



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 151 OF 2015**

**DAVID TOROITICH KIPKORIR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Being an appeal from the original conviction in Criminal Case No. 66 of 2013 delivered on 27<sup>th</sup> October 2015 in the Principal Magistrates Court at Iten by H. M. NYABERI, Principal Magistrate]***

**JUDGMENT**

1. Appellant (**DAVID TOROITICH KIPTOO**) was convicted on a charge of defilement Contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act No.3 of 2006, and he was sentenced to serve life imprisonment.

The particulars of the charge stated that on 9<sup>th</sup> February 2013 at about 6.00pm in **MARAKWET EAST**, within **ELGEYO MARAKWET** County, he intentionally and unlawfully committed an act which caused penetration by use of his genital organ, namely penis into the genital organ namely vagina, of **MJK\***, a girl aged 9 years.

He denied the charge.

**MC** (PW1) told the trial court that on 9.2.13 at 6.00pm while at home with her brother K and a neighbour also named **KIPLAGAT**, the appellant (her uncle) called her and instructed her to go light a fire for him at his brother's house. She obliged and accompanied him. However upon getting to Kimosop's house, they found the door locked, and the appellant requested her to accompany him to Rima. He carried burning firewood from the kitchen of PW1's parents and when she complained that she had a wound on his leg, he used the burning flame to ...pg 2. the wound, then gave her a sweet which she promptly threw away.

2. The appellant held her by the throat, hit her on the chest and threw her to the ground. He told her he would strangle her so that she would be buried the next day. He then removed her pant, removed his pant and lay on top of her. She stated;

***“He lied (sic) on my thighs and did bad manners to me here (holds vagina). I do not know what the thing is called or used for.”***

3. PW1 was screaming and in the process Timothy Kiplagat who was passing by rushed to her aid but appellant pulled his legs and he fell down while screaming. Kiplagat screamed and the appellant ran away. Later her brother Timothy Kiplagat came and collected her. Her brother Cornelius Kiplagat collected her from Timothy's home. PW1 explained that on that date, her mother had traveled while her father was away at work.

16 years old **TIMOTHY KIPRTOICH** (PW2) confirmed that on the evening of 9.2.13 at 6.00pm he had gone to borrow a book from **M's** brother and **KIPLAGAT**. It was not yet dark and shortly the accused whom he referred to as **MARADO**, arrived, entered the house but did not sit down. He said he wanted to go and light a fire at a relative's house and requested **M** to go and assist him carrying firewood while he carried the fire.

4. The pair left, with appellant promising to return soon to join the others in a meal. Kiplagat requested PW2 to wait until the appellant returns, and when PW2 checked outside and saw a fire, he thought that they were lighting a fire, so he went back to the house. He left 10 minutes later at about 7/8pm and on his way he heard the sound of a child crying. PW2 went to the direction of the sound as he thought it was his sister's child. As he drew closer, he heard a child crying

***“stop killing father”***

He jumped over the hill and saw the appellant lying on the child (**M**). He heard **M's** voice and saw her crying – he was now 3 metres away

and would see them clearly. On noticing the PW2's presence, the appellant ran away while referring to PW2 as a dog. PW2 carried **M** home. She could not talk properly, and PW2 realized she had been defiled and he then called **M's** brother and gave the information to him.

5. On cross examination he confirmed he had known the appellant as a neighbour. A man hunt was mounted by villagers who eventually apprehended the appellant and handed him over to **APC BEN KOIMUR (PW3)** of **MARON AP CAMP** who in turn called **KAPSOWAR** police station and **PC NELSON GIBORE (PW4)** of **KAPSOWAR** Police Station. PW4 collected the appellant, booked him in cells interrogated witnesses and eventually charged the appellant.

6. **PRISCILLA CHEMTAI CHEBET (PW5)** the mother to the minor confirmed that she left her children at home as she traveled to **KIPKAREN** area to attend a ceremony on 9.2.2013, when she returned the next day, her son informed her that, the accused had touched the child – she understood that to mean the child had been defiled.

She stated **M** was born on 4.5.2004 and was 9 years old and produced a health card to support.

7. A medical examination conducted on the child by PW6 (**AGNES CHEPKOECH CHEBII**) found laceration of the labia minora and majora with a broken hymen and semen on the labia majora and she concluded that the child had been defiled. She gave the child's age as 9 years – the P3 form she filled was produced as Exhibit.

On re-examination she clarified that the child was 8 years and 8 months.

8. In his sworn defence, the appellant confirmed that he was a younger brother to the complainant's father whom he claimed had a sour relationship with him and they had even fought, and says the allegation of defilement was frame up. He faulted the medical evidence presented saying the medical personnel may have been bribed.

9. On cross examination he denied requesting **M** to accompany him to light a fire saying all the witnesses had framed him up. He had his defence witness **PHILEMON ANGIO** who claimed that the appellant had stolen beans belonging to the minor's mother and also assaulted his brother named **LEONARD CHEBET**.

10. The trial magistrate pointed out that the victim knew the perpetrator who lured her from her parent's house and on the way, knocked her down and defiled her. The proof of defilement was not just in the injured genitalia and broken hymen but a confirmation made by the medical evidence which found evidence of sexual activity and the presence of semen. The trial magistrate found that the minor's age was confirmed by her own evidence, corroborated by that of her mother and the Child Health Card which gave date of birth as 5.6.2004 which was produced, even the clinical finding in the P3 form.

11. The appellant challenged these findings on grounds that:

- a) **There was variance between the charge sheet and the evidence tendered,**
- b) **The evidence was uncorroborated and contradictory,**
- c) **PW2 was not subjected to voire dire examination,**
- d) **The minor's clothes were not produced in court,**
- e) **His defence was rejected without any convincing reason,**
- f) **The sentence was harsh and excessive.**

12. In his written submissions, the appellant claims that the evidence of PW1 was full of contradictions as to exactly what happened because she said the incident occurred at about 6.00pm yet PW2 said it was between 7.00 – 6.00pm. The other contradictions he points out do not touch on the material particulars and I need not delve on them.

He faulted prosecution for failing to call PW1's brother (**CORNELIUS**) as a witness to corroborate what prosecution has presented.

13. In opposing the appeal, Mrs Busienei on behalf of the State points out that the elements of defilement were proved – as the minor and PW2 described the appellant's sexual activities – PW2 literally catching him red handed, and this was fortified by the medical evidence.

Indeed PW1's evidence was corroborated PW2 who saw the appellant having mounted the child who was crying. The child described how the appellant did "bad things to her".

The medical evidence confirmed she had lacerations on her genitalia, presence of semen and evidence of defilement.

14. Indeed the Clinical Officer who examined her also indicated that she was 9 years old. The appellant was well known to the minor and PW2. PW2 was not a child of tender years, and the omission of *voire dire* examination did not render his evidence fatal. The trial magistrate duly considered all this.

15. In the additional submissions the appellant claimed that the health record produced did not suggest the evidence concerning PW1's age –

these submissions are carefully crafted to fit in with the observations this court made – initially the accused had ...pg 8.. on how the health record did not support the complainant's age, but when the court noted that there was tampering with the card and the same belonged to a male person, he now changed tune.

I do not detect any error in fact or law on the part of the trial magistrate who duly considered all the key ingredients of the offence relating, age, penetration, identification and arrival at a sound conclusion.

The upshot is that the appeal lacks merit and is dismissed.

**DATED, SIGNED and DELIVERED at ELDORET this 21<sup>ST</sup> day of NOV. 2019**

**H. A. OMONDI**

**JUDGE**