



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 18 OF 2015

SAMSON KIPYEGO LAGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence in Kapsabet Principal Magistrate's Court Criminal Case No. 1430 of 2014 Republic v Samson Kipyego Lagat by G. Adhiambo AG. Senior Resident Magistrate dated 6th February 2015].

JUDGMENT

1. The appellant was convicted on a charge of defilement Contrary to Section **8(1)** as read with Section **8(2)** of the Sexual Offences Act and sentenced to serve life imprisonment.

The particulars of the charge stated on 6th May 2014 within **NANDI** county, he intentionally and unlawfully caused his penis to penetrate the vagina of **BC*** a child aged 5 years.

He denied the charge.

2. **BC** (a child of tender years gave unsworn evidence that the appellant defiled her. She stated

“I know this man. He is called Samson....He did bad manners to me. He did bad to me here (pointing at her vagina. He used his thing to do bad manners to me here (pointing) at her vagina. He did bad manners to my thing that I use to urinate.”

3. She described how the appellant called her to his house and told her to lie on his bed, and when she wanted to cry, he covered her mouth using his hand then lay on top of her after removing her panty and removing his trouser. After he released her, she went home and reported to her mother, saying the incident took place during the day.

4. The minor's mother **RCS** (PW2) told the trial court that she had left **BC** playing outside while she went to boil water for the appellant. When the water was ready she took it to the appellant's cottage which was opposite the main house, and that is when she saw **BC** leaving the appellant's house while running. The child ran and clung on to her while crying. Upon inquiring what was wrong, the child described her ordeal with the appellant.

5. The minor was rushed to hospital. PW2 told the trial court the minor was born in July 2008 – at the hospital, the minor's age was assessed and she also underwent a medical examination.

Apparently the appellant worked for PW2 as a herdsman and was her distant relative.

6. On cross examination she stated that when the child came out of the door running, she noticed the appellant following her. After the child described her ordeal with the appellant, PW2 was so shocked, and deeply pained, she could not even confront the appellant. She immediately left for hospital with the child.

7. **SILAS RUTO** (PW3) a Clinical Officer based at **Kapsabet District Hospital** examined the minor on 6.5.14 and took urine samples for analysis. He found that the labia minor and labia majora was slightly hyperemic and the hymen was broken, although not freshly torn. However he was able to detect that there was tried partial penetration in the recent past.

8. He also concluded that the minor was defiled again some other time in the past and the filled P3 was produced as Exhibit.

9. **SILAS LAGAT** assessed the minor's age and he produced the age assessment report which confirmed the minor was 10 years old.

IP AUGUSTINE LUGONZO (PW4) confirmed receiving a report about the incident, and learnt that since PW2 had not confronted the appellant so, he was just within her homestead. It was therefore not difficult to proceed there and arrest him.

10. The appellant was examined by **DANSON GICHANGI** (PW5) a Clinical Officer based at **KAPSABET** District Hospital on 07.05.2014, but the examination was basically to establish his health status.

11. In his unsworn defence, the appellant stated that he did not know anything about the charge and he never defiled the child. All he saw were police officers who confronted him at the trading centre and arrested him.

12. The trial magistrate in her judgment, observed that PW2 confirmed seeing **BC** emerge from the appellant's cottage while running followed by appellant and the minor disclosed to her what had happened. She noted that the appellant was well known to the minor, and this evidence was corroborated by the minor's mother (PW2) who said the appellant worked for her as a herdsman – so he was not a stranger to the child and it was day time. Further the minor never changed her version as what she told the court was exactly what she had told her mother.

13. The trial magistrate held that given the close bodily proximity as the appellant defiled the minor, the fact that he was well known to the minor and the incident took place at day time gave the minor ample opportunity to identify and recognize the appellant.

14. Further that the minor's testimony was corroborated by the evidence of her mother who saw her leave appellant's cottage and the medical officer who on examining her confirmed she had been defiled. The P3 form gave an indication that the age of the injury was about 2 days old.

15. The witnesses were described as consistent and credible and the appellant's defence did not shake their evidence.

16. The appellant contested the findings on grounds that the medical evidence did not link to the offence and the case was not proved beyond reasonable doubt. Further that the case was poorly investigated and his defence was disregarded without reason.

17. The appellant filed written submissions where he argued that penetration had not been proved because the hymen was not freshly torn, and that the appellant had engaged in past similar acts.

18. He also argued that the minor's age was not clearly established because other initial indications suggested that she was 5 years old, further examination proved her at not less than 7 years and not more than 14 years, zeroing in to 10 years. He insists that with age specificity, then this was fatal to prosecution case.

19. In opposing the appeal, Miss Mumo submitted on behalf of the State that penetration was proved vide the medical evidence as well as the minor's evidence.

Further that identification was free from error and was by recognition and the defence did not shake the prosecution case.

20. Indeed the medical evidence suggests that the minor had been involved in other sexual encounters. However there was also evidence of a recent partial penetration.

- For defilement, even partial penetration, constitutes an offence of defilement.

As duly pointed out by the trial magistrate, the appellant had an opportunity to be with the minor alone and PW2 confirmed seeing both the child and the appellant emerge from his cottage.

The minor was crying and told PW2 what had happened.

21. Furthermore as properly pointed out, there was adequate favourable opportunity for identification as the encounter was during the day, and the appellant was well known to him. I do not detect any error in law or fact in the findings of the trial court and I decline to interfere.

The age was duly assessed and placed her in the category ranging between 5 – 10 years.

The conviction was safe and is upheld. The sentence was legal and I confirm the sentence. The appeal is dismissed.

DATED, SIGNED and DELIVERED at ELDORET this 12th day of April 2019.

H. A. OMONDI

JUDGE