REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 107 OF 2013

G K K..……..……..APPELLANT

VERSUS

REPUBLIC…….....…RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 195 of 2011 Republic v Gideon Kipkogei Korir in the Principal Magistrates' Court at Iten by Ms. R. Ndombi, Acting Senior Resident Magistrate, dated 11th June 2013.)

JUDGMENT

1. The appellant was convicted on a count of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to twenty years imprisonment.

2. The particulars were that on 24th August 2008 at [particulars withheld] , Keiyo North District, Rift Valley Province, he caused his penis to penetrate the vagina of B. C. *[particulars withheld]* a girl aged 12 years.

3. The appellant has preferred an appeal. The petition was filed on 19th June 2013. On 26th June 2014, the appellant filed a notice of motion seeking leave to amend the grounds of appeal. As no leave was granted, and in view of section 350 of the Criminal Procedure Code, this appeal is founded on the *original* petition. There are five grounds. First, that the prosecution failed to prove the charge beyond reasonable doubt; secondly, that material witnesses such as the father of the complainant were not called to the stand; thirdly, that the evidence of PW5, a clinical officer was unreliable; fourthly, that the learned trial magistrate failed to appreciate the grudge or land dispute between the families of the appellant and the complainant; and, fifthly, that the appellant was not positively identified.

4. The appeal is contested by the State. The learned State Counsel submitted that the charge was proved beyond reasonable doubt. She submitted the appellant was related to the complainant; and, she recognized him as her assailant. The case for the State is that the medical evidence established beyond doubt that the appellant penetrated the complainant. Learned State Counsel submitted that the alleged grudge between the two families was an irrelevant scapegoat. In a synopsis, the case for the State is that the appellant's culpability was established. I was implored to dismiss the appeal.

5. The appellant filed written submissions on 16th July 2015. At the hearing of this appeal on 12th November 2015, the appellant relied entirely on those submissions. I also heard submissions from the learned State Counsel. I have considered the grounds of appeal, the records of the lower court, the

evidence and the rival submissions.

6. 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, *Kariuki Karanja v Republic* [1986] KLR 190., *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 (unreported), *Paul Ekwam Oreng v Republic* Eldoret High Court Criminal appeal 36 of 2011 (unreported), *David Khisa v Republic* Eldoret High Court Criminal appeal 142 of 2011 (unreported).

7. The trial initially proceeded before Ms. B. N. Mosiria, Senior Resident Magistrate, on 18th August 2011. PW1 first testified on that date. On 29th February 2012, the appellant applied for the trial to start *de novo*. On 3rd July 2012, the trial started afresh before a new magistrate, Ms. R. Ndombi, Resident Magistrate.

8. PW1 testified that she was aged *sixteen* years but was *twelve* at the time of the offence. After a detailed *voire dire* examination, the learned trial magistrate formed the opinion that PW1 understood the nature of an oath. The minor proceeded to give sworn testimony. I think the learned the learned trial magistrate acted out of an abundance of caution. The complainant was *not* a child of *tender years*; certainly not as defined in the Children Act. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445.

9. PW1 testified that she was now a form one student at [particulars withheld] Girls School. She knew the accused as a relative. She knew his name as *G*. That is the name she gave to the police. PW1 said she had gone to visit her mother at [particulars withheld] . On 24th August 2008 at 3:00pm, she was on her way back to [particulars withheld] . She followed a path that cut through some bushes. That is where she met the appellant. She greeted him and they passed each other. The appellant then called her, held her hand, pulled her into the forest or bushes, climbed on top of her and defiled her.

10. She said the appellant threatened her; and, told her not to scream or he would kill her. He overpowered her, removed her panties, bikers, and other clothes; pulled down his trousers; and, proceeded to defile her. The ordeal took about eight to ten minutes. No one came to her rescue. When she turned onto her side, the appellant fell off. She left her clothes and started running towards a nearby farm. The farm belonged to PW3. She met PW2, a daughter of the farm owner. PW2 called her father (PW3) to the homestead. PW3 was also the village elder.

