



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 22 OF 2019**

**DICKSON KIPLAGAT .....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Sexual Offences Case No. 3 of 2016 delivered on the 21<sup>st</sup> day of March 2019 by Hon. J. Nthuku, SRM]**

**JUDGMENT**

**INTRODUCTION**

[1] The appellant was on 21<sup>st</sup> March 2019 convicted and sentenced to imprisonment for 15 years for the offence of defilement contrary to section 8(1) and (4) of the Sexual Offences Act, the particulars of which were that the appellant:

***“On the 4<sup>th</sup> day of June 2016 in Rongai Sub-County within Nakuru County, committed an act which caused the penetration of his penis into the vagina of EJK a child aged 16 years old.”***

[2] The appellant had initially been charged with a second count of supplying drugs to procure abortion contrary to section 160 of the Penal Code which count was withdrawn on 29<sup>th</sup> May 2017 under section 87 (a) of the Criminal Procedure Code whereupon he was charged for the offence in a consolidated charge in Criminal Case No. 346 of 2017 together with a doctor, Dr. Marko, according to the record of the trial court.

[3] In support of an application for bail pending appeal before this court the appellant attached an affidavit sworn on 11<sup>th</sup> June 2019 by the complainant in the trial court claiming to have lied under pressure from her parents in her testimony before the trial court, as follows:

***“I, EJK of Baringo County within the Republic of Kenya do hereby make oath and solemnly state as hereunder:***

***1. THAT I am an adult of sound mind the deponent herein above hence competent to swear this affidavit***

***2. THAT I am a holder of Kenyan National Identity card Number 37969410 which was issued to me on 6<sup>th</sup> March 2019.***

***3. THAT I am also the complainant in Eldama Ravine Criminal Case No: 3 of 2016 **Republic Vs Dickson Kiplagat Kipsang.*****

***4. THAT I gave a false testimony in the above Criminal Case and I regret that I did not know the consequences of my actions.***

***5. THAT at the time the said case was happening I was still a minor and I testified under instructions of my parents who threatened to throw me out of the house if I did not do as they had instructed me.***

***6. THAT I have always lived with the guilt but now that I have turned eighteen (18) years I would like to own up and apologize to the Accused, his family and the court for giving false testimony.***

***7. THAT I swear this affidavit to confirm I did lie and request for leniency from the Court since I acted on instructions from my parents who did not like the accused and his family.***

***8. THAT I make this affidavit knowing the same to be true to the best of my knowledge, information and believe and in accordance with the Oaths and Statutory Declaration Act Cap 15 Laws of Kenya.”***

## THE APPEAL

[4] The appellant appealed the judgment on grounds set out in the Petition of Appeal as follows:

### “PETITION OF APPEAL

#### AMMENDED GROUNDS OF APPEAL

*I, Dickson Kiplagat the appellant herein, being dissatisfied with the sentence and conviction of the Senior Principal Magistrate Eldama-Ravine, Hon. J. Nthuku (SRM) delivered upon me on 21<sup>st</sup> March 2019, humbly begs leave of this Hon. Court to appeal against the same on the following amended grounds:*

- 1. THAT, the learned trial magistrate erred in law and fact by sentencing and convicting the appellant on a defective charge sheet.*
- 2. THAT, the learned magistrate erred in law and fact in failure to consider the contradictory nature of the prosecution evidences.*
- 3. THAT, the trial court erred in law and fact in not finding that crucial witnesses were not produced.*
- 4. THAT, the trial court erred in law and fact in concluding that penetration was done by the appellant.*
- 5. THAT, the trial court erred in law and fact in not considering that burden of proof was not discharged to standards by the prosecution.”*

## SUBMISSIONS

### *Appellant's Submissions*

[5] In urging the grounds of appeal the appellant filed written submissions dated 30/9/2019 as follows:

#### *“APPELLANT'S WRITTEN SUBMISSIONS.*

- 1. My Lordship, having down my amended grounds of appeal as above, I now humbly beg leave of the Hon. Court that I may express here in details. I will follow their chronological order as above without repetition of their titles order. I beg also leave that I am referring the Hon. court to various sections/articles of our constitution and other necessary court's references my lord.*
- 2. My Lordship, I was charged with the offence of defilement contrary to section 8(1) as read with 8(4) of the Sexual Offences Act No. 3 of 2006. It was alleged that on 4/6/2016 at Kilinga village Rongai Sub-County, Nakuru County, I caused the penetration of my penis into the vagina of E.J.K, a child aged 16 years old.*
- 3. My Lordship, I was also charged with alternative count of committing an indecent act with the said child by touching her vagina with my penis. I denied the charges and the matter proceeded for trial which ended in imprisoning me to serve 15 years. I was not satisfied by the same hence my appeal against it in this honourable court on the following grounds expounded/dilated.]*

