



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 222 OF 2017

ELIJAH KOMOLIT KIPKOTOT.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet. Cr. Case No. 22 of 2017 delivered on the 23rd day of November, 2017 by Hon. S.O Temu, PM]

JUDGMENT

1. The appellant was on 23rd November 2017 convicted and sentenced to imprisonment for twenty (20) years for defilement contrary to section 8(1) (3) of the Sexual Offences Act, the particulars whereof were that he “on the 2nd day of September 2017 at [Particulars Withheld] village Kuikui sub-location, Baringo North Sub-County within Baringo County intentionally and unlawfully caused his penis to penetrate the vagina of NK. a girl aged 12 years.”

2. The appellant filed a Petition of Appeal dated 7th December 2017 and by amended Grounds of Appeal raised the following grounds of appeal:

- 1. The trial court erred in law and fact by failing to observe that voire dire examination was never subjected to the complainant.*
- 2. I am aggrieved that the trial court failed to observe that the evidence tendered in this matter before the honourable court was full of contradictions and inconsistencies.*
- 3. That the trial magistrate erred in law and fact by failing to hold that the matter was not proven beyond reasonable doubt.*
- 4. I am aggrieved that the trial court erred in law and fact by shifting the burden of proof to the appellant.*
- 5. The trial magistrate erred in law and fact by neglecting the defence evidence of the appellant.”*

In addition, the appellant filed corresponding written submissions in elaboration of amended grounds of appeal.

3. In opposing the appeal, the DPP made oral submissions at the hearing as follows:

“26/6/19

Coram: Before Hon Justice Edward Muriithi

Court assistant: Kemboi

State: Ms Macharia

Appellant: Present

Appellant

I have written submissions.

DPP

I am ready to proceed.

Appellant in Kiswahili

I have nothing to add to the submissions. I shall respond to the submissions by the DPP.

DPP

Appeal is opposed. The appellant was convicted of defilement Contrary to Section 8 (1) and (3) of the Sexual Offences Act and sentenced to 20 years on 23/11/2017.

Appellant was positively identified by Pw1, 2, and 3. All the witnesses testified that the appellant was the neighbor and they knew him well. The 3 witnesses also confirmed that on 2/9/2017 between 9-10 am, appellant was in Pw2's house, where he was taking Busaa.

He took Busaa worth 60/= and was unable to pay because he did not have the money. He requested Pw2 who was selling the Busaa to allow Pw1, the daughter of Pw2 to accompany the appellant to his house so that he would give her 2 kg of maize to compensate for the money.

Pw1 testified that she was sent by the mother Pw2 to pick maize from the appellant's house. She went in the company of the appellant and on arrival she stood at the door and waited for the appellant to give her the money. The appellant then pulled Pw1 inside the house and defiled her. He then gave Pw1 2kgs of maize to take to her mother and 50/= for herself so that she could not say what had happened.

Evidence of Pw1 on what transpired on the material day was not shaken during cross-examination by the appellant. Pw1 testified that she went home and informed her mother Pw2 what had happened. Pw2 also testified that when Pw1 went back home, she was crying and she enquired to know what had happened.

Pw3 testified that he was at Pw2's house. He was taking Busaa. He testified that he found the appellant in the house and saw Pw2 sending Pw1 to the appellant's house. He was also present when Pw1 come back crying. He was informed by Pw2 what had happened and was among the people who went to the appellant's house. They went to his house almost immediately and found him sleeping from where he was arrested.

The doctor who was Pw5 examined the complainant. She testified that there were bruises on her vaginal wall and the Labia Majora was broken. The hymen was missing and she concluded that the complainant had been defiled.

The complainant in her testimony said she was 12 years of age. The mother Pw2 testified that the complainant was born on 8/5/2005 and was about 12 years. Age assessment report indicated that complainant was between 12-14 years.

The age of complainant was therefore proved as it was within the bracket of 12-15 years as provided under Section 8 (3) of the Sexual Offences Act.

Evidence against the appellant is overwhelming and the Prosecution has proved its case beyond reasonable doubt and there is no doubt that it was the appellant who defiled the complainant.

Appellant sentenced to 20 years imprisonment which was the minimum under Section 8 (3) of the Act. I pray that the appeal be dismissed.

Appellant in reply

The maize that I was alleged that I gave to the complainant was not produced before court.

The doctor said the complainant was 12 or 14 years ages. It was not definite.”

EVIDENCE BEFORE THE COURT

4. The prosecution evidence before the trial court was as follows:

“**Court**

[PW1] Minor aged 12 years old is sworn in English/Kiswahili

My name is NKY.

