REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 188 OF 2012

ALPHONCE KOSGEI ROTICH…..……..……..APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 2786 of 2011 Republic v Alphonce Kosgei Rotich in the Resident Magistrates Court at Eldoret by M. W. Njage, Resident Magistrate dated 22nd November 2012)

JUDGMENT

1. The appellant was convicted of defilement of a girl aged eight years contrary to sections 8(1) and 8(2) of the Sexual Offences Act. He was sentenced to life imprisonment.

2. The particulars were that on 8th August 2011 in Wareng District within Rift Valley Province, he caused his penis to penetrate the vagina of *E.N. [name withheld]*, a girl aged eight.

3. The appellant has appealed against his conviction and sentence. The original petition of appeal was filed on 23rd November 2012. On 28th July 2014, the appellant was granted leave to amend his grounds of appeal. The amended petition was lodged on 1st August 2014. On 22nd October 2015, the appellant was granted further leave to amend the petition of appeal. The *further amended petition of appeal* was filed on 26th October 2015. There are twelve *amended* grounds. They can be condensed into six. First, that the life sentence was unlawful, harsh or excessive; secondly that the charge was not proved beyond reasonable doubt; thirdly, that the trial court did not conduct a proper *voire dire* examination; fourthly, that that the learned trial magistrate erred by relying on the evidence of a single witness of tender years; fifthly, that the appellant did not understand the proceedings; sixthly, that the learned trial magistrate failed to comply with the mandatory provisions of section 200 (3) of the Criminal Procedure Code. In that regard, the appellant contends that the recall of the complainant was prejudicial. In a nutshell the appellant submitted that his conviction was unsafe.

4. At the hearing of the petition, the appellant's learned counsel, Mr. Mathai, who was holding brief for Mr. Momanyi, relied entirely on the written submissions filed on 11th February 2016 together with the annexed authority.

5. The appeal is contested by the Republic. The case for the Republic is that the charge was proved beyond any reasonable doubt. It was submitted that the appellant was positively identified by the complainant; that her evidence was reliable; and, was corroborated by medical evidence. The learned Prosecution Counsel, Ms. Oduor, submitted that penetration was proved. The age of the complainant was also proved by documentary evidence. It was submitted further that the appellant understood and

followed the entire proceedings. The Republic submitted that the sentence handed down was lawful. I was implored to dismiss the 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 [2013] eKLR, *Paul Ekwam Oreng v Republic* Eldoret High Court Criminal appeal 36 of 2011 [2013] eKLR, *David Khisa v Republic* Eldoret High Court Criminal appeal 142 of 2011 [2013] eKLR.

7. I will first deal with the question of compliance with section 200 (3) of the Criminal Procedure Code. The section requires the succeeding magistrate to explain to the accused, on the record, of the right to recall any witnesses. Section 200 (3) is couched in mandatory terms: the succeeding magistrate *shall inform* the accused person of that right. Where the accused is convicted on evidence not wholly taken by the convicting magistrate, the High Court can overturn the conviction if there is a material prejudice. In that event, a new trial may be ordered.

8. I have carefully examined the original record. The trial opened on 22nd September 2011 before A. Onginjo, Senior principal Magistrate. The complainant (PW1) testified on that date. She gave *unsworn* evidence. On 15th November 2011, the trial was taken over by J. Owiti, Resident Magistrate. He explained to the appellant his rights under section 200 (3) of the Code. The appellant elected to proceed from where the matter had reached.

9. On 14th March 2012, the case started before a new magistrate, Mary Njage, Resident Magistrate. The prosecutor applied to recall PW1. The court allowed the application. The case started *de novo*. The succeeding magistrate heard all the witnesses in this case and delivered judgment. Section 200 (3) of the Criminal Procedure Code was inapplicable in the circumstances. Since the trial was starting *afresh*, it would be a misnomer to say that the appellant was prejudiced.

10. There is an allegation, without any evidence, that when the complainant took the stand the second time she had been coached. I however find that she was generally consistent. The cross-examination did not reveal that she had been tutored to testify in a particular manner. Her original statement was *unsworn*; the subsequent testimony before the new magistrate was under *oath*. There are some variations from her prior testimony. For example, whether the appellant completely undressed. In both versions however, the complainant was emphatic that she was defiled by the appellant. The judgment was correctly based on the *subsequent* testimony. I find there was no miscarriage of justice by starting the trial *de novo*.

