



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.19 OF 2015**

**ERICK KIMUTAI CHEPKWONY.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the conviction and sentence in Kericho S. O. No.2 of 2013 by Hon. E.M. Ayuka (RM) dated 22<sup>nd</sup> April 2015)*

**JUDGMENT**

1. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act. The particulars of the offence are that on diverse dates between February 2011 to November 2012 at [particulars withheld] Tea Estate in Kericho District of Kericho County intentionally and unlawfully caused his penis to penetrate the vagina of E N, a girl aged 14 years.
2. He also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between February 2011 to 7<sup>th</sup> November 2012 at [particulars withheld] Estate at Kericho District of Kericho County intentionally and unlawfully touched the vagina of E N a child aged 14 years with his penis. The accused was tried and convicted of the said offence and was sentenced to twenty years' imprisonment. Dissatisfied with both the conviction and sentence, the appellant has filed the present appeal in which he raises some five grounds of appeal.
3. The state opposed the appeal, and it was canvassed before me on 3<sup>rd</sup> March 2015. Ms Keli appeared for the state while the appellant was in person.
4. The appellant asked the court to allow his appeal as his case was heard while he had not been given witness statements. He had also asked for the case to start again but this was declined. He prayed that the case be heard afresh and he be given the witness statements.
5. In response, Ms. Keli submitted that the prosecution presented water tight evidence against the accused through the 6 prosecution witnesses. The prosecution had proved all the elements of defilement beyond reasonable doubt, and the sentence imposed on the appellant was legal.
6. With respect to the appellant's first ground-that the charge had been amended and he had not been informed of the amendment, the state's response was that the record was clear that when the charge sheet was amended, it was read over to the appellant and he pleaded not guilty. His allegation that he was not informed of the amendment was therefore misleading.
7. On the appellant's contention that he was not allowed to have the matter start afresh, the state's response was that the appellant was not being truthful. The record of the trial court indicated that when the matter was re-allocated to Hon. Ayuka (from Hon. Ndururi) the provisions of section 200 CPC were explained to the accused and he stated that he wished to have the complainant recalled for cross-examination, which was granted. However, the prosecution had a challenge as the complainant could not be traced. The complainant's request was granted by the trial court but could not be met.
8. With respect to his complaint that he was not given statements, the state submitted that this is an afterthought. Even though the appellant had a right to receive statements, the trial went on but he did not raise the issue; he was able to cross-examine the witnesses but chose only to cross-examine the complainant, and the issue of statements is one that he should have raised before the matter proceeded.
9. The appellant also complains in his appeal that the case took long to conclude. The state's response is that the trial court had noted this, and had given the prosecution a last adjournment.
10. The appellant also complains that he was forced to proceed with the evidence of the clinical officer before he recalled the complainant for further cross-examination. Ms. Keli submitted in response that the record indicates that the clinical officer was in court and the appellant confirmed that he would be ready to proceed with the witness. The appellant had not stated that he wished to proceed with the complainant

before other witnesses.

11 The appellant has also submitted that another (cross-) examination of the complainant was to be done after she delivered (as she was pregnant) and that he wanted to settle down with her. The state's response is that the complainant was a minor and she could not give consent to a sexual relationship with the appellant.

12. As for the appellant's plea for a re-trial, the state was of the view that it would not be in the interests of justice to send the matter for a re-trial, considering the type of offence, the fact that this is a 2013 case and there is no likelihood that the witnesses will be available for the re-trial, particularly in view of the fact that the complainant could not be traced for further cross-examination as had been required by the appellant. The state therefore urged the court to dismiss the appeal.

13. In submissions in response, the appellant reiterated his plea for a re-trial. He argued that he had been jailed for 20 years while some others are given 13 years. He had asked for a birth certificate of the complainant but it had not been given to him, and he asserted that he knew that the complainant was 19 ½ years.

14. In determining the appeal before me, I am required to evaluate the evidence adduced before the trial court. I note, first, that the charge sheet was amended on 5<sup>th</sup> September 2013 and the accused required to plead to the amended charge. A plea of not guilty was duly recorded.

15. The prosecution relied on 6 witnesses in its case against the appellant. PW1, the complainant, stated that she was in class 6 in 2011. She had met the appellant on the way home from school while in school uniform. He had told her he wanted her to be his girlfriend and they would marry after she finished class 8. They had become lovers and would have sex in his house until she became pregnant. She had not had sex with any one other than the appellant.

16. PW2 was the mother of the complainant. Her testimony was that the complainant was born in 1998 and was 14 years old and a pupil at [particulars withheld] Primary. On 7<sup>th</sup> November 2012, PW2 had noticed that her daughter was not eating and was vomiting. She took her to Chemogionday Hospital on 2<sup>nd</sup> January 2013 where she was examined and found to be 2 months pregnant. PW2 then made a report to the Assistant Manager at [particulars withheld] Estate who sent guards to question PW1 with regard to who had impregnated her. PW1 had stated that it was the appellant. PW2 did not know the appellant prior to that date. In cross-examination, she stated that she had never seen the appellant with PW1 and it was PW1 who said it was the appellant who had impregnated her.