11. PW3 assisted PW1. He took her to the road. He asked her for her father's phone number but PW1 could not remember the number. They looked for her uncle, K, who gave them the number for PW1's father. It was now two or three hours after the incident. The appellant appeared at the shopping center wearing a brown t-shirt. When he attacked her earlier, PW1 said he was in a white t-shirt. PW1's uncle arrested the appellant. However PW4, the area Chief, said he is the one who apprehended the appellant. He called the Police who re-arrested the appellant and took him to Tambach Police Station. PW1 was taken to hospital. She was accompanied by her grandmother.

12. PW1 said she had never had sex before. She said she did not have a birth certificate; but she had a clinic or immunization card (exhibit 2). On cross-examination, she said the appellant must have changed his clothes after the incident. She told the police as much. She was unaware of a grudge or land disputes between her uncle, John Maiyo, and the appellant or their families.

13. PW2 is a daughter to PW3. She was aged 13. After a *voire dire* examination, she testified on oath. She knew the appellant. He was their neighbour. On 24th August 2008, she heard some screams. She then saw the complainant emerge from the direction of her neighbour's farm. She did not know PW1. She said PW1 had blood on the face and legs. PW2 called her father, J K. PW1 told them that G had defiled her. She said the appellant emerged from the same direction as PW1. He asked where PW1 was. He told her they had left for the shopping centre. He followed them. Upon cross-examination, she conceded that she

had not indicated in her police statement that PW1 had blood on the face and legs.

14. PW3 was the father to PW2. He was called by PW2. He found PW1 crying. He said she had leaves and scratches all over her body. She told him the appellant had defiled her. He took her to the Chief's office at the shopping centre. On cross-examination, he said he did not hear any screams as he was nearly a kilometer away from the scene. His house is 600 meters from the road. He acknowledged that he had an unrelated case in 2005 between him and the appellant He was the complainant. The case was dismissed. He was unaware of a land dispute between the appellant and complainant's families.

15. PW4 was the area Chief. He received information from PW3, the village elder. He asked the elder to bring the complainant to [particulars withheld] Centre. He received PW1 and PW3 at the Centre at about 6:45pm. PW1 was crying. The appellant was apprehended by the public. He was re-arrested by PW6 Police Constable Mwanyalo.

16. PW6 was the investigating officer. He said the complainant had grass on her hair and was walking with difficulty. He issued both the complainant and the appellant with P3 forms. He said he later visited the scene of the crime with the Chief. The scene was disturbed but he did not recover anything linking it to the appellant. Like I will point out shortly, I was not convinced that he visited the scene of crime. PW4 was not aware of a land dispute between the families of the complainant and the appellant.

17. PW5 was a clinical officer at Tambach Sub-District Hospital. He examined the complainant at 10:00pm the same evening. Her injuries were about 7 hours old. Her hymen was torn, the labia majora was inflamed. There were dry blood stains on the entrance to her vagina and a whitish discharge on her thighs "typical of male sperms". From the urine sample, there were epithelial cells. There were no spermatozoa. He referred her to Iten District Hospital for further treatment and prophylaxis. He produced the P3 form (exhibit 3).

18. PW5 also examined the appellant. His urine had yeast cells but there was no venereal disease. PW5 was given the appellant's inner wear by the police. He said it had a wet whitish discharge which he assumed to be sperms. He did not do any tests to match the whitish discharge on the complainant's thighs and the appellant's spermatozoa.

19. I have then examined the appellant's defence in detail. The appellant gave sworn testimony. He denied committing the offence. He said that on 22nd August 2008 he found J M and the complainant's father slashing grass or constructing a structure on land that belonged to the appellant's grandmother. He had an argument with the two. He said J M wanted to cut him with a *panga*, while the complainant's father threatened him with a stone. The appellant picked up a stone and hit the complainant's father. He said that the two had earlier injured his father. His father was convicted and finally went mad.

20. The appellant said he is the only heir to the land. The appellant decided to report the dispute with M and the complainant's father to the Assistant Chief. On 24th August 2008, he said he did some casual job until 5:00pm. He arrived home at 6:30pm. He needed to get some supplies. He went to the shopping centre. That is when he was arrested and handed over to the police. He confirmed he knew the complainant. He said he last saw her in the year 2003. He said he was being framed up to mask the land dispute. He said the clinical officer should have matched up the samples. He said the evidence of the prosecution witnesses had serious discrepancies. The appellant did not call any witnesses.

