



REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL NO. 26 OF 2016

KIPKOSGEI KORINYANG KIPROTICH..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an Appeal from the original conviction and sentence by Honourable H.M NYABERI Principal Magistrate, dated 2nd February, 2016, in Iten Senior Principal Magistrate's Court Criminal Case No. 216 of 2015)

JUDGEMENT

1. The appellant, *Kipkosgei Korenyan Kiprotich* was tried and convicted of the offence of defilement contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act*. He was sentenced to serve fifteen years imprisonment.
2. The particulars of the offence alleged that on the 17th February 2015 at [particulars withheld] Sub location, Keben location of Elgeiyo Marakwet County, the appellant intentionally and unlawfully caused penetration of his genital organ namely penis into the genital organ namely vagina of *B.C.L* (Name withheld), a child aged 14 years.
3. The appellant was aggrieved by his conviction hence this appeal. In his amended grounds of appeal filed on 12th January, 2017, he challenged his conviction on three grounds namely;
 - (i) That the trial magistrate erred in law and fact by allowing an amendment of the charges under *Section 214 of the Criminal Procedure Code [CPC]* without giving him an opportunity to plead to the amended charges.
 - (ii) That the trial magistrate erred in law by convicting him on evidence which was taken from children without conducting a *voire dire* examination.
 - (iii) That the trial magistrate erred by convicting him on the basis of a defective charge sheet.
4. At the hearing, the appellant prosecuted his appeal in person. He entirely relied on homemade written submissions which he presented to the court on the hearing date.
5. In his brief submissions, the appellant raised some new issues which were not contained in his petition of appeal. These were mainly issues related to his identification as the complainant's assailant and credibility of witnesses. He appeared to have abandoned his amended grounds of appeal in his submissions except the complaint that the trial magistrate erred by failing to comply with the provisions

of *Section 214* of the *Criminal Procedure Code*. His submissions were however not clear on whether his grievance was that the charge sheet was not amended to reflect the complainant's correct age or that it was amended without complying with *Section 214* of the *CPC*.

6. The appeal is contested by the state. Learned prosecuting counsel *Ms. Kigegi* in her submissions contended that the appellant was properly convicted as in her view, the prosecution proved all the elements of the offence of defilement beyond any reasonable doubt. She averred that the complainant was seventeen years old at the time the offence was committed and a *voire dire* examination was not necessary in her case. She urged the court to dismiss the appeal for lack of merit.

7. This is a first appeal to the High Court. I am well aware of my duty as the first appellate court which is to revisit all the evidence tendered before the trial court; to re - evaluate it and reach my own independent conclusions regarding the soundness or otherwise of the appellant's conviction. See **Okeno V Republic [1972] EA 32; Kiilu & another V Republic [2005] KLR 175; Njoroge V Republic [1987] KLR 99.**

8. I have carefully considered the amended grounds of appeal; the evidence on record; and the submissions made by both the appellant and the state. I have also read the judgement of the learned trial Magistrate.

9. I wish to start by stating that my determination in this appeal will be guided by the appellant's amended grounds of appeal and not by any new complaints raised in his submissions. This is so because under *Section 350* of the *Criminal Procedure Code*, an appellant is prohibited from relying on grounds other than those stated in his petition of appeal.

10. Starting with the complaint that the appellant was wrongly convicted as no *voire dire* examination was conducted by the learned trial magistrate, I have gone through the entire proceedings of the trial court. They show that except for the complainant's evidence, the trial court conducted a *voire dire* examination on PW2 and PW3 before their evidence was taken. PW2 and PW3 were minors aged 14 and 11 years respectively. As was held by the Court of Appeal in **M.K.K V Republic Mombasa Criminal Appeal No. 267 of 2008 (2010) eKLR** which was relied on by the state, a *voire dire* examination is only necessary when the trial court is called upon to receive evidence from a child of tender years.

11. A *voire dire* examination is meant to assist the court assess whether a child of tender years understands the meaning and significance of an oath or the duty to speak the truth in which case the child would give either sworn or unsworn testimony depending on whether the child understood the meaning of an oath or not. The examination is also used to determine whether the child is possessed of sufficient intelligence to be allowed to testify.

12. A child of tender years is defined in *Section 2* of the *Children's Act* as;

“..... *A child under the age of ten years*”.

All the minors who testified in this case were eleven, fourteen and about seventeen years of age. They did not therefore fit the description of children of tender years. It was thus not necessary for the trial court to conduct a *voire dire* examination on any of them though the record shows that the examination was conducted on PW2 and PW3.

13. Another grievance by the appellant was that the trial magistrate erred by allowing an amendment of the charge without giving him an opportunity to plead to the amended charges as required by *Section 214* of the *CPC*. A reading of the proceedings before the lower court reveals that this ground of appeal is completely baseless as the record confirms that the charges were not amended at any time in the course of the trial. This fact was in fact noted by the learned trial magistrate in his judgment when he castigated the prosecution for not having amended the charge to reflect the complainant's correct age.