17. PW3, Stanley Chepkwony, was an assistant security guard at James Finlay. He had been telephoned on 21<sup>st</sup> January 2013 and informed about two suspects under arrest at the Administration Police lines. The two were PW1 and the appellant, who worked at Chemasing estate. He had escorted the two to Kericho Police Station. The girl, who said she was 17 and in class 7 but appeared younger, said she was pregnant.

18. PW4 was Henry Kiptoo Sang, a government analyst. He had received blood samples from the appellant, the complainant and a child. His DNA analysis of the blood of the child indicated that ½ was from the appellant and the other half from the complainant. He had established that 99.99% chances were that the appellant was the father of the complainant's child. The report was produced in evidence. He confirmed in cross-examination that the accused was the father of the child.

19. PW5, Robert Langat, was the clinical officer who had examined the complainant and filled a P3 form which he produced in court. The report indicated that the complainant was 14 years old and was 12 weeks pregnant. He also had a P3 form for the accused, who was 26 years old.

20. PW6 was sergeant Lilian Onsongo. She was then stationed at the Kericho Police Station, Children Department. She had received the complaint about the defilement of PW1 on 21<sup>st</sup> January 2013 from PW1 and PW2. PW1 was then pregnant. PW6 took her to Kericho District Hospital where it was confirmed that she was 12 weeks pregnant. She also had an age assessment on the complainant done and it was established that she was 14 years old. A DNA was done after the birth of the child and it was established that the appellant is the biological father of the child. PW6 stated in cross-examination that it was the complainant who revealed that the appellant had had sexual intercourse with her; that she realized she was pregnant and that medical tests had established that the appellant was the biological father of the child.

21. On 29<sup>th</sup> January 2014, the appellant requested for PW1 to be recalled for further cross examination. He repeated this request a couple more times in the course of the proceedings, as the record indicates. However, on 25<sup>th</sup> February 2015, the prosecution indicated that the complainant could not be traced, as its efforts to trace her had proved futile. The accused then indicated that the case can proceed without recalling the complainant, and the prosecution closed its case.

22. When placed on his defence, the appellant elected to give an unsworn statement, and to call 1 witness. He later stated that he had reduced his statement into writing and did not intend to call any witness.

23. In his statement, the appellant alleged that he owed the complainant's mother Kshs.10,000/-. This was the genesis of the charges facing him, which were fabricated. He denied defiling the complainant.

24. In his judgment, the trial magistrate noted that the accused had not raised the issue of the debt due to the complainant's mother. Further, there were independent witnesses who had no reason to frame the accused. The complainant had testified about having sexual intercourse with the appellant, and that prior to her relationship with the accused, had not had sex with anyone else. The DNA analysis showed that the chances were 99.99% that the appellant was the father of the complainant's child.

25. The appellant has complained about the case not starting afresh. However, I note that the appellant did not ask for the case to start afresh

but had requested for PW1 to be recalled for cross-examination. When she could not be traced, he indicated that the matter could proceed without her being recalled.

26. He has also complained about not being furnished with statements. I note that on 2<sup>nd</sup> April 2013, the court directed that the OCS, Kericho Police Station, supplies the accused with statements at state expense. There was no further complaint about the statements from the appellant, and in the circumstances, noting that the appellant proceeded with the case and made no further demand for the statements, I find the argument that he was not given statements unfounded.

27. I have considered the lengthy hand written statement by the accused in his defence. He alleges that he was called to the Assistant Manager's Office and asked about a debt of Kshs.10,000/- he owed to the complainant's mother. He tried to talk to her about repayment later but was taken to Kericho Police Station where he was interrogated about the debt. He alleges that the defilement case was fabricated against him and he did not defile the complainant.

28. It is to be noted, however, that the appellant did not raise the issue of the Kshs 10,000 debt prior to his written statement. He did not raise it in his cross-examination of the mother of the complainant, nor of any of the police officers who investigated the matter and charged him, or the Assistant Manager at the tea estate. In any event, while it is possible to argue that he was framed by the witnesses, it is impossible to argue with the DNA analysis that showed that he was the father of the child born by the complainant. The complainant was 14 years old at the time he started having sexual intercourse with her. She was in school uniform when he first approached her. She was a child and as such could not give consent to a sexual relationship.

29. In the circumstances, I find no merit in this appeal. It is hereby dismissed and the conviction and sentence upheld.

**Dated Delivered and Signed at Kericho this 30<sup>th</sup> day of May 2018.**

**MUMBI NGUGI**

**JUDGE**