



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 137 OF 2014**

**JAPHETH KIPLAGAT KOECH..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[Being an appeal from the original conviction and sentence in Criminal Case No. 602 of 2013  
Republic vs Japheth Kiplagat Koech in the Resident Magistrates' Court at Kapsabet by B. Limo,  
Resident Magistrate delivered on 31<sup>st</sup> July 2014]*

**JUDGMENT**

1. The appellant was adjudged guilty of *defilement* contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act. He was sentenced to *thirty five years* imprisonment.
2. The particulars were that on 21<sup>st</sup> March 2013 at *S I E [particulars withheld]*, Kapsabet Township, Nandi County, he intentionally and unlawfully caused his penis to penetrate the vagina of *S C [name withheld]*, a girl aged *ten* years.
3. The trial court found that the minor was *above* eleven years at the time of the offence. It thus sentenced the appellant under section 8 (3) of the Act.
4. The petition of appeal was filed *in person* on 20<sup>th</sup> August 2014. The appellant has since appointed an advocate. There are three *main* grounds of appeal: First, that the charge was not proved beyond reasonable doubt; secondly, that the witnesses were inconsistent and unreliable; and, thirdly, that the defence set up by the appellant was not taken into account.
5. At the hearing of this appeal, learned counsel for the appellant relied on written submissions filed on 1<sup>st</sup> August 2016; and, a list of precedents annexed thereto. He submitted that the *names* of the complainant and her *age* were different in the charge sheet, P3 form and clinic card. It raised doubts on the identity or age of the complainant. He also referred to the P3 form of the appellant at page 80 of the record. It showed that the results of his examination were negative. In his view, the evidence of PW4 was not properly evaluated. He submitted that the ingredients of the offence were not proved beyond reasonable doubt.
6. The appeal is contested by the State. The learned Prosecution Counsel submitted that all the elements of *defilement* were established. In particular, she stated that the appellant was known to the complainant. Penetration was corroborated by medical evidence. She submitted that the complainant was a minor; and, that the discrepancies in her name or age should not lead to an acquittal. She said that the defence set up by the appellant was spurious. In a synopsis, the case for the Republic is that the evidence established the

appellant's culpability. I was implored to dismiss the appeal.

7. I have considered the grounds of appeal, the records of the lower court, the evidence, the precedents and the rival submissions.

8. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been careful because I neither saw nor heard the witnesses. See Pandya v Republic [1957] E.A 336, Ruwalla v Republic [1957] E.A 570, Njoroge v Republic [1987] KLR 19, Okeno v Republic [1972] EA 32.

9. I will first deal with some preliminary matters. The complainant testified that she was aged *eleven*. At page 7 of the record of appeal, the court conducted a brief *voire dire* examination. The court was satisfied about her intelligence; and, the value of telling the truth. The complainant gave sworn testimony. The true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things: the nature of an oath; and, the need to tell the truth. See Republic v Peter Kiriga Kiune Criminal appeal 77 of 1982 (unreported), Johnson Muiruri v Republic [1983] KLR 445. The Children Act defines a child of tender years to be one of ten years or below. I am satisfied that the court complied *fully* with the procedure of taking the evidence of the minor.

10. On 21<sup>st</sup> March 2013, the complainant was at her sister's (E's) house. Her sister's children, B and C were sleeping on a separate bed. At 9:00 p.m., the appellant knocked at the door. He told her: "*I want you today*". The lights were on. He held her mouth; removed her skirt and inner wear; and, inserted his penis into her vagina. PW1 bled and felt a lot of pain. She then ran out naked towards Hellen's (a neighbour's) place. The appellant ran after her and gave her Kshs 100. She was taken to Kapsabet District Hospital the same night. Hellen informed E about the incident.

11. Treatment notes from the hospital were produced at the trial (exhibit 1). The following day, the matter was reported at Kapsabet Police Station. PW1 was issued with a P3 form that was filled out at the same hospital (exhibit 2). In cross examination, the complainant was emphatic that the appellant penetrated her.

