



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CRIMINAL APPEAL NO.64 OF 2014**

**VINCENT CHERUIYOT LANGAT.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the conviction and sentence in Kericho S.O. No.3 of 2006*

*by Hon. J. A. Nyagol (RM) dated this 25<sup>th</sup> November 2014)*

**JUDGMENT**

1. The appellant, Vincent Cheruiyot Langat, has filed the present appeal challenging his conviction and sentence for the offence of defilement contrary to section 8 (1) of the Sexual Offences Act. The particulars of the offence are that on the 16<sup>th</sup> day of September 2011 at [particulars withheld] in Kipkelion District within Kericho County, intentionally caused his penis to penetrate the vagina of D C, a girl aged 7 years.
2. The accused faced an alternative charge in count 2 of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars under this count were that on the 16<sup>th</sup> day of September 2011 at [particulars withheld] in Kipkelion District within Kericho County, intentionally touched the vagina of D Ca girl aged 7 years, with his penis.
3. The appellant pleaded not guilty to the offence and was tried before the Chief Magistrate's Court. He was found guilty on the main count of defilement and sentenced to life imprisonment in the judgment of the court dated 25<sup>th</sup> November 2014.
4. In the Petition of Appeal filed on 27<sup>th</sup> November 2014, the appellant raises some 5 grounds of appeal. However, in his written submissions dated 11<sup>th</sup> January, 2018 filed in support of his appeal, the appellant raised some other grounds and abandoned the ones set out in his Petition of Appeal. He argues in these grounds, first, that trial magistrate erred by convicting him while there was no corroborative evidence to base the conviction and sentence on. He further argues that the court erred by finding that the offence of defilement had been proved yet the treatment notes from Soilo Hospital had not been produced.
5. In his third ground, he contends that the court erred in law and fact in relying on the evidence of PW1, PW2, PW3 and PW5 without considering that the evidence of the witnesses was inconsistent, incredible and untrustworthy. It was also his contention that the trial magistrate erred by adding in the judgment that the complainant had washed and changed her clothes.
6. In his submissions, he argues that a child who was playing with the complainant was not called to give evidence. He further argues that there was contradiction on the time the event took place, whether morning or afternoon, in the evidence of PW1 and PW2, which should be resolved in his favour. It is also his contention that he was convicted and sentenced to life imprisonment on the basis of contradictory evidence.
7. The submissions of Ms Keli for the State were that the ingredients of defilement were all proved, and the evidence adduced by the prosecution witnesses was consistent and the case was proved beyond reasonable doubt. It is also the state's case that the sentence imposed is the one prescribed by law, and she urged the court to dismiss the appeal.
8. Ms. Keli further submitted that under section 36 of the Sexual Offences Act, it is not necessary for the accused to be tested to prove that he committed a sexual crime, and the evidence before the trial court was conclusive.

