she heard the Complainant cry from inside the house. She ran into the house and saw the Appellant seated on a stool with his trouser lowered holding the Complainant with her dress pushed up and her inner pant pushed aside to gain access to her genital.
5. PW.1 grabbed the child from the appellant and she screamed and neighbours responded and the Appellant was pushed out of the house still naked. The Appellant was taken to Kericho Police Station.
6. The Complainant (L.C.) who testified as PW.2 said she was playing outside their house when Sabaot, (the Appellant) pulled her into the house, removed his trouser and pushed a tail into her.
7. **PW.3, NANCY WENDO**, a Clinical Officer at KERICHO Referral Hospital Examined the Complainant on 18/8/2019. She said her vagina was reddened and tender but there was no discharge. PW.3 said there was an attempt to penetrate and the hymen was intact.
8. The Appellant in his defence said that on 3/6/2019 at 8 a.m., he went with the brother to the victim's mother to the mother's home where they stayed for 3 days and returned on 5<sup>th</sup> and went to the victim's house. He said the mother of the victim asked him to buy her children some sodas. He gave her Kshs.1,000/= and she bought sodas but refused to return his change.
9. The Appellant said when he demanded his change an issue arose between them and she screamed and neighbours gathered. He went to his house and continued drinking and officers went and arrested him, he thought it was about drinking only to hear the following day about the charges of defilement.
10. The Trial Court found the Appellant guilty and convicted him with defilement and sentenced him to life imprisonment. The appellant has appealed to this Court against both the conviction and sentence on the following grounds:-

***(i) THAT the Trial Court failed to appoint an Advocate for the Appellant.***

***(ii) THAT the Prosecution did not adduce sufficient evidence in support of the charge and further, there was no penetration.***

*(iii) THAT the Trial Court did not consider the Appellant's evidence.*

*(iv) THAT the appellant was not medically Examined.*

11. The Appellant filed an amended Memorandum of Appeal where he raised the following further ground of Appeal.

*(i) THAT the child's birth certificate was not produced despite its Existence.*

*(ii) THAT the Prosecution did not call vital witnesses.*

*(iii) THAT the Trial Court did not comply with the provision of Section 124 of the Evidence Act in that no reasons were given for believing the child and further that the prosecution witnesses were inconsistent.*

12. The parties filed written submissions in this appeal. The Appellant submitted that the birth certificate of the child was not produced despite its existence and therefore the age of the victim was not proved.

13. The Appellant also submitted that despite PW.1's evidence that when she screamed neighbours came to the scene the prosecution did not call any other witness to corroborate PW.1's testimony.

14. The Appellant further submitted that no voire dire was conducted on the child and further that the child was coached by PW.1.

15. The Respondent opposed the appeal and submitted there was proof of partial penetration and further that PW.1 the victim's mother found the Appellant on the act of defiling the minor.

16. The Respondent also submitted that the Clinical Officer corroborated the evidence of PW.1 and PW.2 when she found that the Complainant had reddened vaginal wall.

17. On the issue of the age of the victim, the Respondent submitted that PW.1 said the child was born on 18/9/2012 and therefore she was 7 years at the time of the alleged offence.

18. On the issue of the case proceeding without an Advocate, the Respondent submitted that the same does not vitiate the proceedings unless it is proved that substantial prejudice was caused to the Appellant or a miscarriage of Justice was occasioned.

19. The Respondent also submitted that the defence by the Appellant was considered in paragraph 17 of the Judgment and the same was found to be unfounded.

20. This being a first appeal, the duty of the first Appellate Court is to re-evaluate the evidence before the Trial Court and to arrive at its own conclusion 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.

21. The issues for determination in this appeal are as follows:-

*(i) Whether the prosecution proved its case to the required standard.*

*(ii) Whether the Appellant was entitled to legal representation.*

*(iii) Whether the Trial Court considered the defence evidence.*

22. On the issue as to whether the prosecution proved its case to the required standard, I find that although there was penetration and identification of the Appellant who was caught red handed on the act of defiling the minor, I find that there was no documentary evidence that the minor was aged 7 years at the time of the alleged offence.

23. In cases of defilement, prove of age is crucial since the sentence is determined by the age of the victim. This position was explained by the court of appeal in *Hadson Ali Mwachongo versus Republic (2016) eKLR*, where the court stated as follows: ***"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim."***

24. Further, the court of appeal in *Eliud Waweru Wambui versus Republic, (2019) eKLR*, expressed itself as follows: ***"There is no doubt that in an offence such as faced the appellant, indeed in most of the offences under the Act where the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt."***

25. I find that the evidence discloses the alternative charge of indecent act which does not require prove of the age of the victim.

26. I accordingly reduce the offence to one of indecent assault contrary to Section 11 (i) of the Sexual Offences Act No.3 of 2006.

27. On the issue as to whether the Appellant was entitled to legal representation, there is no evidence that any prejudice was occasioned to the Appellant or that there was miscarriage of Justice as a result of the same.

28. The state has not yet reached that level where all Accused Persons are provided with legal representation. This Court takes Judicial Notice that the implementation of the Constitution is progressive.

29. On the issue as to whether the Trial Court considered the defence by the Appellant, I find that this is a case where the victim's mother found the Appellant red handed on the act of defiling the minor.

30. The defence evidence did not dislodge the prosecution evidence. I find that there is no legal requirement that all the witnesses who were at the scene have to be called. The Evidence Act has not specified the number of witnesses who must be called to prove a fact.

31. I find that in the absence of documentary evidence to prove the age of the victim, the evidence on record proves the alternative charge of indecent assault.

32. I accordingly convict the Appellant with the lesser charge of indecent assault Contrary to Section 11 (i) of the Sexual Offences Act and I sentence him to 20 years imprisonment.

33. set aside the earlier sentence of life imprisonment.

34. Th sentence of 20 years imprisonment to start running from 6/3/2020 when the Appellant was convicted.

**Delivered, dated and signed at Kericho this 20<sup>th</sup> day of December 2021.**

**A. N. ONGERI**

**JUDGE**