



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 2 OF 2013**  
**DANIEL KIPKOSGEI LETTING ..... APPELLANT**  
**VERSUS**  
**REPUBLIC ..... RESPONDENT**

*(An Appeal from the Judgment of the Resident Magistrate Honourable B. Limo in Kapsabet Criminal Case No. 1484 of 2012, dated 21 December, 2012)*

**JUDGMENT**

1. The appellant 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*. The particulars supporting the charge were that on the 7<sup>th</sup> day of July, 2012 at [particulars withheld] village within Nandi County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of *JJ (name withheld)* a girl aged 10 years.

2. Following his conviction, the appellant was sentenced to life imprisonment. Aggrieved by his conviction and sentence, he lodged an appeal to this court vide a petition of appeal filed on 4<sup>th</sup> January, 2013.

3. On 16<sup>th</sup> July 2015, the appellant was granted leave by this court (Kimondo J) to amend his grounds of appeal under *Section 350* of the *Criminal Procedure Code*. In his homemade amended grounds of appeal, the appellant in the main complained that the learned trial magistrate erred in law and fact by convicting him on the basis of contradictory evidence which did not prove the charges against him beyond any reasonable doubt; that some key witnesses were not called to testify while those that were called were members of one family; and that the learned trial magistrate failed to give due consideration to his defence.

4. The appellant prosecuted the appeal in person. He entirely relied on written submissions filed on 10<sup>th</sup> February, 2016.

In his written submissions, the appellant mainly re-iterated his grounds of appeal. He further contended that the trial court failed to consider the contradictions in the evidence given by the clinical officers who testified during the trial and that the P3 form tendered in evidence to prove penetration was not authentic; that there was a contradiction regarding the complainant's name thus creating doubt about the identity of the victim and that the village elder who arrested him was not called as a prosecution witness. He implored the court to allow the appeal.

5. The state contests the appeal. Learned prosecuting counsel *Ms Muthui* submitted that the appellant was properly convicted and that his conviction should be upheld. When responding to the appellant's claim

that the prosecution failed to call vital witnesses in support of its case, counsel contended that the prosecution was at liberty to call any number of witnesses it found necessary to prove its case and that there is no law barring the calling of witnesses from one family. She further submitted that the trial court considered the appellant's defence but found that it did not create a doubt in the prosecution's case. She urged the court to dismiss the appeal for lack of merit.

6. This is a first appeal to the High Court. As a first appellate court, I am duty bound to exhaustively reconsider and re-evaluate the evidence presented before the trial court in order to draw my independent conclusions on the soundness or otherwise of the appellant's conviction. In doing so, I should remember that I did not have the advantage of seeing or hearing the witnesses.

7. The duty of the first appellate court has been enunciated in a long line of authorities both in this court and in the Court of Appeal.

In the celebrated case of ***Okeno V Republic (1972) EA 32***, the Court of Appeal held as follows:-

***“ ...An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”***

I will be guided by the above stated principles in determining this appeal.

8. I have considered the grounds of appeal, the submissions made by the appellant and the state and the evidence on record.

The prosecution called a total of five witnesses. After a brief voir-dire examination, the complainant testified that on 7<sup>th</sup> July, 2012 at about 4pm (according to the trial magistrate's hand written notes), she was in their farm picking vegetables in the company of two of her siblings. The appellant, who was their close neighbour joined them and sent away her siblings. When they were left alone, the appellant asked her to lie down after which he removed her inner wear, removed his trousers and then defiled her.

8. According to PW2 who is PW1's brother, he was walking from a neighbour's home on the material day at around 4 p.m when he heard *Daniel*, the appellant herein laughing loudly. He got curious and went to check what was making him laugh. He found him lying on top of PW1 with his genital organ inside PW1's vagina. He arrested the appellant and raised an alarm. The alarm attracted another brother S K to the scene. Together they tied the appellant with ropes and handed him over to their village elder but on his instructions, they took him to Chepsonoi police station. At this time they had been joined by their mother (PW3) and PW1. At the police station PW1 was issued with a P3 form. On the same evening, she was taken to Kapkangani Health Centre for treatment.

9. The P3 form was filled by a clinical officer *Mr. Josephat Koech* who examined PW1 on 9<sup>th</sup> July, 2012, two days after the offence was committed. He found that the hymen was broken and inflamed; there was mild laceration of the labia majora and dirty discharge on the vulva. The P3 form was produced as Exhibit 1 on his behalf by his colleague PW4 under *Section 77* of the *Evidence Act*.

