REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 94 OF 2015

GILBERT KEBENEI KIPCHUMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.180 of 2014

of the Chief Magistrate's Court at Nakuru by Hon. R. Amwayi– Resident Magistrate)

JUDGMENT

1. **Gilbert Kebenei Kipchumba,** the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.

2. The particulars were that on the 30th July 2014 at **[particulars withheld]** village of **Njoro** Sub County Within **Nakuru** County unlawfully and intentionally caused his penis to penetrate the anus of **BL**, a boy aged 3 years.

3. The appellant was sentenced life imprisonment. He now appeals against both conviction and sentence.

4. The appellant raised four grounds of appeal as follows:

a) The learned trial magistrate erred in law and in fact by convicting him on insufficient evidence of identification.

b) The learned trial magistrate erred in law and in fact by convicting him on insufficient evidence of penetration.

c) The learned trial magistrate erred in law and in fact by relying on the evidence of a single eye witness.

d) The learned trial magistrate erred in law and in fact by casually rejecting his defence.

5. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the prosecution proved their case to the required standards. He urged the court to find that the sentence meted out was lawful.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. In order for the prosecution to discharge its duty in the offence of defilement, it has to prove beyond reasonable doubt that (a) there was penetration, (b) that the person accused was responsible for the penetration; and (c) that the age of the complainant was established. These ingredients were recapitulated in the case of **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** by the learned judge Joel M. Ngugi.

8. BL (PW1) is a child aged 3 years. The record of the learned trial magistrate indicated that he (PW1) referred to the penis as a nail. This is what this minor testified was inserted into his anus. This was after the appellant had removed his (PW1's) trousers. At the time the minor was lying down. He said he felt a lot of pain and cried a lot.

9. It was his cries that attracted some passersby. One such a person, was Geoffrey Chepkwony (PW3). He testified that at about 6 p.m. he was going home from his farm. He was walking behind a woman when they heard the cry of a child. They found a child and the appellant in some maize plantation. The appellant started to run away and he gave chase. The appellant hid inside Top Life hotel. He kept watch outside the hotel until the father of the complainant arrived. The appellant was arrested. The father of the minor, EKK (PW2) confirmed that he was

the one who arrested the appellant.

10. The medical evidence was adduced by Evaline Salija (PW4) who examined the minor on 31st July 2014. She said the anal orifice was tender and painful. This medical evidence taken together with the oral evidence prove beyond reasonable doubt that the minor was defiled. The identity of the defiler was also proved to the required standards.

11. When the minor was taken for age assessment before Dr. Cheruiyot Dennis (PW7) on 20th March 2015, he was of the opinion that the minor was between 3 and 4 years. I therefore find that the age of the minor was proved.

12. The contention by the appellant that the learned trial magistrate relied on the evidence of one witness is not supported by the record. There was cumulatively sufficient evidence upon which the conviction was founded. Some of these evidence is that of Geoffrey Chepkwony (PW3) who was attracted by the cries of the minor and found the appellant in maize garden with the minor. The appellant ran away into a hotel from where he was arrested.

13. Though the appellant complained that his defence was not considered by the learned trial magistrate, my reading of the record indicates that before dismissing it, the trial magistrate considered it.

14. Section 8 (2) of the Sexual Offences Act provides:

> **A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life**.

The appellant herein was sentenced to life imprisonment. This is the only prescribed sentence. It was therefore lawful.

15. The upshot of the foregoing analysis of the evidence on record is that the appeal lacks merit and the same is dismissed.

DATED AND SIGNED AT NAKURU THIS 5TH DAY OF DECEMBER, 2019

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KIARIE WAWERU KIARIE

JUDGE

DELIVERED AT NAKURU THIS 19TH DAY OF DECEMBER, 2019

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JOEL NGUGI

JUDGE