12. Hellen (PW2) testified that she heard a cry for help emanating from E's house. She rushed there. The door was locked. She said she heard PW1 saying "*Kiplagat, open the door*". When the door was opened, she saw the appellant. The lights were on. She said the appellant was a boyfriend to the complainant's sister, E. She saw blood flowing down the thighs of the complainant. She took the complainant to her house. She gave her a sweater and called E. E arrived and took PW1 to the hospital.

13. PW3, E, found the complainant in PW2's house. She was crying; her inner wear was missing. She took the complainant to the hospital the same night. She reported the matter to Police Constable Betty Tegere (PW5) the next day. She met the appellant three days later. He was arrested with help from the public. She said the complainant was born on 5<sup>th</sup> November 2001. PW5 produced the clinical card which confirmed the date of birth.

14. PW4 was Silas Kipkoech. He is a clinical officer at Kapsabet District Hospital. He examined the complainant on 22<sup>nd</sup> March 2013. He found blood on her vagina. The hymen was broken. Spermatozoa were negative. He testified that the child was defiled. He produced the P3 form and treatment notes. He said the child was aged ten. He also examined the appellant. The results did not reveal anything significant. His P3 was produced as exhibit 3.

15. When the appellant was placed on his defence, he made a brief statement-

*"I am Japheth Kiplagat Koech from Kapsabet Township. I am a doctor. I did not defile PW1, S H [particulars withheld] . That is all."*

16. A number of issues arise from that evidence. I have already found that the lower court complied fully with the procedure of taking evidence of a minor. The written submissions by counsel purport to argue some grounds of appeal which had *not* been pleaded in the petition. For example it is urged in the written

submissions that two witnesses, *B* and *K*, should have taken the stand. No leave to amend the petition was ever obtained. It offends the mandatory provisions of section 350 of the Criminal Procedure Code.

17. But I am minded to comment on one matter canvassed by the appellant in his earlier application for bail pending appeal. It was then submitted that there was *breach* of section 200 of the Criminal Procedure Code. Nothing could be further from the truth. From the record, it appears that *all* evidence was taken by Mr. B. Limo, Resident Magistrate. He also *wrote* the *judgment*. It is only the *sentence* that was imposed by the succeeding magistrate, Ms. G. Adhiambo, Ag. Resident Magistrate.

18. I will now turn to the *age* of the complainant. The *child health card* gives the date of birth as 5<sup>th</sup> November 2001. On the date of the offence, she was about *twelve*. The complainant told the court she was *eleven*. PW3, PW4 and PW5 all said she was *ten*. The charge sheet stated she was *ten*. There is some obvious discrepancy but it was *not* fatal. She was in primary school. She had *not* attained the age of *majority*. The age of the minor is relevant for purposes of the *sentence*.

19. I am alive that in any trial there are bound to be discrepancies. See *Joseph Maina Mwangi vs. Republic* Criminal Appeal No. 73 of 1993. While the complainant said she *ran* naked towards Hellen's house, the latter said she found her in E's house. But the material evidence in this case is whether the appellant was *positively* identified; and, whether he *penetrated* the minor. I have already dealt with the discrepancies surrounding the age of the complainant. The *names* of the complainant and her *age* were different in the charge sheet, P3 form and clinic card. I do *not* think there is any doubt about the *identity* of the complainant. The girl defiled was the complainant; and, she was taken to hospital immediately. The slight differences in her names do *not* warrant an acquittal.

