



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 39 OF 2015**

*(An Appeal arising out of the conviction and sentence of Hon. S. MOKUA – (SPM)*

*delivered on 13<sup>th</sup> March 2015 in ELDORET CM CR. Case No.4329 of 2013)*

**GEOFFREY KIPTOO SEREM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Geoffrey Kiptoo Serem was charged with the offence of **defilement of a girl** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 8<sup>th</sup> May and 17<sup>th</sup> May 2013 at Eldoret West in Uasin Gishu County, the Appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of LA (the complainant), a child aged twelve (12) years. The Appellant was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that between the said dates and in the same place, the Appellant intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of the complainant. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the main count. He was sentenced to serve twenty (20) years imprisonment. He was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court convicted him on the basis of contradictory evidence that was adduced contrary to **Section 124** of the **Evidence Act**. The Appellant stated that the medical evidence that was adduced was fabricated and did not support the charge. He was of the view that the evidence adduced by the prosecution witnesses did not establish his guilt to the required standard of proof beyond any reasonable doubt. He stated that the trial magistrate erred in failing to consider the fact that the complainant's testimony had not been sufficiently corroborated to enable a court of law, applying its minds to the facts of the case, to convict him. He was finally aggrieved that his defence was not taken into consideration before the trial court reached the verdict that he was guilty as charged. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow the appeal. Ms. Oduor for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence to prove its case against the Appellant to the required standard of proof beyond any reasonable doubt. She urged the court to dismiss the appeal. This court shall revert to the arguments made on this appeal after briefly setting out the facts of this case.

The complainant in this case was at the material time aged twelve (12) years old. She was a Standard Four pupil. Her birth certificate was produced into evidence which indicated that she was born on 24<sup>th</sup> August 2001. She testified that on 5<sup>th</sup> August 2013, the Appellant followed her home as she was walking from school. While she was changing her clothes, the Appellant entered the house, removed her underpants and sexually assaulted her. The Appellant was alone at home at the time. Although she felt pain, the complainant felt ashamed and did not mention the incident to anyone.

On 17<sup>th</sup> May 2013, the Appellant again followed her to her home when she returned from school where he again forcefully had sexual intercourse with her. On this particular day, however, PW4 Daniel Chirchir Barngatuny had gone to visit one Kamau who used to reside at the complainant's home. While there, he entered the house through the back door, which was open, and found the Appellant in the act. The Appellant was having sexual intercourse with the complainant. When the Appellant saw him, he stopped. The Appellant walked out of the house. PW4 did nothing because at the time he had an injury on his leg and could not apprehend the Appellant. Both the complainant and

PW3 testified that the Appellant was very well known to them at the time of the incident.

PW4 informed PW3 SOO, the mother of the complainant about the incident. She reported the incident to Baharini Police Post. The complainant was referred for medical examination at Moi Teaching and Referral Hospital on 20<sup>th</sup> May 2013. On examination of her vagina, it was established that her hymen was torn. It had healed. In the opinion of PW2 Dr. Joseph Embenzi, the medical examination had established penetration. The case was investigated by PW5 PC Musa Ouma who upon concluding the said investigation, was of the view that a case had been made to have the Appellant charged with the offence that he was convicted.

When the Appellant was put on his defence, he denied the charge that he had sexually assaulted the complainant. He told the court that on 17<sup>th</sup> May 2013 while he was at home, he heard screams emanating from a neighbour's house to the effect that the complainant had been defiled. He was shocked when he was implicated in the offence. He was of the view that members of the public had fabricated evidence against him to connect him with the charge.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

***“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.***

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

For the prosecution to establish the charge of defilement, it was required to establish three ingredients: that the complainant was penetrated, the age of the complainant and the identity of the perpetrator. In the present appeal, the prosecution produced the birth certificate of the complainant which confirmed that indeed the complainant was twelve years at the time of the incident. This court is satisfied that the prosecution discharged the burden placed on it to establish the age of the complainant.

As regards to the question of whether there was penetration, **Section 2** of the **Sexual Offences Act** defines **“penetration”** to mean partial or complete insertion of the genital organ of a person into the genital organ of another person. In the present appeal, the complainant testified that the Appellant sexually assaulted her on two occasions, that is, on 12<sup>th</sup> and 17<sup>th</sup> May 2013. The complainant was taken for medical examination on 20<sup>th</sup> May 2013. The medical examination by PW2 established that the complainant's hymen had been broken thus proving that indeed the complainant had been penetrated. The complainant's testimony coupled with that of the medical evidence established to the required standard of proof beyond any reasonable doubt that the complainant had indeed been penetrated.

As regard the identity of the perpetrator, it was the Appellant's appeal that he was not the one who committed the offence. He denied the prosecution assertion that he sexually assaulted the complainant at her home. He urged the court to find that the evidence that was adduced by the two prosecution witnesses implicating him on the charge was fabricated and thus was not established to the required standard of proof. *What was the evidence that was adduced against the Appellant in regard to the identity of the perpetrator of the sexual assault?* According to the complainant, the Appellant, a neighbour, who was known to her prior to the sexual assault, followed her while she was walking home from school. She narrated how on two occasions the Appellant removed her inner clothes inside their house and then sexually assaulted her. On the first occasion, she did not tell anyone. The complainant was alone at home at the time. Her mother PW3 had gone to work. She is a business lady. On the second occasion, the Appellant again followed the complainant to her home and again sexually assaulted her. This time the Appellant was seen by PW4 who testified that he found the Appellant in the act.

On re-evaluating the evidence adduced by the complainant and PW4 as contrasted with the denial by the Appellant of involvement in the sexual assault, it was clear to this court that the evidence adduced by the complainant and PW4 was cogent, consistent and corroborated each other in all material respects. The two prosecution witnesses established that indeed the Appellant is the one that sexually assaulted the complainant. The Appellant was literally caught in the act by PW4. From the complainant's testimony, there may have been an element of agreement between the two. The complainant's behaviour when she was found in the act clearly indicated that there was acquiescence. However, the complainant lacked capacity to give consent. Defilement is an offence of strict liability where once the age of the victim is established, the offence is proved. In the premises therefore, this court holds that the prosecution did establish the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

The Appellant's appeal against conviction lacks merit and is hereby dismissed. The Appellant's appeal on sentence is similarly dismissed as the custodial sentence that was imposed by the trial court on the Appellant is the one that is provided under the **Sexual Offences Act**. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2018**

**L. KIMARU**

**JUDGE**

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26<sup>TH</sup> DAY OF OCTOBER 2018

HELLEN OMONDI

JUDGE