REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.51 OF 2014

NEHEMIAH KIPLANGAT NGENO....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Kericho Chief Magistrate's Court Sexual Offence Case No. 55 of 2013 (Hon. L. Kiniale, SRM) dated 10th September 2014)

JUDGMENT

1. The appellant, Nehemiah Kiplangat Ngeno, 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 were that on the 14th day of October 2013 at [particulars withheld] area in Kericho District within Kericho County, intentionally caused his penis to penetrate the vagina of JC, a girl aged 12 years.

2. The appellant 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 this offence were that on the same date and place as in the main count, he intentionally and unlawfully touched the vagina of JC, a girl aged 12 years, with his penis.

3. The accused pleaded not guilty and after a full trial, he was found guilty on the main count and sentenced to 20 years imprisonment. He was also declared a dangerous sexual offender as provided under section 39(1) (c) of the Sexual Offences Act.

4. The appellant was dissatisfied with both his conviction and sentence and he filed the present appeal in which he raised 7 grounds of appeal in the petition of appeal filed in court on 12th September 2014. At the hearing of his appeal, however, the appellant relied on 4 grounds of appeal set out in the petition of appeal filed by his Counsel, Mr. Kipkoech Terer, dated 18th January 2018.

5. These grounds were, first, that the trial court erred in law and fact by not finding that the prosecution failed to prove its case beyond reasonable doubt. Further, that the trial court erred in law and fact by not considering evidence before it that showed that it was not the appellant who defiled the complainant. Thirdly, the appellant argued that the trial court erred in believing the prosecution evidence. His final ground was that the trial magistrate *'descended into an abyss of lawlessness when she failed to appreciate the reasonable inference that the complainant behaved like an adult who condone consensual sex.'*

6. Mr. Terer appeared for the appellant while the state was represented by Prosecution Counsel, Mr. Ayodo, at the hearing of the appeal.

7. 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, bearing in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing-see **Okeno vs R [1972] EA. 32** and **Joseph Njuguna Mwaura & 2 Others vs Republic [2013] eKLR**.

8. The prosecution case was presented through 4 witnesses. PW1 was the complainant, JC, who, after a *voire dire*, was found to understand the nature of an oath and therefore gave sworn evidence. She testified that on 13th October 2013, she had ran away from home at about 11. 00 p.m. This was after her father had asked her why she did not answer when he called. She left home and slept at some nearby kiosks. At about 5.00 a.m., the appellant, who was a boda boda rider, saw her and stopped. He went to where she was, grabbed her, removed her inner pants, placed his hand over her mouth and then defiled her.

9. Thereafter, he carried her on his motor cycle and took her to a nearby hotel where he bought her tea and chapati and left her there. She returned home and told her mother what had happened. She stated that she knew the appellant, who was a neighbour at home. She confirmed in cross-examination that she knew the appellant well, that he was her mother's customer, and that he used to take her brother to school on

his motor cycle. She further stated that she was aged 13 at the time of her testimony, having been born in June of 2000.

10. PW2, RW, was the complainant's mother. She operated a hotel at [particulars withheld] in Kericho. She knew the appellant, who operated a boda boda in the area. On the material day, the complainant had been called by her father, but had not answered. When asked why she had not answered, she had ran away from home as she was afraid of her father who had a short temper. She had returned the following day and informed her mother that she had slept at the kiosks, and that in the morning, the appellant had raped her. PW2 had told the complainant to shower then had gone to report the incident. She denied in cross-examination that she owed the appellant money. She used to pay him every morning when he took her children to school.

11. PW3, Misoi Isaac, was the clinical officer who had completed the P3 form in respect of the complainant. He noted that she had hyperemic vaginal wall red (sic) and her hymen was torn. She had a whitish fluid on her vaginal wall which looked like semen to the naked eye. She had pus and yeast cells. He concluded that the complainant had been defiled. He also had carried out an age assessment which showed that the complainant was approximately 12 years of age.

12. On 14th October 2013 at about 6.00 p.m., PW4, No. 86937 PC Safi Dari had received the complaint from the complainant and her parents that the complainant had been defiled. The complainant knew that the person who defiled her was the appellant. The complainant had reported that she had been afraid of her father's fury and had run away from home on the night of 13th October 2013 and had slept at the vibandas (Kiosks). PW4 narrated the report of the defilement as told to her by the complainant. She had taken the child to the Kericho District Hospital for age assessment as she did not have a birth certificate. The appellant was well known to the complainant as he used to ferry her brother to school.

