



**REPUBLIC OF KENYA**

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

**CORAM: D.S.MAJANJA J.**

**CRIMINAL APPEAL NO. 90 OF 2018**

**BETWEEN**

**DAVID OKELLO VICHENJE alias KENYATTA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the original conviction and sentence of Hon. E. Kigen, RM dated 8<sup>th</sup> October 2018 at the Magistrates Court at Eldoret in Criminal Case SO No. 44 of 2018)*

**JUDGMENT**

1. The appellant, **DAVID OKELLO VICHENJE alias KENYATTA**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1) and (2)** of the *Sexual Offences Act* ("the Act"). The particulars of the charge against him was that on 15<sup>th</sup> February 2018 at [particulars withheld] Village, Lugari Sub-County within Kakamega County, he unlawfully and intentionally caused his genital organ namely penis to penetrate the vagina of FLA, a girl aged 11 years.
2. The appellant now appeals against the conviction and sentence based on the grounds set out in his petition of appeal, amended grounds of appeal and his written submissions. He contested the fact that the medical evidence was inconsistent with the act of penetration, that the case was not proved beyond reasonable doubt and that the age of the child was not established. He also contended that he was not identified as the perpetrator as the evidence was not positive and free from and was based on the evidence of a single witness. The case for the respondent was the prosecution proved all the elements of the offence of defilement beyond reasonable doubt.
3. Before I deal with this appeal, I recognise that it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic [1972] EA 32*). In order to proceed with this task, I will set out a summary of the evidence as it emerged before the trial court.
4. The prosecution evidence was that on 15<sup>th</sup> February 2018, the child, PW 1, was sitting outside her house at about 4 pm when the appellant, whom she knew as *Kenyatta* called her to the house. In her unsworn testimony, she recalled the appellant took her to his house, removed her clothes and "*did bad things to her.*" She added that this was not the first time he had done this to her as he used do would call her every evening and put his penis in her vagina. She told her mother, PW 2, what happened on the next day.
5. PW 2 recalled that on 15<sup>th</sup> February, 2018 as she was heading home from Church, she noticed PW 1 was not walking well. She refused to eat on that night and when she asked PW 1 what the problem was, PW 1 informed that *Kenyatta* had called her into his house and given her mangoes and sugarcane. She took PW 1 to the school on the next day and was advised to take her to hospital.
6. PW 3, who lived with the appellant in the same compound, recalled that on 15<sup>th</sup> February 2018 at about 4.00pm, she saw PW 1 coming from the appellant's house. She called PW 1 and demanded to know why she was coming from that house, PW 1 told her that the appellant had been asking her to come to the house every day for sugarcane and water. She took PW 1 and handed her over to the school teacher, PW 4.
7. A teacher at the school which PW 1 was attending, PW 4 testified that on the evening of 15<sup>th</sup> February 2018, she met PW 3 with PW 1. PW 3 had signaled to her to come and when she interrogated PW 1, PW 1 told her that the appellant had been giving her water and sugarcane. PW 2 later came to see her to tell her that she had received information that the appellant had defiled PW 1.
8. The Investigating Officer, PW.6, confirmed that on 16<sup>th</sup> February 2018, he received the report from PW 2 that PW 1 had been defiled.

They came in the company of PW 4. He issued the P3 medical report and charged the appellant. He stated that PW 1 identified the appellant as *Kenyatta*. The Clinical Officer who filled the P3 medical report on 16<sup>th</sup> February 2018, PW 5, observed that that the child had a broken hymen but there were no bruises. The laboratory tests revealed spermatozoa and pus cells, which confirmed that there had been penetration.

9. In his sworn defence, the appellant admitted that he was *Kenyatta* but denied that he had committed the offence. He stated that PW 2 owed him Kshs. 10,000/= for work he had done but she refused to pay and that he was framed as a result of demanding payment.

10. The thrust of the appellant's case is that the prosecution failed to prove every element of the offence of defilement beyond reasonable doubt. Under **section 8(1)** of the **Act**, the prosecution must prove that an accused did an act of penetration with a child. "*Penetration*" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

11. I have considered the entire evidence and I find that the testimony of PW 1 was clear and consistent on what the appellant had done to her. According to her, it was not the first time that the appellant had subjected her to penetration. The appellant was her neighbour whom she knew as *Kenyatta* and he admitted that was his name in his defence. The incident took place at daytime and in my view the entirety of the evidence standing alone was capable of securing a conviction under the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which provides that the uncorroborated testimony of a victim in sexual offences is sufficient to support a conviction without corroboration, if the trial magistrate believed, for reasons to be recorded, that the child was stating the truth. The trial magistrate came to the conclusion that PW 1's testimony was credible and that she had no reason to lie against the appellant.

12. If any corroboration were required, it is to be found in the testimony of PW 2, PW 3 and PW 4 who all saw PW 1 in a state of distress on the material day and to who PW 1 informed of the ordeal. Moreover, PW 3 saw PW 1 leave the appellant's house confirming PW 1's narration and putting the appellant at the locus in quo.

13. The medical evidence and particularly the laboratory examination show that there were spermatozoa which confirms the act of sexual intercourse and therefore penetration. It is only the appellant who could have committed the act as he was seen with PW 1 after the incident and as PW 3 testified he was living alone. Finally, the overwhelming evidence of the prosecution I have set out above, leaves the appellant's defence that he was being framed empty. Like the trial magistrate found, I also find that the appellant did not even suggest to PW 2 in cross-examination that she owed him money.

14. The question of age of a child is a question of fact. The evidence before the court was in the form of a birth certificate which shows that the child was born on 2<sup>nd</sup> November 2006 which means that she was 11 years 3 months old. Since the child was aged below 11 years, the mandatory sentence prescribed by **section 8(2)** of the **Act** is life imprisonment. The sentence imposed was thus legal.

15. I affirm the conviction and sentence. The appeal is dismissed.

**DATED and DELIVERED at ELDORET this 23<sup>rd</sup> day of APRIL 2019.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Oduor, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.