#### **ISSUES FOR DETERMINATION**

- i.) Was the charge sheet defective?*
- ii.) Were the testimonies of prosecution witnesses reliable and trustworthy?*
- iii.) Were there any contradictions in prosecution evidence entered in court?*
- iv.) Were the vital witnesses in this matter summoned by the prosecution?*
- v.) Did the prosecution satisfy the ingredients of the offence of defilement?*

*1. Was the charge sheet defective? My Lordship, the particulars of the charge sheet are as follows "on the 4<sup>th</sup> day of June 2016 at Kilinga village in Rongai Sub County within Nakuru County, committed an act which caused the penetration of his penis into the vagina of EJK a child aged 16 years old. The charge sheet herein above lacks the words "INTENTIONAL" "UN-LAWFUL" and further more that the said act was done "WILLINGFULLY". The omission of the said wordings from the charge sheet renders the charge herein defective. For this offence to be complete it has to be unlawfully, intentional and willing fully in the instant charge, the charge sheet statement does not state, whether the act was unlawful and whether it was committed willingly. In the absence of the above stated words in the charge sheet renders the same defective. The same charge sheet does not indicate the Occurrence Book (O.B) No., the identity of the accused/suspect, tribe, sex and neither age. My lordship, with all those shortfalls coming from the important document, then its effectiveness in statement is not certain. Here I submit that anyone from Kilinga village could be*

arraigned in court and prosecuted on that charge sheet. Hence my humble call for its declaration as defective one. My Lordship, still hanging on the same charge sheet, it states that accused was arrested on 29/9/2016 and arraigned in court 30/9/2016. The signature of SRM is dated 20/4/2017 and same to rubber stamp of O.C.S Mogotio (20/4/2017). There is a vacuum space between those dates (7 months), which conflicts itself.

2. Were there any contradictions in prosecution evidence entered in court? During the trial PW1 (COMPLAINANT) alleged that on 04/06/2016 they were sent during mid-term but she only said this after suspension" from the evidence of the two witnesses it is clearly seen that the two are contradictory in nature and the trial magistrate ought to have seen. The alleged date of the offence as per the charge sheet is on 04/06/2016 and also as stated by PW1 in her evidence. PW 6 - Investigating Officer while giving her evidence in chief stated that the alleged offence occurred on "09/06/2016 when she was sent home for school fees" The pregnancy test was conducted on 18/09/2016 and PW2 stated that "we examined her and found her 10 weeks pregnancy". He further stated during cross examination by the counsel for appellant that "I didn't see the patient" he further stated that "I can't link the accused to the pregnancy" My lordship it is clear from the evidence of the doctor that he never saw the patient and thus no pregnancy test was conducted. both doctors contradicted themselves on the actual age of the pregnancy as PW2 Examined her and formed opinion that the pregnancy was 10 weeks old as examined on 18/6/2016 while PW5 stated that on 23/09/2016 " she was 18 weeks pregnant". From this evidence the variance is 8 weeks difference while the tests were conducted at an interval of 5 days. still on the issue of the pregnancy the learned magistrate while delivering her ruling stated in page 2 that "PW2 Edwin Kimurwa the Clinical Officer testified that on 18/9/16 the complainant was examined at Mogotio sub county hospital and found to be 16 weeks pregnant" herein the learned magistrate contradicted the testimony of the said witness who had stated in his evidence that the pregnancy was 18 weeks. Another clear contradiction is the evidence of PW1 in her evidence she said "I was treated and the foetus was removed through the vagina. I didn't see the foetus". PW3 the father of the victim while testifying said "the foetus died within minutes of birth. We took the body home and buried it" Were the testimonies of prosecution witnesses reliable and trustworthy? PW1 testified that she knew she was pregnant after she tested positive when the school conducted pregnancy tests. Having well aware that she was pregnant she went to a clinic to test pregnancy and that she did not tell the accused person or her parents on what had happened inside the said clinic. Her evidence at page 22 was that (I was treated and the foetus was removed through the vagina. I didn't see the foetus). None of the medical doctors who testified saw the foetus. The complainant after the conviction of the appellant through a sworn affidavit which is filed in this court stated that she was forced by his parents to implicate the appellant. This discredited the evidence of the complainant in its entirety. In the Case of NDUNGU KIMANYI VS REPUBLIC KLR (1979) 282, the court of appeal stated: "We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely on should not create an impression in the mind of the court that lie is not a straightforward person and raise suspicion about his trustworthiness or do or say something which should indicate to court that is a person of doubtful integrity and therefore unretia6Cewitness which makes it unsafe to accept his evidence."