13. When placed on his defence, the appellant elected to give a sworn statement. He stated that on 14th October 2013, he had woken up at 7.00 a.m. and taken his neighbour's children to school. The neighbour was PW2, the mother of the complainant. He had later gone to PW2's hotel where he was informed that PW2 was looking for him with police officers. He had gone to the police station the following day which is when he learnt he had been reported to have defiled a young girl. He was arrested on 23rd of October 2013 and charged with the offence of defilement. He alleged that the complainant's mother owed him money, and that is why he had been framed. He confirmed in cross-examination that he was employed by the complainant's mother to ferry her children to school, and that her family knew him well.

14. In her judgment dated 10th September 2014, the trial Magistrate identified 4 issues as arising for determination. These were whether the complainant was a child below the age of 18 years, whether there was evidence of penetration, whether, if penetration was proved, it was the appellant who committed the offence, and finally, whether there was sufficient evidence to sustain a conviction. She found that the age of the complainant, who stated that she was born in June of 2000, was established by the age assessment.

15. It was her finding further that there had been penetration, and that it was the appellant who had committed the act of penetration. She further found that the evidence on record was sufficient to sustain a conviction, noting that the appellant was well known to the complainant, that the medical evidence confirmed that the complainant had been defiled; that the investigating officer had visited the scene and noted that there were vibandas (kiosks) where the complainant testified that she had spent the night and been defiled the following morning by the appellant.

16. The trial court further found that the appellant's defence in which he alleged that he was framed over a dispute regarding his pay for ferrying PW2's children to school did not displace the prosecution evidence. She accordingly found the appellant guilty on the main count of defilement and sentenced him to 20 years imprisonment.

17. In his submissions on behalf of the appellant, Mr. Terer submitted with respect to ground 1 that the court had erred in finding that the case against the appellant had been proved beyond reasonable doubt. His submission was that the burden of proof lies on the prosecution to prove the participation of an accused in an offence beyond reasonable doubt, but this did not happen in this case.

18. It was his submission that crucial witnesses were not called to testify. While he understood the provisions of sections 124 and 125 of the Evidence Act on the admissibility of the evidence of sexual violence victims, witnesses should have been called to shed light on the circumstances surrounding the commission of the offence. One of them, according to Mr. Terer, was the owner of the hotel where the complainant was alleged to have been when her father called her on 13th October 2013 at 11.00p.m. No prosecution witness was called to prove that she was in the hotel and in whose company.

19. It was also his submission that the father of the complainant was not called as a witness, yet, according to Mr. Terer, he resides 40 metres away from the court. Further, that since it was alleged that the complainant's father had called her and she did not respond to her father, the evidence of the father was indispensable to explain under what circumstances his daughter feared for her life and run away from her father at night and spent the night at a risky verandah of [particulars withheld].

20. According to Mr. Terer, the court failed to take judicial notice of the fact that [particulars withheld], where the alleged offence took place, is situated in the urban sprawling slums of Kericho, is a hot bed of all vices. The allegation that the complainant spent the night in the verandah in [particulars withheld] was therefore not humanly possible. Mr. Terer submitted that the failure to call these crucial witnesses should invite the inference that the witnesses would have given adverse evidence.

21. It was also Mr. Terer's submission that the prosecution did not link the appellant with the commission of the offence. In his view, the court had erred as it did not consider that the complainant could have been defiled by someone else. He observed that the complainant was defiled at night, before 6.00 a.m. as no-one knew where she had spent the night between 7.00 p.m. and 6.00 a.m., and that the victim did not give an account of her whereabouts between 11.00 p.m. and 6.00 a.m.

22. His submission was that the court erred by believing the prosecution evidence; that on 13th October 2013, the complainant had gone out

intentionally and purposefully to have sex with undisclosed persons; that this is a reasonable inference to draw as she dodged her parents and siblings and went to have sex. That she went back and met the appellant who was on his usual business, and the parents did not bother to look for the complainant.

23. Counsel further submitted that after the alleged defilement, the complainant accompanied the appellant to have a cup of tea at a hotel. His submission was that her behaviour did not portray the picture of someone who is young, but that of an adult. It was therefore unfair and disproportionate for the appellant to suffer 20 years in prison while the complainant behaved like an adult and never complained. Counsel urged the court to be guided by the decision of Chitembwe J in **Martin Charo vs Republic (2016) eKLR** with regard to the behaviour of a minor who behaves like an adult.

24. Finally, Mr. Terer submitted that the prosecution evidence was not water tight, the offence of defilement was not proved, and the appeal should be allowed and the appellant set at liberty.