10. When put on his defence, the appellant chose to make an unsworn statement. He did not call any witness. He claimed that on 7<sup>th</sup> July, 2012 at around 4 p.m, he went to PW1's home to demand payment of a debt owed to him by her mother (PW3). PW2 beat him up and took him together with PW1 to Kapkangani Health Centre and later took him to a police station. In a nutshell, he denied having committed the offence as alleged.

11. After re-evaluating the evidence on record, I did not come across any material contradictions in the prosecution's case contrary to what was alleged by the appellant in his submissions. Though it is true that PW1 in her evidence described herself as *J C*, this did not create any doubt on whether or not she was the complainant in this case. It is clear from the rest of the evidence including the evidence of PW3 her mother, the P3 form and the child Health Card produced as exhibit 3 that she was the same girl who was described as *JJ* in the charge sheet.

12. From the medical evidence in the P3 form, there is no doubt that the complainant was indeed defiled on the material date. There is nothing in the P3 form to suggest that it was not authentic as claimed by the appellant. Besides, he did not challenge its authenticity during the trial.

13. The only issue that then arises for my determination is whether the learned trial magistrate erred in her finding that it is the appellant who committed the offence.

I wish to start by observing that the complainant was clear and consistent in her evidence that it is the appellant who found her in the shamba at the time alleged and defiled her. She knew him very well previously being their neighbour at home. It should be remembered that the incident happened at around 4pm in broad daylight. According to PW1, this was the second time that the appellant had defiled her. Her evidence was materially corroborated by the evidence of PW2 who found the appellant in the act. The appellant in his defence admitted that he was PW1 and PW2's close neighbour. There is therefore no doubt that the appellant was positively identified as the person who sexually assaulted the complainant. There was a case of recognition which is always more reliable.

14. Besides, there is evidence that the appellant was arrested at the scene of crime and was from there handed over to the police. There was no break in the chain of events that would have created any doubt regarding the identity of PW1's assailant.

15. I am alive to the fact that the appellant denied having committed the offence and alluded to a grudge with PW3 apparently over an unpaid debt. The appellant's defence is in my view unbelievable and appears to have been an afterthought considering that this issue never arose during his cross-examination of PW3. In any event, the complainant in this case was PW1 and not PW3. There is no evidence to suggest that PW1 had been coached by her mother to give false evidence against the appellant.

16. The appellant also challenged his conviction on grounds that the witnesses who testified for the prosecution all came from the complainant's family and that the village elder was not called as a witness. As correctly submitted *Ms. Muthui*; there is no law that bars the calling of witnesses from the same family. They were competent witnesses for the prosecution and the trial court was entitled to accept their evidence provided that it was credible and reliable.

17. It is clear from the judgment of the learned trial magistrate that she believed the evidence of PW1 and PW2. Their evidence was clear, consistent and straight forward. I have no reason to fault the trial magistrate's finding on their credibility. It is important to note that though there was corroboration of PW1's evidence through the testimony of PW2 and the medical evidence in the P3 form, this being a sexual offence involving a minor, under the proviso to *Section 124* of the *Evidence Act*, corroboration of her evidence was not mandatory. The trial court would have been right if it convicted the appellant on the basis of PW1's evidence only if it believed she was telling the truth and recorded its reasons for that finding.

18. Regarding the appellant's complaint that the prosecution failed to call the village elder as a witness, I find that even if the said village elder had been called as a witness, his evidence would not have added any value to the prosecution case. I say so because there is evidence that he did not witness the commission of the offence nor did he play any role in the arrest or prosecution of the appellant. Besides, under *Section 143* of the *Evidence Act*, no number of witnesses are required to prove a fact. Nothing therefore turns on that ground of appeal.

19. For all the foregoing reasons, I have come to the same conclusion as the learned trial magistrate did

that the prosecution proved the charges against the appellant beyond any reasonable doubt. I am thus satisfied that the appellant was properly convicted.

20. On the appeal against sentence, the appellant was convicted of the offence of defilement contrary to *Section 8(1)* as read with *Section 8 (2)* of the *Sexual Offences Act*. *Section 8(2)* prescribes a penalty of life imprisonment for persons convicted of the offence of defiling minors who are below 11 years old. There is evidence to prove that the complainant in this case was ten years old at the time the offence was committed – See Child Health card produced as Pexhibit 3. Infact, the stated age of the complainant was not challenged either during the trial or an appeal.

The appellant was sentenced to life imprisonment which was the only sentence allowed by the law. The sentence was therefore lawful and I find no reason to disturb it.

21. In view of the foregoing, I find no merit in this appeal. I accordingly dismiss it in its entirety.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 20<sup>th</sup> day of July 2016**

In the presence of:

The appellant

Ms Mokuu for the state

Mr. Lobolia Court Clerk