REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 56 OF 2014

PETER EWOI LUMULA..…….APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Being an appeal from the original conviction in Criminal Case No. 836 of 2013 Republic v Peter Ewoi Lumula in the Resident Magistrates Court at Kapsabet by B. Limo, Resident Magistrate, dated 1st February 2014)

JUDGMENT

1. The appellant was convicted for *defilement* of a girl aged *ten* years contrary to sections 8(1) and 8(2) of the Sexual Offences Act. He was sentenced to *life imprisonment*. He now appeals against both the conviction and sentence.
2. The particulars were that on 12th April 2013 at *Showground* area, in Nandi County, he intentionally and unlawfully caused his penis to penetrate the vagina of A. V. A. *[name withheld]*, a child aged ten.
3. The original petition of appeal was filed on 28th March 2014. On 11th February 2016, the Court granted the appellant leave under section 350 of the Criminal Procedure Code to amend the grounds of appeal. The amended grounds were lodged on 1st March 2016. The *amended petition* raises six main grounds. First, that the P3 form produced at the trial was defective; secondly, that the age of the minor was not proved; thirdly, that the prosecution's witnesses gave contradictory and inconsistent evidence; fourthly, that the appellant's defence was dismissed off-hand; fifthly, that the appellant was not accorded a fair opportunity to conduct his defence or prepare his witnesses; and, sixthly, that it was unsafe to rely on the exhibits to pin the appellant to the crime.
4. At the hearing of the petition, the appellant relied on detailed hand-written submissions filed on 25th May 2016. He added that the exhibits produced, including bed sheets, blue pants, cap, trouser, T-shirt and *akala* sandals were mentioned by *different* witnesses; and, that the evidence of PW1, PW3, PW4 and PW5 regarding those exhibits was inconsistent. He said that the documents before the court showed the minor was *twelve* years. Regarding the P3 form, he submitted that it was not stamped; and, that it made a wild allegation that he was "caught red-handed". In a synopsis, the appellant submitted that the charge was not proved beyond reasonable doubt.
5. The appeal is contested by the State. The case for the State is that the prosecution proved all the key ingredients of defilement. It was submitted that the appellant was positively identified; and, that there was clear and corroborated evidence linking him to the offence. The Republic submitted that the age of the minor was established by the immunization card; and, that penetration was proved. Regarding the exhibits, learned Prosecution Counsel submitted there was reliable evidence linking the items to the appellant. Lastly, the Republic's case is that the appellant received a fair trial; and, that the defence tendered was hopeless. I was urged to dismiss the entire appeal.

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 very careful because I have neither seen 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. PW1 was the victim. The trial court conducted a detailed *voire dire* examination. I have studied page 22 of the record (page 6 of the typed proceedings). The minor said she was aged *ten*; and, that she was a class 4 pupil at *K. T. [particulars withheld] School*. She attended church regularly at *P. A. G [particulars withheld] Showground Estate* and knew the perils of telling lies. The learned trial magistrate formed the opinion that she *understood* the nature of an *oath*. The minor was sworn.

8. 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. The actual *questions* posed to the minor by the learned trial magistrate were *not* put on the record. But the *answers* are on the record. That was a minor infraction that did *not* prejudice the appellant. I thus find that the trial court adopted the correct procedure of taking the minor's evidence.
9. On 12th April 2013, the complainant was asleep in the kitchen. She said that at about 2:00 a.m., the appellant opened the door. He held her on the mouth and throat; removed her panties (exhibit 2); and, inserted his penis into her vagina (the record shows that PW1 pointed to her vagina). She said she felt pain; she was suffocating. In the process, she kicked a basin which alerted her father to the commotion. Her father had a torch. He told the assailant to open the door. The attacker escaped through the window. Her parents took her to the main house to sleep. The complainant said it was dark in the kitchen. In the morning she saw a black long trouser (exhibit 4), T-shirt (exhibit 5) and a cap (exhibit 3). She had bled. She showed the court the blood-stained bed sheet she had slept on (exhibit 1). She said the clothes and bed sheet were given to the Chief. PW1 was later taken to Kapsabet District Hospital for treatment.
10. The complainant clarified that her mother collected the clothes from the kitchen. She said the appellant wore the clothes often. She said she knew the appellant. He was their neighbour and lived about 200 meters away. One other item found in the kitchen was *akala* sandals. PW1 said that the exhibits were displayed to the public who confirmed they belonged to the appellant. On her part, PW1 told the court that *"I have also seen the accused wear the clothes; the T-shirt, long trousers and open shoes"*. The record shows the appellant only asked one question in cross-examination to which PW1 replied *"you closed my mouth"*.
11. PW2 was the complainant's mother. She testified that the complainant was aged *ten*. She heard the noise in the kitchen. She alerted her husband. They both ventured out. The kitchen door was locked from inside. The padlock was missing. She heard someone jump out through the kitchen window. PW1 told her she was defiled. She took PW1 to the main house until the next morning. PW2 saw blood on the bed sheet (exhibit 1). In the morning, PW2 saw the black trouser, a cap, T-shirt and open *akala* shoes (exhibits 1, 3, 4, and 6). She said the clothes were on the table in the kitchen. She took the exhibits to the Chief and reported the matter to Kapsabet Police Station. She was issued with a P3 form (exhibit 11). She then took the complainant to Kapsabet District Hospital.
12. When she was cross-examined, she confirmed that she did not hear the padlock (exhibit 8) on the kitchen door being cut. She said it was dark and raining. She heard someone jump out of the kitchen window. I have noted that although PW2 referred to a knife (exhibit 9), the complainant did not make any mention of it.
13. PW3 was the appellant's landlord. He went to the scene. PW2 showed him the clothes that were recovered from the kitchen. He testified that the clothes belonged to the appellant. He knew him as *Peter* and had been his tenant from April 2012. He also said the *akala* shoes belonged to the appellant.