I am a resident of Kasiet.

I am 12 years old.

I am a pupil at [Particulars Withheld] Primary school in class six.

I am staying with my father and mother at home.

I know the accused who is before court.

He is called Kamor and he is our neighbor.

On 2/9/17 at about 10am I was at home with mother.

The accused had come home where there was alcohol.

The accused had drunk and he informed my mother that I should go with him and he was to give maize 2 kilos as he had no money.

Our home to the accused's house is about 20 minutes' walk.

We had gone with the accused to his house.

The accused had asked me to give him the sack which I was to carry the maize with.

I had taken the sack from my house.

The accused had put maize in the bag.

I was a standby at the accused's door as he placed the maize to the bag.

The accused's house is made of grass and is round.

The accused had held my left hand and I had screamed and he held my mouth.

The accused had informed me that if I screamed he was to cut me with a panga.

He had pulled me into the house and he placed me onto the bed.

I was wearing a shirt and skirt and trouser and pant.

The accused had asked me to remove my trouser and I had removed.

He had removed his short and he had ties on me.

The accused had inserted his thing penis into my vagina.

I had removed my pant too.

I had felt pain when he inserted his thing into mine.

When he finished the accused asked me to sleep and I said no but he insisted and I had slept for a while.

The accused had gone out and he found that the maize had spilled and he came back to the house and he gave Ksh. 50/- and he asked me to go home and I took the maize and the money and I went home. When I reached home I had informed my mother that the accused had defiled me.

My mother has asked people to go and arrest the accused and I was taken to Barwesa Hospital but we did not find the doctor and we went to Kinyach police station and we reported the incident and the police had asked us to go to Arror hospital for treatment.

I was treated and I was issued with treatments notes.

Treatment notes are marked as MFIP1

The P3 is identified and marked as MFIP2.

I was treated at Kabarnet hospital later.

Treatment notes for Kabarnet are marked as MFI P3.

I was taken to hospital for age assessment.

I was taken x-ray at the hospital Kabarnet.

The age assessment notes are marked as MFI 4a and x-ray film MFI P4b.

The 50 shillings note is marked as MFIP5.

Accused is identified in court.

Cross examined by accused in Kiswahili and English

My mother had informed me that she wanted Ksh.60/=.

The Ksh. 50/= was mine. You had given it to me to be mine.

I had come to you here at about 10am.

Prosecution

No re-examination

The incident had taken place at 10am.

PW2 FEMALE ADULT IS SWORN

My name is DC.

I am a resident at [Particulars Withheld].

The complainant herein is my second born child.

The accused is called Kamor and he is my neighbor.

At about 900am. On 2/9/17 I was at home brewing alcohol and he had drunk alcohol worth Ksh. 60/= and he stated that he did not have money and he asked me to send a child to go and get maize from him.

I had sent the complainant to go to the accused's home for the maize.

At about 10.30am she came back crying.

The complainant was to pick 2kg of maize.

She had bought the maize and she entered into the house and I followed her and I had asked her why she was crying and she stated that when they reached [particulars withheld] home he had given her maize and he had pulled her hand into the house and the complainant had screamed for help and the accused had held her mouth and he had pushed her to the bed and he had removed her the pant and he had defiled her.

I had taken the child to Kasitet police station as we went to Arror hospital where she was treated.

We had gone to Barwessa hospital but there were no doctor.

We later went to Kabarnet county hospital.

The complainant is 12 years old.

She is in class six.

She was born on 8/5/05.

Accused is identified in court.

Cross examination by accused

One kilo of maize is Ksh. 30/=.

You had come to my home on 2/9/17.

The money was for the same day.

My alcohol was busaa.

Prosecution

No re-examination.

PW3 MALE ADULT IS SWORN

My name is John Cherutoi.

I am a resident of Kasitet.

I am a farmer.

The complainant is known to me. She is my neighbor.

DC is the complainant's mother.

I know the accused he is called Komor and he is my neighbor.

On 2/9/17 I was mama K's home at about 10am drinking busaa.

I had met the accused there taking busaa.

When he was asked to pay he stated that he had no money and he requested to be given a child the complainant herein to go and pick maize from his house.

After a while the complainant had come and she entered into the house and the mother had entered into the house and I had heard her scream for help.

She came out and stated that the complainant had been defiled.

I went to the accused's house with others and we had found him in the house asleep and we had arrested him.

I had rung the home guard one Raphael and he came and he took the accused to police station.

Cross examination by accused

The complainant was crying when she stated that you had defiled her.

She was from you home with the maize and 50 shillings note.

