



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL CASE NO. 89 OF 2019**

**DICKSON KIPKOGEI KORIR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal from the Judgment of the Principal Magistrate Honourable B. W. Wachira*

*in Kapsabet Senior Principal Magistrate's court Criminal Case No. 2588 of 2015*

*dated 17<sup>th</sup> May, 2019)*

**JUDGMENT**

*DICKSON KIPKOGEI KORIR*, the appellant herein was charged in the main count with the offence of defilement, contrary to *Section 8(1)* as read with *Section 8(3) of the Sexual Offences Act No. 3 of 2006*.

The particulars of this offence are that on the 18<sup>th</sup> day of August 2015 at Bonjoge location in Nandi County, the appellant herein intentionally and unlawfully did cause his penis to penetrate the vagina of VC, a child aged 13 years.

The appellant also faced an alternative count of indecent Act with a child, contrary to *Section 11 of the Sexual Offences Act No. 3 of 2006*.

The particulars hereof being that on the 18<sup>th</sup> day of August 2015 at Kapkeben sub location in Nandi County, the appellant intentionally and unlawfully caused his penis to come into contact with the vagina of VC, a child aged 13 years.

The prosecution case is that VC who gave evidence as PW-1 and who is the complainant in this case, was born on 30<sup>th</sup> September 2002 in accordance to her birth certificate which was produced in court as exhibit 1. By the time of the alleged offence she was therefore aged 13 years. On 18<sup>th</sup> August 2015 at about 5.00 p.m the complainant was at home taking care of their cows. PW-2 got home from work at 6.00 p.m. She found the complainant and told her that she was going to charge her phone as there was no power in the house. PW-2 then left. An aunt to the appellant by the name of *Joyce Cheptoo* requested the complainant that they visit the appellant father's home. The complainant prepared as was urged by *Joyce Cheptoo* and they left. When PW-2 returned home she did not find the complainant. When she asked another child of whereabouts she was, she was told she had gone to Burende. At appellant father's home, the complainant and *Joyce Cheptoo* found the appellant's sister, called *Chepkoech*. They left the place for the shop. They were in company of a child of *Joyce* aged 11 years. *Joyce* bought cooking fat at the shop. She then led them to a chang'aa drinking den. She bought a cup of changaa and gave the children a little of it. She then bought more and they all took it. At about 10.00 p.m the appellant went for them at the place. He had a motorcycle and *Joyce Cheptoo* told them to board. They did and went upto appellant's home. *Joyce Cheptoo* urged the complainant to sleep with the appellant. The complainant was by then abit drunk, but however declined the request. *Joyce Cheptoo* questioned why then she took alcohol bought with appellant's money. The appellant and the complainant were sitting on the bed in his bedroom while *Joyce Cheptoo* and her daughter were in the sitting room. The appellant forcefully removed the complainant's clothes and "raped" her. She tried to raise alarm but the appellant held her tightly. When *Joyce Cheptoo* later opened the door, there were two boys outside namely James Cheruiyot and *Abraham Kipsang*. The complainant knew them as neighbours. She urged them to escort her home of which they did. This was at around midnight.

PW-2 who was tired had waited for complainant at home and when she took long to return she fell asleep. She was woken up later by a commotion outside. When she went to check she found the complainant in the kitchen. She told her that she had gone to demand her debt from *Cheptoo*. She appeared drunk. In the morning PW-2 looked for *Joyce Cheptoo* who said the complainant was with another child called *K*, aged 12 years. As PW-2 investigated the incident, *K*'s mother told her after a week that the complainant was with *Joyce Cheptoo* in a drinking den and that she was later taken to the appellant's house where she was locked in and defiled. PW-2 interrogated the complainant

who confirmed the report. On 4<sup>th</sup> September 2015 PW-2 reported the matter at Bonjoge AP's Post to PW-3. The report was booked and she was advised to report at Koitabut police post. She reported there and on 5/9/2015 at 5.00 p.m she returned to Bonjoge AP's Post with a warrant of arrest. On 7/9/2015 at 4.00 a.m, with the assistance of the village elder, PW-2 went to the appellant's home to effect arrest. The door was locked from outside using a padlock but the appellant was inside. He had locked the door from outside and gone in through the window. The officers broke the door after he had refused to open. He was found hiding under the bed and arrested. He was taken on 7/9/2015 to Koitabut police post, in presence of the complainant. PW-5 recorded the witnesses statements. Complainant was taken for medical examination. PW4 examined her and filled the P3 form at Serem Health Centre. On examination, her external genitals were okay. The hymen was torn. The suspect was also examined and he was okay. PW5 who is the investigating officer charged the appellant with the offences carried in the charge sheet.

The appellant in his unsworn testimony stated that he was not with the complainant on 18/8/2015. He alleged it is the complainant's mother who alleged they were together. He was then arrested. The village elder promised to investigate the complaint.

The trial court evaluated the evidence and found that the offences against the appellant were proved by the prosecution beyond reasonable doubt. The appellant was thus convicted of the main count and sentenced to 20 years imprisonment.

The appellant dissatisfied with the said conviction and sentence, appealed to this court on the grounds that:-

- (1) The trial magistrate failed to comply with Section 200 of the CPC.
- (2) The trial magistrate failed to comply with Section 210 and 211 of the CPC as the appellant opted to give unsworn defence but was sworn.
- (3) Several crucial prosecution witnesses were not called and the court should have made adverse inference against the prosecution on that.
- (4) No medical evidence supported the evidence of the alleged penetration.
- (5) The age of the victim was not proved beyond reasonable doubt.
- (6) The prosecution case was not proved beyond reasonable doubt.