25. In his submissions in reply, Mr. Ayodo for the state submitted that the prosecution case was watertight as the trial court had found. That it was clear from the evidence of PW1 that she ran away from home that evening to escape her father's fury as she did not respond when her father called her earlier. Mr. Ayodo summarised the evidence before the trial court and submitted that the prosecution evidence was very consistent and the court had relied on it to convict the appellant.

26. With regard to the second ground of appeal-that the appellant had stated that he was not the one who defiled the complainant- Mr. Ayodo's submission was that the complainant knew the appellant even before the incident. She knew him very well as he was the one who used to take her brother to school using his motor cycle. Mr. Ayodo's submission was that there was no room for error as this was a case of identification by recognition.

27. With regard to the appellant's ground that the trial court believed the prosecution case without an iota of doubt, the state submitted that the prosecution evidence was consistent and corroborative and exhibits were produced to prove the prosecution case.

28. As for the contention in ground 4 that the complainant had behaved like an adult who condoned consensual sex, Mr. Ayodo submitted that this was never brought out during the proceedings, not even in the sworn statement of defence by the appellant. Further, that nowhere in the proceedings was it shown that the victim looked like an adult or even behaved like an adult. That the evidence from the prosecution was that the complainant was a child aged 12 years, which evidence had not been challenged either at the trial or in the appeal. Counsel sought to distinguish the present case from the decision in **Martin Charo vs R** on the basis that there was no evidence in this case that the victim went to the appellant's room.

29. In response to the contention that there had been a failure to call crucial witnesses such as the father of the complainant, Mr. Ayodo submitted that those witnesses would not have added any value to the prosecution. The witnesses who testified were enough for the prosecution. In his view, if they would have given adverse evidence, the appellant could have called them as his witnesses. Mr. Ayodo urged the court to dismiss the appeal and make a finding that the conviction was safe.

30. Having considered the record of the trial court, the appellant's grounds of appeal and the submissions of Counsel for the appellant and the state, I believe that three issues arise for determination in this appeal:

i. Was the prosecution evidence sufficient to found a conviction against the appellant?

ii. Was the appellant properly identified as the perpetrator of the offence?

iii. Does the reasoning in Martin Charo exonerate the appellant?

31. I will consider the first two issues together, as they are closely interlinked. Falling within these issues is the question of the identity of the person who committed the offence of defilement against the complainant, whether the appellant was identified as the perpetrator of the offence, and whether the prosecution should have called other witnesses such as the complainant's father.

32. The story that emerges from the prosecution evidence is this. The complainant, a 12 year old child, was called by her father after she returned from a hotel. Though it is not stated so expressly, it appears that the hotel referred to was the one which her mother, PW2, operated. She did not hear, so she did not answer. Her father asked her why she did not answer. From the evidence of PW1 and PW2, it sounds like her father is something of a terror with a short temper. The complainant therefore ran away from home at around 11.00 p.m. on 13th October 2013 and spent the night at a verandah near some kiosks in [particulars withheld] in Kericho.

33. At around 5.00 a.m. the following morning, the appellant, whom she knew well, comes along on his motor cycle. She knew him as he used to take her brother to school. He grabs her and defiles her, with his hand over her mouth. It is early morning, so there were no other people about. He then takes her on the motor cycle to a hotel in Kericho town, buys her tea and chapati, and leaves her there. She walks home, where she gets around 12.00 p.m., and informs her mother.

34. Though the complainant had, on the instructions of her mother, showered and changed her clothes prior to going to report the incident and going to hospital, the medical evidence produced by PW3 was that she had been defiled. An age assessment had also established that the complainant was a child, aged 12. Even if the court were to take her evidence that she was born in June of 2000, she would still have been only 13 at the time of the incident, a child for the purposes of the Children Act and the Sexual Offences Act.

35. The appellant did not deny that he knew and was known to the complainant and her mother. He confirmed that he used to take PW2's children to school. There is therefore no doubt that the complainant knew the appellant well. She knew that he was the one who had defiled

her. He had not ridden off after the incident, which would perhaps have assisted his argument that he was not the one who had defiled her. Instead, he had carried her on his motor cycle to Kericho town, taken her to a hotel, and bought her chapati and tea. It is hard to fathom the thinking behind this act.

36. At any rate, the appellant was well known to the complainant. He was recognised by the complainant. He spent time with her after the defilement. There is no doubt, in my view, that the appellant was the perpetrator of the offence of defilement against the complainant. The prosecution evidence, in my view, was consistent and credible, and the trial court directed itself properly in accepting it. The evidence of the complainant was corroborated by the medical evidence, and section 124 of the Evidence Act allows the court, even in the absence of corroboration, to convict on the evidence of the victim of a sexual offence if satisfied that the victim is truthful.