PW4 MALE ADULT IS SWORN

My name is RPK.

I am resident of [particulars withheld]. I am KPR officer.

I know the complainant minor herein as she is my neighbor.

DC is the complainant mother.

I am not related to them.

The accused is known to me. He comes from my home center.

On 2/9/17 I was at [particulars withheld] at 2pm when J had rung me and he informed me that there was an incident of defilement that had taken place at [particulars withheld] and he required my assistant.

The chief had rung me and he informed me that I should go and arrest the suspect of the defilement.

I went to the accused's home which had two houses and I found that the local people had arrest him.

I had re-arrested him and I took to the police station.

Sketch plan of the accused's home is identified and marked as MFIP6.

Cross examination by accused

I was informed that you had defiled the child.

PW5 FEMALE ADULT IS SWORN

My name is Doctor Mumbi.

I am working at Baringo County Hospital.

I had been a doctor for two years.

I had filled P3 on 4/9/17 NKR.

He came with allegations that she had been defiled.

She was given OB No. 27298/17 I had examined the child.

She had some clothes which were with blood stains.

She had bruised to her chicks.

She was normal in other parts of the body.

The complainant had been seen at the outpatient department where she had been treated and given medication.

She had been injected and given anti-HIV and pregnancy.

When I had looked at the child's private parts vagina.

The Labia majors were swollen.

The hymen was broken.

Her inner area part of the vaginal walls had bruises and she had blood discharge and whitish discharge upon that examination.

I had made an opinion that there was penetration to the complainant's vagina.

I wish to produce the P3 as an exhibit.

The P3 is produced ad an exhibit P2.

The treatment sheets dated 8/9/17 from Kabarnet county hospital is produced as exhibit3.

I had assessed the complainant's age.

I had conducted wrist x-ray.

I had formed an opinion guided by the parent's information and the x-ray film I had made an opinion that the complainant child

was between the age of 12 -14 years.

The report and x-ray are produced as exhibit P4a & b.

The complainant had gone to Aror Mission Hospital where she was treated.

The treatment notes from Aror Mission hospital are produced as exhibit P1.

Cross examination by accused

I don't know as to who had committed the offence.

There was nothing on mind which can state that you had committed the offence.

PW6 MALE ADULT IS SWORN

My number is 42250 CPL Michael Makokha.

I am attached at Kinyach police station on investigation.

On 2/9/17 at about 5pm I was at the police station when the complainant herein came together with her mother and they reported that the mother had sent her child the complainant to pick maize from the accused's home and when they reached the accused's house the accused had pulled the complainant to the house as he had defiled her.

The accused had allegedly threatened to cut the complainant with a panga if she screamed.

The accused had given the complainant 50 shillings note No.GC1228739 after the incident so that she should not report the incident.

The complainant had notified the mother what had happened to her.

There were other witnesses who had seen when the complainant was sent to the accused's home.

The (PW3) witness had gone to the accused's home and they had arrested him and KPR officer PW4 had brought him to police station.

I had recorded statements and I had referred the complainant to hospital.

On 4/9/17 the complainant had gone to Kabarnet hospital where P3 was filled. The complainant's age was assessed and it was established that she was 12 years old.

The 50 shilling note is produced as exhibit P5.

On 22/9/17 I had gone to the accused's house and I looked at the house and I had found that the time was isolate and even if the child complainant could have screamed nobody could have heard.

I had drawn sketch plan and I wish to produce it as an exhibit.

The sketch plan is produced as exhibit P6.

Cross examination by accused

The child is the one who stated that you defiled her.

The panga was never recovered.

Prosecution

No reexamination

That is the close of the prosecution's case."

5. The appellant when put on his defence gave an alibi defence as follows:

“DW1 ACCUSED MALE ADULT IS SWORN IN KISWAHILI AND ENGLISH

My name is Elijah Komor Kipkotot.

I am a resident of Cheptigich.

I am a herdsman.

The charges are not true.

On the 2/9/17 I was at Kipsaraman where I had gone for my business.

I left there on the same day and I went home by motorcycle.

I had a lighted at Kampi Nyasi and I had met Isaac Kiptis and I went with him home.

When I reached home the said Isaac had gone to his home and I stayed at home from 3pm up to about 3.20pm when people came there and they had arrested me.

I asked them as to why and they stated that I knew my offence and they had taken me to Kinyach Police station where I was informed that I had raped a child.

I have witnesses that I was with at Kipsaraman and the Bodaboda rider who took me home by the name of Kibe.

That is all.

CROSS EXAMINATION BY PROSECUTION

I know the complainant herein as she is my neighbor.