It is my humble submission that the evidence which was relied by the learned magistrate in convicting me was untruth and does not fall within the description of a reliable witness. Her evidence was contradicted by the medical doctor during his cross examination.

3. Were the vital witnesses in this matter summoned by the prosecution? The prosecution failed to call three essential witnesses whose evidence would have provided the much needed corroboration to the PW1 evidence. The evidence of her fellow students whom she was with when the appellant defiled her as stated at page 23, on cross examination by Kerubo for the accused PW1 stated that ( on the day he defiled me I was with other students). The other students were never called to corroborate the evidence of the PW1. The mother to the victim who played a key role from the time the victim was tested for pregnancy in school until the time she took her to hospital never testified. Her evidence was crucial in corroborating the evidence of PW1 and PW3. **BUKENYA & OTHERS VS. UGANDA** 1972 EA 549 LUTTA, Ag. V-P of Court of Appeal for Eastern Africa made this celebrated holding. (Refer to ENID KAARI NG'ANG'A V REPUBLIC (2006) eKLR Pg 3 Para 4 as highlighted) "(IV) the prosecution must make available all the witnesses necessary to establish the truth, even if their evidence may be inconsistent. (V) 'Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution". In the instant case, vital witnesses were left out by prosecution and thus the evidence of the complainant was hardly sufficient to prove the case to with beyond reasonable doubt. This was a fitting case to make an adverse inference that the evidence of the witness not called by the prosecution was adverse to the prosecution case. The inconsistencies in the prosecution evidence created serious doubts on the prosecution's case that ought to have guided the learned magistrate to acquit the appellant as the case did not met threshold of proof set for criminal cases.

i.) Did the prosecution satisfy the ingredients of the offence of defilement? The burden is on the prosecution to adduce evidence, which would prove its case beyond reasonable doubt. In the absence of credible evidence proving the guilt of the accused persons, the prosecution cannot invite the trial court to convict on the basis of inferences and conjecture. The law places an obligation upon the prosecution to prove each and every element of an offence beyond reasonable doubt. In the present case, in order to prove the offence herein, the prosecution had an obligation to prove:

a. The accused Age of the victim.

b. Penetration.

c. Identity of the defiler.

The learned Magistrate while delivering her judgement stated that "on the issue of age, the birth certificate shows she was born on 20/10/1999 so as at June she was aged 16 years and her age has therefore been proved". It was of importance for the learned magistrate to call for an age assessment from a medical doctor so as to corroborate the birth certificate or the prosecution could have filed a notification card. Due to the runaway corruption in the several departments of Kenya government including the registration department it will be unsafe to rely on a birth certificate while convicting the appellant. PW1 stated that she was 18 years and was born on 20.10.1999" PW2 Edwin Kimulwa clinical officer testified that "I have a treatment card from Mogotio sub county hospital dated 18/09/2016 for Edith Kibowen 17 years female from Mogotio high school." PW3 Philemon Kimali the father to the victim in his testimony when the court asked him stated "faith is now 18 years. He was 17 years then". My lordship from the

evidence in record it is imperative that the age of the victim was not clearly ascertained as all the witnesses gave conflicting age of the victim. It is my submission that the age of the victim was not proved beyond any reasonable doubt.

*IN THE CASE OF HILLARY NYANGESA V REPUBLIC HIGH COURT APPEAL NO. 123 OF 2009 AND IN TWO COURTS ADOPTING THE DICTAIN THE CASE OF FRANCIS ONAMU V UGANDA THE COURT HELD AS FOLLOWS: "In defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim. In the case of any other evidence apart from medical evidence age may also be proved by a birth certificate, the victim's parents or guardian and by observance and common sense' In the instance case the victim PW1 stated that she was 18 years and was born on 20.10.1999" proved."*

*It is evident that all the witnesses gave conflicting age of the victim and does medical doctors evidence was mandatory as held in the above case. Penetration was never proved as the learned magistrate heavily relied on the pregnancy of the victim to conclude that the appellant was responsible. The evidence of PW3 the victim's father was that a child was born and buried, it was of great importance to prove the paternity of the said foetus whether it could link the appellant. On the identity the victim was under pressure from his parents to implicate the appellant as stated by the Investigating Officer. It is my submission that the prosecution failed to prove their case to wit beyond any reasonable doubt. My lordship the learned trial magistrate erred in law and fact by admitting the evidence and in concluding that the prosecution proved their case to wit beyond any reasonable doubt despite the clear contradiction and other shortcomings.*