As the appellate court of the first instance, I have re-evaluated the entire evidence on record, the judgment passed, mitigation and the sentence; grounds of the appeal and submissions by both sides in the case.

This case as the record vividly reveals was initially heard by *Hon. Obina*, upto the fourth witness. On 8/9/2017 *Hon. Alego* re-allocated it for hearing in court No. 3 on 15/1/2018. On this day it went for hearing before *Hon. Wachira* who the first thing he recorded is, "*proceedings be typed and case to continue from where it had reached. Section 200 of the CPC complied with*".

*Section 200(3) of the Criminal Procedure Code, Cap. 75* provides that:-

***“(3) where succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform of the accused person of that right.”***

The court's record of 15/1/2018 does not show that the accused was informed of his right under *Section 200 (3)* of the Criminal Procedure Code. If he was informed, which is highly doubted, his response or position is not indicated. Whatever informed the court to proceed from the point reached is unknown. The court made a decision and then indicated of compliance with *Section 200(3)* of the Criminal Procedure Code. Such indication may have been an afterthought to cover up for a flouted procedure. In ***John Bett Kinengeni vs Republic (2015) eKLR***, the Court of Appeal held that failure to comply with provisions of *Section 200 (3)* of the *Criminal Procedure Code* in an appropriate case render the trial a nullity as *Section 200(3)* requires in a mandatory tone that the succeeding magistrate or judge shall inform the accused person of the right to demand a recall of any of the witnesses to be reheard by the succeeding magistrate or judge.

On the 2<sup>nd</sup> ground of appeal I have noted that though the typed record shows the appellant gave sworn evidence in his defence while he had opted to give unsworn statement in defence, this is a typographical error as the

handwritten record shows clearly he gave unsworn statement in defence.

This ground is therefore not right.

On ground three I do concede that some foreseeable crucial witnesses were not called by the prosecution. These would include *Joyce Cheptoo's* child aged 11 years, who was with her mother at the sitting room in the appellant's house as the incident allegedly took place in the appellant's bedroom. The others are two boys, *James Cheruiyot* and *Abraham Kipsang*, who allegedly escorted the victim home after the alleged incident. Failure to call these three crucial witnesses left the complainant's evidence uncorroborated. Complainant was not entirely truthful in her evidence. She stated in her evidence in chief that, "*.....They took me home. I woke up my mum. It was around midnight. I told her what had happened. I slept. The next day she took me to Serem hospital.*"

However, the evidence of PW-2 who is her mother discloses otherwise. She stated in her evidence in chief that. "*..... I went and found*

her(complainant) in the kitchen at night. She told me she had gone to demand her debt from Joyce Cheptoo. She was drunk she looked drunk. There was smell of alcohol. In the morning is when she told me she had gone to demand her debt from Joyce.”

PW2 investigated her movements on the material night. It is only after one week that K’s mother informed her that the complainant was with Joyce in a drinking den and that she had taken the girl to the accused person’s house where she was locked in and defiled. PW-2 talked to the complainant again and she disclosed the information. The mother reported to the police. The evidence by PW2 of which agrees to the subsequent evidence on when the matter was reported and the complainant examined, shows that complainant was not entirely truthful in her evidence when she said she reported about the incident on the material night of its occurrence. The discrepancy was not weighed by the trial court in its judgment, and a reason given on the basis of which it was found credible. The complainant in her evidence while describing the incident stated that she was raped. Rape is a technical word which constitute an offence under *Section 3* of the *Sexual Offences Act*, which is different from defilement under *Section 8* of the *Sexual Offences Act*. The complainant while explaining about the offence in her evidence in chief said that, “Dickson held me by force and removed my clothes. He raped me.” It is not clear on whether the appellant removed his clothes, which body organs were used in the incident, and whether there was penetration. The evidence of PW-4 shows that upon examination the complainant external genitals were okay. The hymen was torn. These evidence is not enough to show there was penetration on the alleged date of the incident. It was not suggested when the hymen was torn. The complainant in her evidence never stated in her evidence that the hymen was torn then. It is a well established fact that hymen cannot only be torn as a result of a sexual activity. It can be torn otherwise. I therefore find that the trial court erred in finding that:-

- (1) The complainant understood what was rape being a class 7. The accused therefore put his penis into the vagina of the complainant and there was penetration.
- (2) The evidence of the complainant was buttressed by the evidence of PW-2 the complainant’s mother who told the court the complainant was brought at night and drunk and she narrated what happened.
- (3) The medical evidence adduced for accused and the complainant strengthened the complainant’s case to the effect that there was vaginal penetration.

The foregoing wrong findings made the court wrongly find that the prosecution had established the offence against the accused beyond reasonable doubt. The court was even wrong in making a finding on the alternative count where the main count had been allegedly established beyond reasonable doubt.

This court therefore finds that the trial was a nullity as the court failed to comply with provisions of *Section 200 (3)* of the *Criminal Procedure Code*.

The complainant given that she was not entirely truthful in her evidence, and her case was not well corroborated, raises doubt as to whether the offence of defilement was committed against her by the appellant. The said doubts are resolved in appellants favour.

The conviction and the sentence imposed are unsafe and are hereby quashed. The appellant is set free unless otherwise lawfully held.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED VIRTUALLY at ELDORET this 29<sup>th</sup> day of April, 2020.**

In the presence of:-

- (1) Mr. Kusuiya for the appellant
- (2) Ms Hellen Githaiga for State
- (3) Mr. Gregory - Court assistant