21. A number of issues arise from that evidence. I will deal first with the *identification* of the appellant. The complainant and appellant were not strangers. They were relatives. PW1 said that on 24th August 2008 at 3:00pm, she was on her way back to [particulars withheld] . She met the appellant along a path. She greeted him and they passed each other. The appellant then called her, held her hand, pulled her into the forest or bushes, climbed on top of her and defiled her. It was in broad daylight.

22. The identification of the appellant was thus never in doubt. That to me 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. I have reached

the inescapable conclusion that the appellant was positively identified by PW1.

23. The next key question is whether the appellant *penetrated* the complainant. That is the crux of this appeal. *Penetration* is defined in section 2 of the Sexual Offences Act as follows-

> *'"penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person".*

24. The complainant was emphatic that she had sex with the appellant in the bushes. She had not had sexual intercourse before then. It was not consensual. That is borne out by her injuries which were corroborated by the clinical officer, PW5. However, the clinical officer or the police lost a major opportunity. The police took away the appellant's inner wear. PW5, the clinical officer said the appellant's inner wear had a wet whitish discharge. But no tests to match the whitish discharge on the complainant's thighs and the appellant's spermatozoa were made. When juxtaposed against the defence of *alibi*, it left some doubts in the appellant's favour. If the appellant had committed the offence, why did he follow up the complainant to PW3's house and later to the shopping centre? What happened to PW1's clothes? As I will demonstrate shortly, the investigating officer (PW6) lied that he went to the scene of the crime. The appellant's inner wear was never tendered in evidence.

25. PW4, the area Chief at first said he was *unaware* of a land dispute between the complainant's father and the appellant. But at page 111 of the record, he conceded he *"was told that the father of the victim stays in your father's (appellant's) land [particulars withheld]"*. PW3 acknowledged he had an *unrelated case* between him and the appellant in 2005. He was the complainant. The case was dismissed. From the sworn testimony of the appellant, there was a simmering land dispute. There was an ugly confrontation between the appellant, the complainant's father and J M. Purely from a legal standpoint, the underlying land dispute would not an excuse for the defilement. The trial court was dealing with a criminal charge of defilement. The key question then is whether all the elements of the charge were proved beyond reasonable *doubt*.

26. From the testimony of PW5, the clinical officer, I am left in no doubt that the complainant was *penetrated*. PW5 examined the complainant *seven hours* after the incident. The complainant's hymen was torn; her labia majora was inflamed. She had dry blood stains on the entrance to her vagina; and, a whitish discharge on her thighs "typical of male sperms". From the urine sample, there were epithelial cells. However, for reasons that I shall deal with shortly, the credibility of PW1, PW2, PW3, PW4 and PW6 was cast into some *doubt*.

27. The age of the complainant is *material* in offences of this nature. See *John Wagner v Republic* [2010] eKLR, *Macharia Kangi v Republic* Nyeri, Court of Appeal, Criminal Appeal 346 of 2006 (unreported), *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported), *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011(unreported). The reason is that section 8 of the Sexual Offences Act provides for graduated *minimum* sentences. The *age* of the complainant may mean the difference between a life sentence and a few years in jail.

28. The complainant testified she was *sixteen* years at the time she gave evidence. She was now in form one. At the *time* of the *offence* she was thus *twelve* years. That is clear from her testimony and the clinic or immunization card (exhibit 2). The absence of a birth certificate does *not* mean the age was not proved. I have no reason to doubt that the complainant was twelve years. I am fortified in that conclusion from the recent decision of the Court of Appeal in *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Criminal Appeal 661 of 2010 (unreported). The learned judges 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."

29. I will now return to the issue of credibility of witnesses. There are *five* glaring discrepancies in the evidence. The first relates to the *date* of the offence. The appellant contended that at page 27 of the record, PW1 said the offence occurred on *23rd August 2008* at 3:00 pm while at page 64, she said it happened on *24th August 2008* at 3:00pm. I think the appellant failed to appreciate that page 27 of the record referred to the *initial* testimony by the complainant. The true record for purposes of the trial court and this appeal is her *renewed testimony* at page 64 of the record. But it remains material that in the *original* cross-examination, PW1 was *emphatic* that the offence occurred on 23rd August 2008. It is not lost on me either that the *date* in the *original copy* of the charge sheet on the record has been altered from *23rd* to *24th* August 2008.