9. It was her submission further that the essential ingredients of defilement had been established by the prosecution. Penetration was proved from the testimony of the complainant and was corroborated by PW4, the clinical officer. The clinical officer had testified that upon examining the complainant, he had found that there was abrasion of the vulva and numerous pus cells and spermatozoa and concluded that there was defilement.
10. It was the state's case, further, that the second ingredient in the offence of defilement, the age of the complainant, had been established. PW 5 had proved the age of the complainant when he produced the immunization card of the child; and the card established that when the offence was committed, she was 7 years old.
11. With respect to the identification of the perpetrator, the state submitted that the complainant was clear in her cross-examination by the accused that she knew the accused even by name, so there was no confusion as to who defiled the complainant.
12. As for the allegation that there was a grudge between the accused and the complainant's family over a land issue, the state's position was that no evidence was adduced to prove this allegation. In any event, if there was such a grudge, it would not displace the fact that the accused defiled the complainant as there was sufficient evidence that it was the accused who defiled the complainant.
13. Finally, on the allegation by the appellant that the offence had been committed on 16<sup>th</sup> September 2011 and he was arrested on 27<sup>th</sup> January 2012, the record was clear that this was because the appellant disappeared for at least 3 months after the commission of the offence. The state therefore urged the court to dismiss the appeal as it was without merit.
14. The trial of the appellant had initially proceeded before Ndururi, PM, to conclusion, and the appellant had been convicted. It appears, however, that the High Court quashed the proceedings and ordered a re-trial. The proceedings before the High Court leading to the quashing of the initial trial are not before this court. At any rate, the appellant took plea on 19<sup>th</sup> January 2013, and after pleading not guilty on both counts, the trial proceeded before Hon. J. A. Nyagol, RM.
15. As the first appellate court, I am under a duty to re-evaluate the evidence presented before the trial court and reach my own conclusion. I must, however, bear in mind that I did not see or hear the witnesses, which the trial court had the advantage of doing-see **Okeno vs R [1972] EA. 32** and **Mohamed Rama Alfani & 2 Others vs Republic, Criminal Appeal No. 223 of 2002**. I will therefore proceed now to examine the proceedings before the trial court.
16. PW1 at the retrial was S C, the mother of the complainant. Her evidence was that she had gone to the farm on 16<sup>th</sup> September 2011 and when she came back, she found the complainant crying. She had not heard anything while at the farm. The accused was outside, and the child told her that he had done "bad manners" to her. She had asked the accused but he denied this. The "bad manners" had happened in her house. She had looked at the child and found that she had soil in her private parts. She had taken the child to Soili Hospital, and had also informed the Chief (PW3).
17. She had noted that the child had a tear on her private parts and had bled a bit, and there was also male semen. The child was in pain and was crying. The accused had then disappeared for almost 3 months and when he re-appeared, he was arrested. In cross-examination, she stated that she had not heard the child scream. She had told the accused to feed her cattle. She mentioned a Mama Esther and Mama James who had also seen the child. The child's pant had blood stains. The child had been at home with another younger child. In re-examination, she stated that she had seen the accused outside her home, and that he used to graze her cattle.
18. PW2 was Richard Kimutai Sigei, the assistant chief of Kipkelion Division, Macheso Location, Kapkwen sub-location. He had received information on 16<sup>th</sup> September 2011 that the complainant, D C, had been defiled. He had advised that the child be taken to Kipkelion sub-district Hospital He had gone with the complainant and her mother. (PW2) to the Kipkelion Police Station on 17<sup>th</sup> September 2011 and they had recorded statements. He had been informed by PW1 and the child that it was Vincent Cheruiyot Langat, the appellant, who had defiled the complainant. PW2 knew the appellant as he worked as a herdsboy in the area. In cross-examination, he stated that the accused had disappeared until February 2012.
19. PW3 was the complainant, 8 years old and a pupil in class 2 at [particulars withheld] Primary School. She testified that she knew the accused. He had come to her home and found her with her younger brother, at about 10.00 a.m. Her mother had gone to pick beans. He had taken her inside the house, removed her pants and opened his trousers and did "bad manners" to her. He had thrown her on the floor and taken his 'thing for urinating' and inserted it in her private parts. She had screamed and her mother had come, and the accused had started running away. She knew the accused before as he herded cattle at a neighbour's home. In cross-examination by the accused, she stated that she knew him, and that he had closed her mouth with his hands as he defiled her.
20. PW4 was Weldon Mitei, a clinical officer at Kipkelion sub-district hospital. He had examined PW3 who had been brought to the hospital at about 5.00 p.m. with a history of having been defiled. He had found a small injury on the vulva. A urinalysis revealed evidence of spermatozoa and numerous pus cells. His conclusion was that PW3 had been defiled.
21. PW5 was Philemon Ruto, the investigating officer. He had received a report on 17<sup>th</sup> September 2011 that the child had been defiled. He had given the complainant and her mother a P3 form and recorded statements. On 27<sup>th</sup> January 2012, the area assistant chief arrested the appellant, whom PW5 re-arrested and charged with defilement. PW5 produced the immunization card of the child which showed that she was born on 5<sup>th</sup> October 2004.
22. When placed on his defence, the accused elected to give an unsworn statement and to call no witnesses. In his unsworn statement, he said that the matter started with a land case at home. His father had wanted to sell land to the Chief so that the Chief could give the land to the mother of the complainant. He and his father had refused. He had been arrested on 15<sup>th</sup> September 2011 and charged with the offence.

23. I have considered the decision of the trial court against the evidence adduced before it and the submissions in this appeal. I agree with the trial court that the prosecution had established that the child was a minor, born on 5<sup>th</sup> October 2004. Her evidence, that of her mother and the evidence of the investigating officer PW5, was clear that she was 7 years old at the time of the incident.

24. The second issue for consideration is whether she had indeed been defiled. Her evidence was clear that the accused had taken her into her mother's house, removed her pants, and inserted his penis- in her words, "his thing for urinating" into her private parts. Her evidence was corroborated, if such corroboration was necessary, by the evidence of PW4, the clinical officer, who produced the P3 form that showed that there was penetration. Though there was no blood on the child's genitalia, the treatment notes from the hospital showed that the mother of the child had washed her and changed her clothes. The urinalysis, however, showed the presence of pus cells and spermatozoa.

25. As for the identity of the perpetrator, the complainant knew the accused. He had gone to her home during the day, and committed the offence in her mother's house. PW1 confirmed that she had asked the accused to feed her cattle. She had found him outside after the defilement, and had even asked him whether he had defiled the child, which he had denied.

26. The accused was known to PW2, the Assistant Chief, as a herds boy in the area. The accused had disappeared from the area after the incident, and had only been arrested on 27<sup>th</sup> January 2012, more than 4 months after the incident.

27. The accused's unsworn statement tries to link his troubles to a dispute over land. However, it is noteworthy that the allegations about land were not put to either PW1 or PW2. I am therefore satisfied that the trial court properly made a finding of guilt against the accused.

28. In the circumstances, I find that the present appeal lacks merit, and it is hereby dismissed.

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

**MUMBI NGUGI**

**JUDGE**