14. PW5 was the Assistant Chief. She testified that she used to see the appellant wearing the clothes, namely, the T-shirt, jeans trouser and cap. She went to the home of the appellant. He was not there. Later the appellant was spotted in town. She traced his movements and found him at Kobil Petrol Station. She escorted him to Kapsabet Police Station.
15. PW4, Silas Koech, was a clinical officer. He examined the complainant at Kapsabet District Hospital on 13th April 2013. He filled in a P3 form (exhibit 11). He confirmed the complainant was aged *ten* years. He found that the complainant's hymen was broken, and her vaginal walls were inflamed. STDs were negative. HIV test was also negative. The P3 form states there "was some degree of intercourse".
16. PW6, Police Sergeant Lugonzo, was the investigating officer. He received the complaint from PW2 on 13th April 2013. He issued a P3 form. He accompanied PW1 to Kapsabet District Hospital. A P3 form was filled out and signed later the same day. The appellant was also examined at the hospital and a P3 form signed on 27th April 2013. PW6 produced the complainant's Health Card containing the complainant's date of birth.
17. I have then considered the defence proffered by the appellant in the trial court. He made an unsworn statement. He stated as follows.

> *"I wish to state that on [the] day, I was from town from [sic] work. I decided to go through the village. I met people who asked me where alcohol is sold. I took the people [there]. That is my neighbour's house. I proceeded to my house. I saw my landlord. [He came] to my house and told me I have to be taken to the police because of my neighbour's [sic] house. The landlord is called Kimeli who came to testify in court. In the morning I vacated my landlord's house.*
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> *"Later after I rushed away [sic], I found the landlord in a hotel in Kapsabet Town. Later, I came out and found a woman who told me there is work at Kapsabet Police Station. I was told I was under arrest. Later I was charged. I did not commit [the] offence. I was later examined. I still deny the offence".*

18. I will deal first with the validity of the P3 form of the complainant (exhibit 11). The appellant contends that it is defective for want of a rubber stamp. There is no legal requirement that a P3 form must contain a rubber stamp impression of the hospital or the person who fills it out. What is necessary is that the original form must be filled out by a *competent* clinical officer or doctor, *signed* and *dated*. PW5 confirmed he issued the original P3 form on 13th April 2013. PW4, the clinical officer, confirmed he examined the complainant and filled out the form the same day. I have seen the original P3 form on the record. It is dated 13th April 2013 and signed. PW4 was a competent witness. He testified on both the P3 form and the accompanying medical chits. They were all produced in court. I agree with the appellant that the form contains an allegation that that he was *"caught red-handed"*. The person filling out a P3 form captures the history of the incident as narrated by the complainant. From the evidence at the trial, the appellant was not literally caught in the act. The evidence shows the assailant was interrupted by PW2 and her husband; and, that he escaped through the kitchen window. There is absolutely no merit in that ground of appeal.
19. I will now turn to the evidence of *identification*. The appellant and complainant were not complete strangers. They were neighbours. The appellant was a tenant of PW3. He had resided there for a year. It was 200 metres from the complainant's house. However, the incident occurred at 2:00 a.m. It was dark. It was raining. The complainant was asleep. She was *"surprised that somebody was holding her mouth and throat"*. The person removed her panties and penetrated her. Clearly, she did *not* identify her assailant. The circumstances of identification were not favourable to a positive identification.
20. In the meantime, the commotion in the kitchen attracted her parents in the main house. The attacker was startled by the torch light; and by PW2 and her husband. He jumped out through the kitchen window. It must follow that *neither* PW2 *nor* her husband positively identified the appellant.
21. But the assailant left a *smoking gun*. The *tell-tale* signs were in his items of clothing. He obviously did not have time to dress up or pick up his clothes. He left behind *incriminating* evidence

including a black jeans trouser (exhibit 4), T-shirt (exhibit 5), a cap (exhibit 3) and *akala* open sandals (exhibit 6). I agree with the appellant that clothes may by themselves not have distinctive features; and, that the various items of clothes were mentioned by *different* witnesses. PW1 mentioned the trousers, T-shirt, *akala* shoes and cap. Her mother mentioned the T-shirt, shoes and clothes that were left on a table in the kitchen. She also referred to a padlock and knife (exhibits 8 and 9). The latter were not mentioned by PW1. But PW1 clarified that it is her mother who collected the clothes from the kitchen. PW1 said the appellant *wore* the clothes *often*. PW3, who had been a landlord of the appellant for a year, confirmed the clothes (exhibits 3, 4, 5 and 6) *belonged* to the appellant. He knew him as *Peter*. In his cross-examination, the appellant did *not* cast any doubt that the clothes belonged to him. In his defence the appellant did not also deny that fact.