*I humbly pray for total success of my appeal, conviction quashed, sentence set aside and I be set at liberty.*

*My submissions above are fortified by the following authorities:*

- 1). ENID KAARI NG'ANG'A -V- REPUBLIC (2006) eKLR*
- 2). NDUNGU KIMANYI -V- REPUBLIC KLR (1979) 282"*

#### **DPP's Submissions**

[6] In response, the DPP did not oppose the appeal and in written submissions dated 26<sup>th</sup> May 2020 filed in court and urged the court to allow the appeal as follows:

*"This appeal is **NOT** opposed.*

*The appellant herein was sentenced to serve 15 years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual offences Act. Evidence on record shows that the complainant was 17 years of age at the time the offence took place. The complainant herein is not a child of tender years. She was therefore well aware of the testimony that she gave before court. In her evidence she stated that she was defiled by the appellant on the 4<sup>th</sup> of June 2016 as she had gone home for school fees. She went back to school the following day. She suspected she was pregnant when she closed school as she was feeling dizzy but did not disclose the same to her parents. She tested positive for pregnancy on 18<sup>th</sup> of September 2016 when she together with other girls from her school were taken to Mogotio Health centre for pregnancy test. The complainant went home and it was until 21<sup>st</sup> September 2016 when the appellant took her to have an abortion at Marko's clinic.*

*I have noted that there are very many inconsistencies in evidence. While the complainant states that the appellant defiled her when she had been sent home for school fees, her father PW3 stated that the complainant informed him that she was defiled during mid-term. Further, the complainant in her evidence states that she was informed that the drugs inserted in her vagina was for procuring an abortion by the doctor. She states that the foetus was removed from her but she did not see the foetus. However, her father PW3 stated that the foetus died within minutes of birth. They took the foetus home and buried it. It is not clear where the complainant was when the foetus was buried or whether it was buried in her presence.*

*It is also not clear why samples were not taken from the foetus for DNA*

*Considering that the complainant was a minor. The evidence that she was indeed defiled was clear but the issue remains on who defiled her as the appellant herein raises an alibi and states that he was in Nairobi when the offence is alleged to have occurred.*

*DW4 testified that at the time of testifying on 23<sup>rd</sup> January 2019, the complainant had a child which was established to be of the appellant who was taking care of it until he was convicted. **The learned trial magistrate ought to have taken this piece of information seriously at it clearly showed the conduct of both the complainant and the appellant.** I do support the defence on this where they have quoted the case of **KKM VS R (2017) eKLR.***

*I have also noted the contents of an affidavit on record sworn by the complainant, EDITH JEBET KIBOWEN on 11th June 2019 where she states that she testified under instructions from her parents and that she lied to court.*

**The truth of the matter is that she regrets her actions for having sent the father of her child to jail. It is my opinion that the complainant herein who was 17 years at the time and the appellant were just fulfilling their sexual desires and did not stop even after this case was filed and they continued and had another child. The complainant is an adult now and it is my opinion that the appellant herein should be acquitted to take care of his child.** However, the court's decision suffices.

*Dated at Kabarnet 20<sup>th</sup> day of May 2020.*

*Esther Macharia*

*Ass. Director of Public Prosecutions*

*For the Director of Public Prosecutions.”*

## **DETERMINATION**

[7] I have reconsidered the evidence in line with the duty of a first appellate court (see **Okeno v. R** (1972) EA 32). I would agree with the principle in **Bukenya & Others v. Uganda** (1972) EA 349 where the Court of Appeal for East Africa held that “*where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.*”

[8] In the present case, the evidence of the accused’s involvement was barely sufficient and there were some discrepancies in the medical evidence of PW2 and PW5 as to the age of the resultant foetus, failure to take DNA samples for profiling to establish paternity as corroborative evidence, and the circumstantial evidence of the complainant’s brother PW4 seeing her with the accused in the evening before she aborted the foetus in no as required by the standard of circumstantial evidence incapable of explanation of any other hypothesis other than that they were going to Marcos clinic in the accused’s plan to abort the foetus. There was need for other evidence to corroborate the complainant’s evidence, as her was not the only evidence before the court as to invoke the provisions of section of Proviso to section 124 of the Evidence Act, as follows:

### **“124. Corroboration required in Criminal Cases**

*Notwithstanding the provisions of [section 19](#) of the Oaths and Statutory Declarations Act ([Cap. 15](#)), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*

*Provided that where in a criminal case involving a sexual offence **the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.***

*[Act No. 5 of 2003, s. 103, Act No. 3 of 2006, Second Sch.]”*

[9] Although this court is, on the principle of **Okeno v. R**, supra, required to defer to the observation of the trial court which saw and heard the witnesses, and the court notes that the trial court found the complainant’s brother PW4 to have been telling the truth, it would only prove that the accused and complainant had on the day before she aborted been seen leaving her home together but the witness could not say where they had gone. The court has to speculate that they had gone to Marcos clinic as testified by the complainant PW1, but which is not the only reasonable hypothesis that could be drawn from the fact. In addition, the fact that the complainant respondent in cross-examination that she was in the company of “**other students**” points to the availability of other evidence which was not called thereby invoking the principle of adverse inference by failure to lead evidence, that such evidence may have been adverse to the case of the Prosecution.

[10] The Affidavit of the Complainant in this court deponing that she lied in the trial court at the pressure of her parents, has been read by the prosecution as an attempt, perhaps belatedly, to save the accused from the consequences of his crime. However, the same was an attachment to an application for bail pending appeal and not properly additional evidence which the court could consider as no leave for admission therefor was sought and obtained in accordance with section 358 of the Criminal Procedure Code. The DPP may properly consider whether to prosecute for the offence of perjury committed by the complainant before the trial court or this appellate court or both.

[11] There is no merit in the objection that the charge sheet was defective for omitting the words intentionally and unlawfully in the particulars of the offence. The appellant was clearly informed of the offence in accordance with section 134 of the Criminal Procedure Code and he was not deceived in any way by the particulars as to the nature of the charge being one of defilement of a child aged 16 years. In addition, the words intentionally and unlawfully are not part of the offence under section 8(1) of the Sexual Offences Act, and unlike in the case of rape, therefore, need not be set out in the particulars of the charge as there can be no lawful defilement or sexual intercourse with a child nor unintentional defilement. The words **Intentionally** and **Unlawfully** are part of the offence of rape and attempted rape under sections 3 and 4 of the Sexual Offences Act, respectively. Not so in the offence of defilement.

[12] Instructively, sections 3, 4 and 8 (1) of the Sexual Offences Act are in terms as follows:

### **3. Rape**

(1) A person commits the offence termed rape if—

a. he or she **intentionally and unlawfully** commits an act which causes penetration with his or her genital organs;

b. the other person does not consent to the penetration; or

c. the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term “**intentionally and unlawfully**” has the meaning assigned to it in [section 43](#) of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

#### **4. Attempted rape**

Any person who attempts to **unlawfully and intentionally** commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.

#### **8. (1) Defilement**

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

[13] There was also no merit in the objection as to the dating of the charge sheet as 20<sup>th</sup> April 2017 and date of arrest as 29<sup>th</sup> September 2016 bearing in mind that the charge sheet was an amended charge sheet introduced on 20/4/2017, with no objection by the accused, to include the second count relating to the abortion of the complainant’s foetus.

[14] As regards the appellant’s defence, the trial court very properly considered and rejected the appellant’s alibi defence as an afterthought. However, considering the fact that the complainant who is now adult has sworn an affidavit, although not properly introduced into evidence before the court, supporting the appellant’s case, the court takes the view, as urged by the DPP, that the justice of the case may be in giving opportunity for the appellant to provide for the couple’s living child.

[15] However, on account of the insufficiency of evidence to support the conviction on the principle of **Bukenya v. Uganda**, supra, and noting the fact that the DPP does **not** support the conviction and oppose the appeal, I allow the appeal as urged by the DPP, set aside the conviction of the appellant for the offence of defilement contrary to section 8 (1) as read with 8 (4) of the Sexual Offences Act and set aside the sentence of imprisonment for fifteen (15) years imposed on him therefor.

#### **ORDERS**

[16] Accordingly, for the reasons set out above, the conviction and sentence passed on appellant for the offence of defilement contrary to section 8 (1) and (4) of the Sexual Offences Act are, respectively, quashed and set aside.

[17] Consequently, the court directs that the appellant be released from custody unless he is otherwise lawfully held.

*Order accordingly.*

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF JUNE 2020.**

**EDWARD M. MURIITHI**

**JUDGE**

#### **Appearances:**

Mr. Kiptoo K. Simon, Advocate for the Appellant.

Ms. E. Macharia, Ass. DPP for the Respondent.