14. On the claim that the charge sheet was defective as the evidence presented before the trial court was at variance with the statement of the offence and particulars thereof, I find that in order to properly address

this complaint, it is important to briefly revisit the evidence that was tendered before the trial court.

15. PW1 in her testimony narrated how a person she knew before and who she identified as the appellant herein broke into a room in which she was sleeping together with her siblings who included PW2 and PW3. They were alone as their mother, PW4 had gone on a business trip. PW1 recalled that it was around 4 a.m but a delight light was on. She described the light from the delight as very bright.

16. At the time she saw him, the appellant was already on top of her. He had already removed his clothes which were on the floor. He only had his underpants on. PW1 then realized that though she had slept with all her clothes on, she did not at that time have her underpant. And while threatening her with a knife, the appellant proceeded to defile her.

17. PW2 and PW3 woke up to find the appellant threatening their sister with a knife. They both supported PW1's evidence that there was a delight light on and that they saw and recognized the appellant who only had his underpants on before he escaped from the room through a window. They also knew the appellant before including his names.

18. When PW1 was examined by PW5 a clinical officer at Chelalolwa Health Centre later the same day, PW5 noted that her private parts specifically the labia was inflamed and there was a whitish discharge oozing from her genitalia. On cross examination, he stated that he noted bruises on the labia. The approximate age of the injury was 12 hours. The appellant who had been arrested by members of the public soon after the incident was also examined and a whitish discharge was found on his genitalia.

19. Given the above evidence, it cannot be said that the evidence adduced by the prosecution was at variance with the offence of defilement. It is my finding that the evidence clearly disclosed and supported the offence of defilement.

20. The fact that the particulars supporting the charge alleged that the complainant was 14 years old while her actual age at the time the offence was committed was 17 years as demonstrated by the birth certificate produced as Pexhibit 3 was, as correctly held by the learned trial magistrate, immaterial. I say so because the offence of defilement is committed where the victim of sexual assault is below the age of 18 years. It did not therefore make a difference whether the complainant was 14 or 17 years at the material time.

21. Though it would have been desirable for the prosecution to amend the charge sheet to depict the correct age of the complainant when her actual age was established, the failure to do so did not render the charge fatally defective as it still disclosed the offence of defilement. The fact that the prosecution cited the wrong penalty section in the statement of the offence was in my view an error which could not have caused the appellant any prejudice. The appellant knew all along the offence he was facing and the actual age of the victim which was disclosed early enough in the proceedings. The error of citing the wrong penalty section was in my view an error which is curable under *Section 382* of the *Criminal Procedure Code*.

22. Having made that finding, the question to grapple with is whether the evidence on record was sufficient to prove the appellant's guilt as charged beyond any reasonable doubt.

23. In his defence, the appellant gave an unsworn statement in which he only narrated how he was arrested at 11 a.m on the same day the offence was committed. He did not specifically deny the allegations made against him by PW1, PW2 and PW3. He claimed that the charges were framed up against him but he did not disclose who had allegedly framed him and for what reason.

24. On my own appraisal of the evidence, I find that the appellant was very well known to PW1, PW2 and PW3. This was not disputed by the appellant. They all testified that they saw and recognized him in the room in which they were sleeping through light from a delight (solar generated lamp). He had no clothes on except his underpant. PW1's narration regarding how the appellant defiled her before she was able to escape from the room was graphic. When she was examined later the same day, her private parts had injuries which confirmed that she had been defiled. I am thus unable to fault the finding of the learned

trial magistrate that the charge of defilement had been proved against the appellant beyond any reasonable doubt.

25. For all the foregoing reasons, I am satisfied that the learned trial magistrate properly analysed the evidence on record including the appellant's defence and came to the correct conclusion that his guilt had been proved beyond any reasonable doubt. I consequently find that the appellant was properly convicted. His appeal against conviction therefore fails.

26. Though the appellant has not appealed against the sentence imposed upon him by the trial court, as the first appellate court, it is my duty to satisfy myself that the sentence was lawful. Under the *Sexual Offences Act*, the sentence for the offence of defilement is determined by the victims age.

Under *Section 8 (4)* thereof, a person convicted of the offence of defilement where the victim is between sixteen and eighteen years of age is liable to suffer a penalty of a mandatory minimum sentence of fifteen years imprisonment. The sentence imposed on the appellant in this case was fifteen years imprisonment which is the mandatory minimum sentence prescribed by the law. The sentence was therefore lawful and it is accordingly upheld.

27. In the result, I find no merit in this appeal. It is accordingly dismissed.

It is so ordered.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 28th day of June 2017.

In the presence of:-

The appellant

Ms Kainga for the State

Mr. Lobolia Court Clerk