I know DC. She is my neighbor.

I know John Cherutoi but he stays far from home.

I was not at D's home on the date of the incident drinking busaa.

I have no difference with the complainant minor.

DC was charging Ksh. 60 from me.

The money was for alcohol that had taken on 23/8/17.

I was drinking with Chepkok on the said date and Isaac Kokuoni.

On the date of incident I had gone to Kipsaraman at 6 am with Jacob.

I had taken goats to Kipsaraman to one Kandie.

The said Kandie had purchased three goats.

I had reached Kipsaraman at 11 am.

I had reached home at 3 pm using bodaboda and the rider was Kibe.

I had differences with Michael over Maize.

I did not ask the witness over land issue.

I had asked him questions over the offence and not land.”

ISSUES FOR DETERMINATION

6. The issues for determination in this case are whether the offence of defilement was proved and whether the appellant was shown to have been the perpetrator.

DETERMINATION

Voire dire examination

7. Section 19 (1) of the Oaths and Statutory Declarations Act, requires **voire dire** examination for children of tender age, as follows:

*“(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, **any child of tender years** called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, **his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth;** and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced in writing with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.”*

8. A child of tender age has been defined as “any child of an age, or apparent age of under the age, of under 14 years; although, as was said by Lord Goddard C.J., in *R v. Campbell* (1956) 2 ALL E.R. 272, ‘whether a child is of tender years is a matter of **the good sense of the court...**’” (see *Kibangeny arap Kolil v R* 1959 EA 92.) Section 124 of the Evidence Act requires corroboration for the unsworn evidence of a child of tender years received under section 19 of the Oaths and Statutory Declarations Act as follows:

*“124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for any 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.”

9. In allowing the child complainant in this case to testify on oath without prior *voire dire* examination, the trial court may have, in **the good sense of the court**, considered, having seen the child herein, that she was not a child of tender age for whom *voire dire* examination was required. Indeed the age assessment by the doctor placed the age of the child at between 12 - 14 years of age, and the trial court may be excused of the default in taking a *voire dire* on the child in this case. However, the important consideration is whether the accused was consistently with his fair trial rights under Article 50 (2) (k) of the Constitution afforded an opportunity to cross-examine the child witness.

10. There could only have been prejudice if, in terms of section 124 of the Evidence Act, the accused was convicted on the basis of the uncorroborated evidence of a child whose evidence was irregularly taken on oath without prior determination as to her understanding of the nature of the oath and or the duty to tell the truth. In *Oloo v. R* (2009) KLR 416 the Court of Appeal held that -

*“[I]n law evidence of a child of tender years given **on oath** after *voire dire* examination requires no corroboration in law but *the Court must warn itself that it should in practice not base a conviction on it without looking [for] and finding corroboration of it.* Evidence of a child of tender years not given on oath must in law be corroborated.”*

11. Section 382 of the Criminal Procedure Code provides as follows:

*“382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings Subject to the provisions herein before contained, **no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***

*Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether **the objection could and should have been raised at an earlier stage in the proceedings.***

[Act No. 33 of 1963, First Sch.]”

12. I do not find merit in the objection as to failure to conduct a *voire dire* on the child whose age was established by medical evidence as being between 12 - 14 years and whose evidence was subjected to both cross-examination by the accused and corroboration by independent evidence before a conviction was based on it. The accused’s right to challenge evidence was observed and in terms of section 382 of the Criminal Procedure Code, no injustice can be shown to have been suffered by the accused on account of the default of prior *voire dire* examination herein.

Analysis of evidence

13. Weighing the prosecution evidence against the appellant’s defence as a whole, the story that outs is that on the 2/9/2017 on a day when the appellant says he was away at Kipsaraman until 3pm when he came back home, PW1 the complainant girl, a class 6 pupil whose age is assessed at 12-14, testified that the accused had gone to their home at 10.00am and consumed alcohol which her mother sold to him and when he could not pay had requested that the girl goes with him to his home so that he gives her 2kgs of maize in lieu of the Ksh.60/- money owing for the alcohol, each kg of maize being Ksh.30/-, and while there the appellant had pulled here into his house, and threatening to cut

her with a panga had her remove her pants and defiled her, and thereafter giving her the maize and Ksh.50/- for herself. The complainant (PW1) had on returning home informed her mother (PW2) of the incident and the latter had asked people to go and arrest the appellant.