11. I have studied page 19 of the record (page 11 of the typed proceedings). The trial court conducted a detailed *voire dire* examination. The minor said she was aged nine; and, that she was a class 3 pupil at *A. H. [particulars withheld] Academy*. She attended church regularly at *S. P. [particulars withheld] Fellowship* 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.

12. 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 agree with the appellant, that 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.

13. The appellant contends that he did *not* understand the proceedings. I have carefully studied the original record of the trial court. The charge was first read to the appellant on 11th August 2011. The appellant said he understood *Keiyo* language. The lower court called for a *Keiyo* interpreter. The substance of the charge and its elements were read to the appellant. The appellant answered "*It is not*

true". A plea of *not guilty* was entered. Throughout the trial, the appellant was represented by an advocate. He cross-examined all the witnesses. When he was put on his defence, the record shows he gave an unsworn statement in *Kiswahili*.

14. The obvious inference is that the appellant knew both *Keiyo* and *Kiswahili* languages. Mitigation was tendered by his learned counsel. Granted those circumstances, I am unable to hold that the trial was unfair; or, that the appellant did not understand or comprehend the proceedings. See *Abdalla v Republic* [1989] KLR 456, *Kiyato v Republic* [1986] KLR 418, *Lusiti v Republic* [1976-80] 1 KLR 585, *Desai v Republic* [1974] EA 416, *Adan v Republic* [1973] EA 445, *Kariuki v Republic* [1984] KLR 809.

15. I will now re-appraise the evidence tendered in the lower court. The complainant testified that on 8th August 2011, at about 5:00 p.m., she was in the sitting room with her younger sister. The appellant, who was employed by her guardian as a herdsman, knocked on the door. They opened for him. He moved around the house. He then called her to the bedroom. He asked her to undress and lie on the bed. He then "did bad manners" to her. She felt pain. She bled. She pointed to her private parts in court and said that the appellant did "bad manners with his thing which he uses to *kususu*". She said the appellant had removed his trousers half-way. The appellant then heard the parents of the complainant approaching and took off. As he had threatened the complainant, the complainant did not report the matter immediately.

16. PW2 is an aunt to the complainant. The complainant's mother is deceased. PW2 had been taking care of the complainant since the year 2010. PW2 had employed the appellant as a herdsman for about a month. On the material date, she returned home at about 4:30 p.m. She found the appellant in the compound. The cows were in the compound. She found it suspicious as the cows should have been driven back at 5:30 p.m. Later in the evening, she noticed that the complainant took unduly long in the toilet. She decided to investigate. She found the complainant examining a tissue paper. That is when the complainant mentioned that *"Kosgei ali[m]fanyia mambo mbaya"*.

17. PW2 and her husband took the complainant to the hospital. At the hospital, she noted that PW1's vagina was bruised. She reported the matter to Kiambaa Police Station. She gave the police the bloodied bikers that the complainant wore (exhibit 1). She was issued with a P3 form (exhibit 2). The police then arrested the appellant.

18. When cross-examined by the appellant's counsel, she conceded that her husband did not record a statement. She said she took the complainant to the hospital the following day; and, that by that time, the complainant had taken a bath. She said that although there are other residents in her compound, the complainant was clear that it was the appellant who defiled her.

19. PW3 was Dr. Cynthia Kibet. She did not examine the complainant. The complainant was examined by her colleague, Dr. Florence Jagagua, at Moi Teaching and Referral Hospital. Dr. Jagagua could not testify because she had travelled out of jurisdiction. The trial court allowed PW3 to produce the P3 form (exhibit 2). The medical examination revealed that the complainant's hymen "was red and torn at position 3:00 o'clock". A vaginal swab did not reveal any spermatozoa or pus cells; the urine had a few pus cells. There was no vaginal discharge. VDRL and HIV were negative. She said the findings indicated there was penetration. On cross-examination, she said the examination was conducted two days after the incident. She conceded that riding a bicycle could cause inflammation to the hymen but "it was not clinically accepted".

20. PW4 was Police Corporal John Kimanga. On 10th August 2011, he was on duty at Kiambaa Police Station. At about 8:00 p.m., he received the complaint from the guardians of the complainant. They gave him the undergarment worn by the complainant. He issued them with the P3 form. He visited the scene on 10th August 2011. The appellant was first arrested and detained at Eldoret Police Station. He re-arrested the appellant.