22. The clothes were recovered the morning after the incident. The appellant was *not* a tenant in the house of the complainant. The only logical inference is that in his hurry to escape from the *locus in quo*, he left the clothes. From the *totality* of the *circumstantial evidence*, the clothes point *irresistibly* to the appellant as the person who attacked and defiled the complainant. True, there was *no* direct eye-witness account on identification; but, there is *compelling* circumstantial evidence pointing*exclusively* to the culpability of the accused. See *Sawe v Republic* [2003] KLR 364. In *R v Kipkering arap Koske & another* 16 EACA 135 (1949) the court held-

> *"In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"*

23. The next key question is whether penetration was proved. Section 2 of the Sexual Offences 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".*

24. From the unchallenged evidence of PW1, PW2, and PW4 there is *no* doubt about *penetration*. PW1 was emphatic she was penetrated. She bled. PW2 saw the blood-stained bed sheet (exhibit 1). The examination by the clinical officer (PW4) revealed the complainant's *hymen was broken, and her vaginal walls were inflamed*. The P3 form indicates there was sexual intercourse. I find that penetration was *proved* beyond reasonable doubt. I also do *not* entertain any *doubt* that anyone *other than* the appellant penetrated the complainant.
25. I am alive of the defence by the appellant. It is *not* true that his defence was dismissed *off-hand*: the learned trial magistrate considered the defence at page 59 of the record (page 43 of the typed record). He found the defence hopeless. I concur with that finding. The defence does not answer to the charge. It details at length the movements of the appellant on the day of the incident and the following day.
26. It would seem that the appellant was setting up some form of *alibi*. 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. The *alibi* in this case was a sham. I have already found that the appellant left incriminating evidence at the scene; and, that the entire corpus of circumstantial evidence points exclusively to his guilt.
27. On 13th November 2013, the record shows that the rights under section 211 of the Criminal Procedure Code were explained to the appellant. He indicated that he would give an *unsworn statement*; and, that he would *not* be calling any witnesses. It is thus an afterthought and a red herring to say that he was not given an opportunity to prepare for his case; or, that he was not afforded a right to call witnesses. I find that the appellant received a fair trial.
28. The age of a 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. I agree with the appellant that the lower court erred in finding that the complainant was aged *ten*. From the Child Health Card (exhibit 7), I am satisfied that the complainant was born on *5th November 2001*. Her first dose at *six weeks* was administered on 11th January 2002. PW6 misled the trial court that the latter was her birthday. The complainant was thus well over *thirteen* years on 12th April 2013, the date of the offence.

29. That takes me to the charge sheet, the particulars and the sentence in this case. The charge sheet framed an offence of defilement of a girl aged *ten* years contrary to sections 8(1) and *8(2)* of the Sexual Offences Act. Since the complainant was well over *twelve years*, the proper penal section was *8 (3)*. The learned trial Magistrate found the offence was proved as charged under sections 8(1) and *8(2)* of the Act and sentenced the appellant to *life* imprisonment.
30. I am of the view that the variance between the particulars and evidence only prejudiced the appellant on *sentence*. The defect in the particulars of the charge sheet was also *curable* by section 187 as read with section 382 of the Criminal Procedure Code. See ***Martin Wanyonyi Nyongesa v Republic***, Eldoret, Criminal Appeal 661 of 2010 (unreported). So much so that I am only prepared to review the *sentence*.
31. From my analysis and re-evaluation of all the evidence, I am satisfied that the charge of *defilement* was proved beyond reasonable doubt. I cannot say that the burden of proof was shifted to the appellant at any point. The defence mounted was feeble and a sham. It follows as a corollary that the conviction was *safe*.
32. I have found that the complainant was well *above* thirteen years on the date of the offence. The trial court erred by sentencing the appellant to life imprisonment. Under section 8(3) of the Sexual Offences Act, defilement of a child of between *twelve* and *fifteen* years attracts a sentence of *twenty years* imprisonment. I will thus disturb the sentence.
33. The upshot is that the appeal against *conviction* has no merit and is *dismissed*. I *set aside* the sentence of *life imprisonment*. I order instead that the appellant shall serve a sentence of *twenty years* imprisonment. The new sentence shall run from *1st February 2014*, the date of the original conviction.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 23rd day of June 2016

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant.

Ms. G. Mokua for the Republic.

Mr. J. Kemboi, Court Clerk.