37. The appellant has questioned why the father of the complainant and the owner of the hotel referred to were not called as witnesses, and that an adverse inference should be drawn that their evidence would have been adverse to the prosecution case. The state responds that their evidence would not have added any value to the prosecution case.

38. It is correct, as submitted by Mr. Terer, that a failure by the prosecution to call a crucial witness can lead to an adverse inference being drawn against the prosecution. In **Bukenya and Others vs Uganda (1972) EA 549**, it was held that the prosecution was under a duty to avail all witnesses necessary to establish the truth, even if their evidence may be inconsistent. Further, that where essential witnesses are available but are not called, the court is entitled to draw the inference that if such witnesses had been called, their evidence would have been adverse to the prosecution case.

39. In this case, it appears to me that the evidence of the father of the complainant, even if he had been called, would not have added any value to the prosecution case. What emerges from the evidence on record is that the complainant was so scared of her father that she preferred to spend the night outside than face his wrath. As for the alleged owner of the hotel referred to, I observed earlier that the record was not clear with respect to the hotel referred to. At any rate, I am not satisfied that such owner, even if called, would have weakened the prosecution case as it emerged so clearly from the evidence of the complainant. The first three grounds of the appellant's petition of appeal are therefore without merit.

40. The last issue to consider is whether the reasoning of the court in **Martin Charo vs R** is of assistance to the appellant. What I understand from the invocation of this decision is that the appellant concedes that he had sex with the complainant, but that it was her fault and he should not suffer for it. She had 'intentionally and purposefully' gone to look for sex, and there was therefore consensual sex.

41. In his decision in **Martin Charo**, Chitembwe J stated as follows:

> ***"It is clear to me that although PW1 was a young lady aged 14 years, she was behaving like a full grown up woman who was already engaging and enjoying sex with men. She seems not to have been complaining about the incident. She had only gone to the appellant's house to have sex and go back home only for her brothers to interfere."***

42. The appellant wants the court to be guided by this reasoning and find that the complainant had gone out to have sex with men, and so the appellant is not guilty of the offence of defilement.

43. I am aware that the decisions of my brother and sister judges in the High Court are of persuasive authority. However, I am unable to find anything in the above reasoning that I can agree with. First, with respect to the facts of this case, there is no evidence that the complainant, a 12 year old child, had 'gone out to intentionally and purposefully' have sex with men. She was perhaps foolish in running away from home and spending the night outside near the kiosks. Her parents were doubtless negligent in allowing a 12 year old child to spend the night outside, especially from terror of her own father. She did not, however, invite sex with the appellant. She was grabbed and defiled, with a hand over her mouth to stop her from screaming. This, by a person she knew well, who then, in a perverse act of supposed magnanimity, takes her on his motor cycle and buys her tea and chapati.

44. Secondly, even had the child, 12 years of age, consented to sex as in the alleged circumstances of the **Martin Charo** case, would it be sufficient to exonerate the appellant from blame? I have seen this argument advanced in several cases. I find it insidious and corrupting of children. The argument, in my view, seeks to place blame and responsibility on the child victims of defilement. As in the **Martin Charo** case, the argument is that the child chose to go to men's houses; she enjoyed sex; she was not defiled. She takes responsibility for her actions. The adults in the story are not to blame.

45. I take the view that this argument is wrong, on two fronts. First, it loses sight of the fact that in order for defilement to be established, the element of force does not have to be established. The fact that a child goes to a man's house and has consensual sex with him does not take away criminal liability from the adult. The law is that a child below the age of 18 has no capacity to consent to sex. Secondly, an adult is deemed to know that it is unlawful to engage in sexual conduct with a child. An adult who engages in sex with such a child commits the offence termed defilement. The penalties for the offence are set out in the Act. It is no defence to argue that the child willingly engaged in sex, or went to men's houses. The responsibility is placed on the adult, not on the child. To hold otherwise is to turn the law and good sense on its head.

46. I find that in this case, the prosecution evidence was sufficient to prove that it was the appellant who committed the act of penetration with the complainant, a child of 12 years. He was therefore properly convicted of the offence of defilement. The sentence that was meted on him was proper-section 8(3) provides that a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

47. I therefore find no merit in this appeal, and it is hereby dismissed and the conviction and sentence upheld.

Dated, Delivered and Signed at Kericho this 18th day of December 2018

MUMBI NGUGI

JUDGE