21. I have then considered the defence proffered by the appellant. He made an unsworn statement. He stated the following-

> *"On 24.6.11, I started work of herding cows. On 26.7.2011 she [PW2] asked me where I was in 2007. I told her in school. She asked me if I had an identity card. On 3.8.2011 she gave me 100. She told me her husband would go on safari. She told me she would pay me on 5.8.2011. On 6th, she told me she had got late in paying me. In the evening, she paid me Kshs 3,500. I asked for permission to go home on Tuesday. On 8th, in the evening, her husband came and suggested I go on Wednesday. Then he kept telling me to go to work in Nyandarua. On the night of 9th, they arrested me. That is all".*

22. A number of matters arise from that evidence. The first relates to *identification*. The appellant and complainant were not complete strangers. The appellant was employed by her guardians as a herdsman. That was confirmed by PW2. The appellant had been employed for *over* a month. The complainant knew the appellant as *Kosgei.* The appellant did *not* contest those facts. He was at the *locus in quo*. The offence took place at about 5:30 p.m. 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.

23. The complainant gave testimony on oath. She did not waver upon cross-examination. She was consistent. I thus find that the complainant positively identified the appellant as the person who called her into the bedroom and defiled her. A child of her age may not describe sexual acts in a graphic manner. But in this case, she sufficiently described the act in the following terms: *"He asked me to undress and lie on the bed. He then "did bad manners" to me. I felt pain. I bled. [Witness pointed to her private parts and said] the appellant did "bad manners with his thing which he uses to kususu [urinate]".*

24. I have reached the conclusion that the complainant positively identified the appellant; and, that the appellant penetrated her with his penis. In his defence, the appellant did not categorically deny it. He instead went into a long narrative of his employment or delayed wages. Under section 124 of the Evidence Act, the evidence of the complainant would have been sufficient. But in this case the penetration was corroborated by Dr. Kibet (PW3) and the P3 form (exhibit 2).

25. The medical evidence established that the complainant's hymen "was red and torn at position 3:00 o'clock". A vaginal swab did not reveal spermatozoa or pus cells; the urine had a few pus cells. There was no vaginal discharge. VDRL and HIV were negative. PW3 said the findings indicated there was *penetration*. The likelihood of the injury to the complainant resulting from riding a bicycle was clinically discounted. There was no such evidence in any event.

26. I am alive that the examination took place two days after the incident. The complainant had already taken a bath. The fact that there were *no* spermatozoa does *not* absolve the appellant. 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".*

27. 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 her. Like I have said, the defence by the appellant did not relate to the accusations facing him. He never said he did not know the complainant or defile her. The defence went into great detail of his employment or delayed wages. He seemed unhappy with the way PW2 or her husband treated him or dealt with his request for an off. That cannot be a justification for defiling an innocent child. I find the defence set up by the appellant to be hollow; and, that it raised *no* doubts in his favour. I agree with the learned trial magistrate that it was a red herring.

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 [2013] eKLR. The reason is that section 8 of the Sexual Offences Act provides for graduated *minimum* sentences. From the evidence

of the complainant, her guardian (PW2) and the birth certificate (exhibit 3) I am satisfied that the complainant was born on 8th September 2003; and, that she was aged *eight years* at the time of the offence.

29. I am alive that the legal burden of proof lay throughout with the prosecution. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166. But from my *analysis* and *re-evaluation* of all the evidence, I am satisfied that the charge and all its elements were *proved* beyond reasonable doubt. I cannot say that the burden of proof was shifted to the appellant at any point. It is also not true that the defence proffered by the appellant was not taken into account. The truth of the matter is that the defence was feeble and a sham. It follows as a corollary that the conviction was *safe*.

30. Under section 8(2) of the Sexual Offences Act, defilement of a child of eleven years or *below* attracts imprisonment for *life*. The sentence is *mandatory*. The complainant was *eight years* at the time of the offence. Having found the conviction was *safe*; I am unable to disturb the sentence.

31. The upshot is that the entire appeal is devoid of merit. It is hereby *dismissed*.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 14th day of June 2016

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant.

Mr. Momanyi for the appellant.

Ms. G. Mokua for the Republic.

Mr. J. Kemboi, Court Clerk.