20. I have reached the conclusion that the discrepancies highlighted are not *material*. I am also fortified by the decision in *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Court of Appeal, Criminal Appeal 661 of 2010 (unreported). The learned judges of appeal delivered themselves as follows-

*"From the evidence, besides the evidence of PC Paul Mwangi, who we consider was incompetent to ascertain the child's age, all other evidence indicated that ZN was either 12, 13 or 15 years. When this is considered against the backdrop of the charge sheet which specified the complainant's age as 12 years, it is evident that the ages indicated, all fell within the age bracket specified under Section 8 (1) and (3) of the Act, and concerned the defilement of a child within the particular age bracket. As such, we find that, the charge and the sentence preferred were sound, and no prejudice could be held to have been suffered by the appellant. At any rate, we consider that the discrepancies are not material and curable under Section 382 of the Criminal Procedure Code."*

21. Since the minor was *twelve*, the proper *penal* provision was section 8 (3) of the Act. The learned trial magistrate was thus *correct* in sentencing the appellant under the latter provision. The interpretation was also *favourable* to the appellant. I find there was no material variance between the charge sheet and the evidence. The charge sheet *correctly* cited the provision creating the *offence* in section 8 (1) of the Act. The infraction in citing the wrong provision for *sentencing* is not material.

22. The appellant was thus properly charged for defilement of the minor. However, I agree with his learned counsel that he should have been charged under section 8 (3) of the Act and not section 8 (2). As I have stated, the infractions were minor and curable under section 382 of the Criminal Procedure Code. *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Court of Appeal, Criminal Appeal 661 of 2010 (unreported).

23. I will now turn to *identification* of the appellant. The complainant and appellant were *not* strangers. The appellant was a boyfriend to the complainant's sister, Eunice. The complainant was living in Eunice's house. She *knew* him. There was sufficient light in the house when the incident occurred. The appellant was also found inside Eunice's house by Hellen (PW2). That is evidence of *recognition*; stronger evidence than that of identification. See *Wamunga v Republic* [1989] KLR 424, *Republic v Turnbull & others* [1976] 3 All ER 549, *Obwana & Others v Uganda* [2009] 2 EA 333.

24. The next key question is whether the appellant *penetrated* the complainant. There is no doubt about the matter. The complainant was emphatic that the appellant *penetrated* her. She bled. She was examined by the clinical officer (PW4) the same night. He found blood on her vagina. The hymen was broken. Spermatozoa were *negative*. He testified that the child was *defiled*.

25. The appellant has tried to make capital out of the fact that *his* medical examination was *negative*. The fact that there were *no* spermatozoa; or, that his own examination revealed nothing significant does *not* absolve him. What is material is *penetration*. Section 2 of the Act defines *penetration* as follows-

“*Penetration*’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.

25. The next key question is whether the appellant *is* the person who *penetrated* the complainant. From the unchallenged evidence of PW1 and PW2, I am satisfied that the appellant is the person who penetrated PW1. When I juxtapose the evidence of PW1, PW2 and PW4 against the brief defence by the appellant, I find the defence to be a sham. It is completely hollow; and, it raises *no* doubt in his favour. I agree with the learned trial magistrate that it was a red herring.

26. In the end, I find that the prosecution proved beyond reasonable doubt that the appellant defiled the complainant on the *material* date. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332. It follows as a corollary that the conviction was *safe*.

27. The appellant was sentenced to *thirty five years* imprisonment. The appellant has *not* challenged the sentence. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

“*The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may.....(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or.....*”

28. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

“*The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. ...The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence.*”

29. The appellant was a *first offender*. In mitigation, he prayed for *leniency*. He said he had four children who depend on him. Under section 8 (3) of the Sexual Offences Act, the *minimum* sentence is *twenty years*. The sentence handed down of thirty five years was within the law. But it was *too harsh* in the circumstances. I am accordingly minded to disturb the sentence. I think in all the circumstances of this case, the *minimum* sentence of *twenty years* was sufficient.

30. The upshot is that the appeal only succeeds in part. The appeal against conviction is devoid of merit and is *dismissed*. I *set aside* the sentence of thirty five years imprisonment. I *substitute* it with a sentence of *twenty years* imprisonment to run from the date of the original conviction.

It is so ordered.

**DATED, SIGNED and DELIVERED** at ELDORET this 31<sup>st</sup> day of January 2017.

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

The appellant.

Ms. Isiaho for Mr. Kigamwa for the appellant.

Ms. B. Oduor for the Republic.

Mr. Kemboi, Court Clerk.