14. PW2 testified that she had sold alcohol worth 60/- to the appellant who said he had no money and asked her to send a child to go and get 2kg maize from his house as payment, and that she had sent the complainant who came back around 10.30am crying and said that the appellant had defiled her. PW2 gave the age of the complainant as 12 years and her date of birth as 8/5/2005, and PW5 the medical expert testified that she had assessed the complainant's age by parent's information and X-ray film on the complainant's wrist at between the age of 12- 14 years.

15. PW3 confirmed the material facts of the appellant having been at the Busaa den drinking, the complainant having been sent to go and collect maize from the appellant's house and her return and report that she had been defiled.

16. Medical evidence by PW5 confirmed penetration, saying that *"when I looked at the child's private parts vagina. The labia majora were swollen. The hymen was broken. Her inner part of the vaginal walls had bruises and she had blood discharge and whitish discharge upon that examination."*

17. PW6, the Investigating Officer confirmed the report to the police station by the complainant and her mother on 2/9/2017, and the arrest and escort of the appellant to the police station on the same day.

Appellant's Defence

18. Of course, an accused person who raises an alibi defence does not thereby assume the duty to prove it. [see *Wangómbe v. R* (1980) KLR 149]. It is the prosecution to prove the guilt of the accused not for the accused to prove his innocence. The alibi evidence may raise a reasonable doubt as to the guilt of the accused. However, in this case, the bare alibi that the appellant had on the material day been away at Kipsaraman for business until 3.00 - 3.20pm when he came back home and people came to arrest him does not counter the consistent evidence of the prosecution that he was at a Busaa house where he drunk and accumulated a bill of Ksh.60/- which he sought to pay by two kg measures of maize for which he asked the Busaa seller to send her daughter to collect from his house whereat he found opportunity to capture and defile the minor who went to collect the maize.

19. There was no question of mistaken identity as the appellant was well known to the prosecution witnesses PW1, PW2, PW3 and PW4 as a neighbour. The appellant himself testifying as DW1 confirmed that the witnesses PW1, PW2 and PW3 were his neighbours, and that he owed Ksh.60/- for alcohol but which he claimed was for an earlier occasion on 23/8/2017.

CONCLUSION

20. Although the evidence of the child complainant (PW1) aged between 12-14 years was given on oath, this court warns itself of the danger of convicting on her evidence and seeks corroboration by independent testimony, which it finds in the evidence of the mother who received the child crying from her ordeal with the appellant, PW3 the neighbour and alcohol customer who was at the complainant's mother's home drinking Busaa and who had met the accused who he knew as neighbour there taking Busaa and who *"when asked to pay he stated that he had no money and he requested to be given a child the complainant here into go and pick maize from his house [and] after a while the complainant had come and she entered into the house and the mother had entered into the house and I heard her scream for help"* and by PW4 police reservist who testified that he had at 2.00pm be called by the Chief to go and arrest the appellant as a suspect of defilement finding him already arrested by members of the public as testified by PW3, and by the medical evidence of PW5 indicating that there was penetration of the complainant's vagina. The evidence of all the Prosecution witnesses was consistent in support of a finding that the complainant minor had been defiled.

21. On the corroboration of the evidence of the minor witness (PW1) by the testimony of PW2, PW3, PW4 and PW5, the court accepts the complainant's evidence that she had been defiled by the appellant, who was known to PW1, PW2, PW3 and PW4 as their neighbour, when at about 10.00am she had gone to receive maize in lieu of money in payment for alcohol taken by the appellant at her mother's house and that, upon her reporting the matter to her mother, the appellant had been arrested at about 2.00pm that day and I, therefore, reject the alibi defence by the appellant that he had been away at another centre until 3.00pm when he came home only to be arrested by people on allegations of defilement. Noteworthy, the facts of appellant's owing of some Ksh.60/- for alcohol taken from the complainant's mother and his arrest on the 2nd September 2017 by people on allegations of defilement are common denominators in the prosecution and the defence stories, the defence almost admitting the prosecution's case.

22. I would find the offence of defilement proved against the appellant beyond reasonable doubt.

SENTENCE

23. Section 8(3) of the Sexual Offences Act provides that *"a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term not less than twenty years"*. I do not consider that the Court has discretion to depart from a **minimum** as opposed to a **maximum** sentence.

ORDERS

24. Accordingly, for the reasons set out above, the court finds no merit in the appeal and the same is dismissed.

25. However, pursuant to section 333(2) Proviso of the Criminal Procedure Code, the sentence of imprisonment for twenty (20) years imposed on the appellant by the trial court shall commence on 4/9/2017, the date of his arraignment and remand awaiting trial as the accused

did not obtain bail pending trial.

Order accordingly.

DATED AND DELIVERED THIS 24TH DAY OF JULY 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.