



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.6 OF 2018**

**CHARLES KIPKORIR KOECH.....PETITIONER**

**- V E R S U S -**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal from the sentence of 15 years imprisonment for the offence of Defilement***

***by Hon. S. M. MOKUA – (C.M) in Kericho CM Criminal Case No.90 of 2016 delivered on 12/3/2018)***

**J U D G M E N T**

1. The Appellant was sentenced to 15 years imprisonment for 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.
2. The particulars of the offence were that between the 3<sup>rd</sup> and 7<sup>th</sup> December, 2016 at [Particulars Withheld] Village Kapkatet Location of Bureti Sub-County Kericho County the appellant unlawfully caused his penis to penetrate the vagina of F.C, a child aged 15 years.
3. The Appellant was charged with an alternative count of **INDECENT ACT** with a child in that on the same material particulars as in Count 1 (above) the Appellant unlawfully touched the buttocks and vagina of FC, a child aged 15 years with his hands.
4. The Prosecution evidence in summary was that on 3/12/2016, FC the victim who is an Orphan was heading towards her home when the Appellant who was a motorcycle rider agreed to drop her at home for Kshs.100/= . Instead of taking her to her home, the Appellant took the victim to his home where she remained for 3 days. On the 4<sup>th</sup> day she was rescued and taken for examination and treatment and found to have been defiled.
5. The victim who testified as PW.1 said during her stay with the Appellant they had sexual intercourse.
6. PW.2 the Assistant Chief Sosit Location rescued the victim following reports that a school girl was staying with the Appellant. He had the Appellant arrested with the help of AP. Officers.
7. The victim was taken for age assessment found to be 15 years of age.
8. PW.5, George Ouma of Kapkatet District Hospital examined the victim and concluded that there was vagina penetration. He noticed numerous pus cells in the urine and blood. PW.5 produced the P.3 Form as on Exhibit.
9. The Appellant said in his defence that he was arrested on 7/12/2016 after his motorcycle developed a mechanical problem and he was escorted to Kapkatet AP. Camp where it was alleged he had taken a girl to his house. The Appellant said he is a married man and he cannot keep a girl in his house.
10. The Trial Court found the Appellant guilty as charged and sentenced him to 15 years imprisonment. The Appellant has now appealed to this Court on the following grounds:-

***(i) THAT the Appellant was convicted without sufficient evidence.***

***(ii) THAT the medical records were not proved.***

***(iii) THAT the defence by the Appellant was not considered.***

11. The parties filed written submissions which I have duly considered. The Appellant submitted as follows:-

*(i) THAT he pleaded not guilty and still maintains his innocence and further the Prosecution evidence was not corroborated.*

*(ii) THAT the medical evidence did not prove penetration and the scene of crime is still unknown.*

*(iii) THAT the defence evidence was rejected by the Trial Court.*

12. The Respondent opposed the Appeal and submitted as follows:-

*(i) THAT there is evidence that the Appellant took the victim, a girl aged 15 years old to his house on 3/12/2016 and she was rescued by the Area Assistant Chief on 7/12/2016.*

*(ii) THAT there is sufficient medical evidence that the victim was defiled and further the Trial Court believed the testimony of the victim.*

*(iii) THAT the Prosecution called all crucial witnesses and their evidence was corroborative and consistent and further, section 143 of the Evidence Act provides that there is no particular number of witnesses required to prove the Prosecution case.*

*(iv) The Respondent also submitted that the defence by the Appellant was taken into account.*

13. This being a first Appellate Court, the first duty of the first appellate court is to re-evaluate the evidence adduced before the Trial Court and to arrive at its own conclusion bearing in mind that the Trial Court had the advantage of seeing the witnesses.

14. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a 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 (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; 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, see Peters vs. Sunday Post [1958] E.A 424.”**

15. To establish a case of defilement, the prosecution was required to prove three elements in order to secure the conviction of the Appellant on the charge of defilement as follows;

*(i) Penetration.*

*(ii) Identity of the Perpetrator and,*

*(iii) The age of the victim.*

16. Penetration is defined under **Section 2(1)(d) of the Sexual Offences Act No.3 of 2006** as:-

**“the partial or complete insertion of the genital organs of one person into the genital organs of another person”.**

17. In the current case, the prosecution proved penetration. The Complainant(PW1), said the Appellant took her to his home and she stayed with the Appellant for 3 days and that during that period, they had sexual intercourse.

18. The testimony of PW.1 (The victim) was corroborated by that of PW.5 who examined her and confirmed penetration. The Trial Court also relied on **Section 124 Evidence Act**.

19. The second element that the prosecution was required to establish is the identity of the perpetrator. The Appellant was well known to the Complainant and he was positively identified.

20. The Appellant was identified by the victim and PW.2, the Chief who rescued her from the home of the Appellant. The victim a school girl was spotted at the home of the Appellant and a report was made to the Chief by neighbours. The Chief was able to rescue the victim and trace the Appellant and have him arrested.

21. Under **Section 124 of the evidence Act**, the Trial Court can rely on the testimony of the victim alone if for reasons to be indicated, the Trial Court found that the victim was speaking the truth. The Trial Court conducted Voir Dire Examination and found the testimony of the Complainant reliable.

22. The Trial Court noted that the testimony of the Complainant was consistent and not shaken by the Appellant’s cross-examination.

23. I find that the Trial Court had valid reasons for relying on **Section 124 of the Evidence Act** which provides as follows:

**“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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.”**

24. The third element that the prosecution is required to prove is the age of the complainant. Under **Section 2(1) of the Sexual Offences Act**, the definition of a child is the one assigned thereto in the **Children Act**. This means any human being of less than eighteen (18) years. In the present appeal, the age of the Complainant was proved by production of the age assessment Report which confirmed that the victim was 15 years of age.

25. I find that the defence by the Appellant was considered by the Trial Court and the Court said the Appellant only gave an account on how he was arrested but he did not say his whereabouts between 3<sup>rd</sup> and 7<sup>th</sup> December, 2016.

26. I find that the Prosecution proved the charge against the Appellant to the required standard.

27. The conviction herein is safe and the sentence secure.

28. I dismiss the appeal for want of merit and I uphold both the conviction and sentence.

**Delivered, signed and dated at Kericho this 19<sup>th</sup> day of November, 2020.**

**A. N. ONGERI**

**JUDGE**