30. The second major discrepancy is at page 66 of the record. PW1 said that after the ordeal, she ran into a neighbouring farm. When she got there, she *"met one man in the farm whom I told what happened……he took me to his house and asked me what happened"*. PW1 did not mention meeting PW2 at all. But according to PW2, she heard some screams. She then saw the complainant emerge from the direction of her neighbour's farm. She did not know PW1. PW2 then ran to call her father, J M , (PW3). PW3 confirmed that it is PW2 who called him. That is a serious flaw in the evidence.

31. There is a third discrepancy. PW2 said that PW1 had blood on the face and legs. PW2 did not mention that fact in her statement to the police. PW3 on the other hand only stated that PW1 had *"leaves all over her body and scratches on legs and hands"*.

32. Fourthly, although PW6 claimed to have visited the scene of crime, it remained *highly doubtful*. It is a simple lie. For starters he said he went there with the Chief. He never went there with PW1. Only PW1, or, the appellant for that matter, would have known about the exact spot where the offence occurred. Furthermore, the Chief (PW4) said that he did *not* visit the scene (page 109 of record). PW1's clothes were never recovered. The inner wear of the appellant was never produced in evidence.

33. There is a fifth discrepancy between the evidence of PW1 and PW3. PW1 said that she did *not* have her father's phone number. She said as follows at page 67 of the record: *"I went up to my uncle K and called him and he is the one who gave the phone number to my father"*. PW3 on the other hand said that when he reached his house he found PW1. He said PW1 *had a 50 shillings note and contact for her father on a piece of paper*. PW3 said he called the number and gave his phone to PW1 who spoke with her *father*.

34. I am alive that in any trial there are bound to be discrepancies. In *Joseph Maina Mwangi vs. Republic* Criminal Appeal No. 73 of 1993**,** the Court of Appeal held-

"*In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences."*

35. The *five* discrepancies I pointed out cannot be wished away lightly. They point to serious weaknesses in the evidence. They raise serious questions on the *credibility* of the complainant, PW2, PW3, PW4 and PW6. The appellant submitted that material witnesses were bypassed. One such witness is the father of the complainant. I remain alive that under section 143 of the Evidence Act, no particular number of witnesses is necessary to establish a fact. See *Joseph Njuguna Mwaura and others v Republic* Court of Appeal Criminal appeal 5 of 2008 [2013] eKLR, *Bernard Kiprotich Kamama v Republic*, High Court, Eldoret, Criminal Appeal 123 of 2010 [2013] eKLR. Granted the underlying land dispute; and, the recent confrontation between the appellant and the father of the complainant, the latter's evidence would have been relevant.

36. Lastly, the appellant in his sworn evidence was categorical that he was *not* at the scene of the crime.

He was thus setting up an *alibi*. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The appellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution's case. It was thus open to the trial court to weigh it against the evidence already tendered. See *Wang'ombe v Republic* [1976-80] KLR 1683, *Karanja v Republic* [1983] KLR 501.

37. The appellant denied that he penetrated the complainant. He said he last saw her in 2003. The police took away the appellant's inner wear. PW5, the clinical officer said the inner wear had a wet whitish discharge. No tests to match the whitish discharge on the complainant's thighs and the appellant's spermatozoa were made. The appellant's inner wear was not produced in evidence.

38. The discrepancies and gaps in the evidence must be weighed against two factors: first, the underlying land dispute or grudges between the appellant, the complainant's father, PW3 and J M; and, secondly, the *alibi* by the appellant. The gaps are material. They cast some doubt upon the prosecution's case. The burden of proof fell squarely on the shoulders of the prosecution. The appellant had no duty to seal any loopholes. See *Kiarie v Republic* [1984] KLR 739, *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332 at 334, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).

39. In the end I have reached the conclusion that the prosecution failed to prove *all* the elements of the offence beyond *reasonable doubt*. It follows as a corollary that the conviction was *unsafe*.

40. The upshot is that the appeal is allowed. The conviction and sentence are hereby set aside. The appellant shall be released forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 26th day of January 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant (in person).

Ms. B. Oduor for the State.

Mr. J. Kemboi, Court Clerk.