REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 148 OF 2013

EDWIN KIBET KIPKEU……..…….APPELLANT

VERSUS

REPUBLIC…….....…….RESPONDENT

(Being An Appeal From The Original Conviction And Sentence In Criminal Case No. 242 Of 2011 Republic V Edwin Kibet Kipkeu In The Senior Resident Magistrates Court at Iten by R. Ndobi, Ag Senior Resident Magistrate dated 15th July 2013)

JUDGMENT

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

2. The particulars in the *amended charge sheet* were that on 12th April 2011 at [particulars withheld], Marakwet West District within Rift Valley Province, he caused his penis to penetrate the vagina of *I J Y [name withheld]*, a girl aged *eleven*.

3. The appellant has appealed against his conviction and sentence. The original petition of appeal was filed on 29th July 2013. On 17th March 2016, the appellant was granted leave to amend his grounds of appeal. The *amended* grounds were lodged on 23rd June 2016. There are five *amended* grounds. First, that the identification of the appellant was not positive; secondly, that the evidence was riddled with contradictions; thirdly, that there was variance between the age of the complainant and the one in the charge sheet; fourthly, that the names of the complainant were different from those in her clinic card; and, fifthly, that penetration was not proved.

4. At the hearing of the appeal, the appellant relied wholly on his hand-written submissions filed on 23rd June 2016. He added the following: that the charges were trumped up to mask a land dispute; that the age of the complainant was eleven years five months; that her names kept on changing; and, that there were discrepancies in the medical evidence. In a nutshell the appellant submitted that his conviction was unsafe.

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 known to the complainant; and, that she recognized his voice. In addition, the appellant tried to entice the complainant with sweets not to report the offence. The Republic submitted that the evidence was reliable; and, that penetration was corroborated by medical evidence. The age of the complainant was also proved by documentary evidence. 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 have studied page 26 of the record (page 10 of the typed proceedings). The trial court conducted a detailed *voire dire* examination. The minor said she was aged *ten*; and, that she was a class 4 pupil at *K [particulars withheld]* Primary School. She attended church regularly at *AIC. K [particulars withheld]* 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. I thus find that the trial court adopted the correct procedure of taking the minor's evidence.

9. I will now re-appraise the evidence tendered in the lower court. The offence took place at 11:00 p.m. The complainant was asleep. She did not know how the appellant gained entry into the house. She said she must have forgotten to secure the latch on the door. She reacted to searing pain in her private parts. She woke up and held onto the jacket of her assailant. The assailant identified himself as Edwin Kibet and sought her forgiveness. He promised to bring her some sweets the following day.

10. In the material parts of her evidence in chief, the complainant stated as follows-

> *"The accused had injured me at night and that's when I held his clothes and he said it was Edwin Kibet. When he attacked me I was sleeping…..I was with small children. I had locked but it seems I didn't close with hinge but just pushed [the] door. He did attack me at 11 p.m. I was sleeping with small children. I don't know how accused got in, but he got in before the pain. I was deep asleep I didn't hear anyone come in. When I felt pain, I woke up and found person lying on bed with me, I did hold his clothes and asked who he was, he said he was Kibet and I should forgive him. He really disturbed me till I told him I will not report him. I saw him get into his house…….. I did feel pain in the private part which boys are not supposed to see even when you bathe."*

11. The complainant's parents were away at the time of the incident. She informed her father the following day. Her father (PW3) testified that the complainant was born on 15th December 1999. He referred to the clinic card (exhibit 2). He said that on 12th April 2011, he left home at about 10.00 a.m. He requested the appellant to take care of the complainant and two younger children, a fact contested by the appellant. He returned the following day at about 6:00 p.m. He said that his wife had gone to plough some land at Chesoi. He said that the complainant told him that the appellant had entered their house at around 11.00 p.m. the previous night and defiled her. He informed his wife (PW4).

12. PW4 checked the complainant's clothing. Although the complainant was walking up straight, she complained she could she could not seat well as she was bleeding. PW4 sought assistance of the village elder and her neighbours. They summoned the appellant and members of his family. She testified that he admitted committing the offence. The members of the public wanted to beat up the appellant but she persuaded them to leave the matter to the police. She testified that the appellant was tied up using a rope and escorted to the Assistant Chief's office. They did not get him. The appellant denies that he was tied up or frog marched to the office. In the meantime, PW4 went back home, bathed the complainant and took her to Kapsowar Hospital. That was on 16th April 2011. She recorded a statement at Kapsowar Police Station and was issued with a P3 form.

13. PW2 was Dr. Kimosop. He examined the complainant three days after the incident. He testified that

the complainant's hymen was slightly torn. It was in the process of healing. There was no discharge or bleeding. There was no evidence of a venereal disease. He took some samples for laboratory examination. The results were all negative. In his opinion, there was evidence of penetration by a blunt object evidenced by the torn hymen. He produced the P3 form of the complainant.

14. PW5 was the investigating officer. He visited the scene. He testified that the door to the complainant's house was secured by a bent nail. The nail could be adjusted to lock the door from inside. He said it was easy to force the door open. He first saw the complainant on 16th December 2011 when she was taken to the police station by her parents. Her eyes were "yellowish". The complainant told her she felt pain when urinating. He recorded their statements and issued the parents with the P3 form.

15. PW7 was a clinical officer. He examined the appellant. He testified that there were no injuries on the appellant's genitalia. His clinic had no lab personnel but HIV was non-reactive. He said "nothing did happen". He produced the P3 form relating to the appellant.

16. I have then considered the defence proffered by the appellant. He protested his innocence. He claimed there was a vendetta. In the material parts of his statement, he said as follows-

> *"I come from [particulars withheld]. The parents [of] the complainant were in a Government forest. They were chased; they came and asked my parents for help and were assisted. On 12/4/2011, I went to the farm with my wife up to 6:00 p.m. We had supper and slept with my family. I did not hear anything. The following day while making lunch at 1 p.m., I received a call from my father who was at Chesoi who told me to tell William Yator to find another place to move as my father intended to bring a herdsman to live in that house. I could not get William Yator on phone. I sent my son and he returned with William we had lunch together and I broke the news to him that he finds another place to live. He was not satisfied with the news. He said that it could be me who incited him. I told him I had no interest in the land. I told him to speak with my father who told him the same thing. He insisted that I had incited my parents. He later said I had incited his wife who left with the children at one point. It is true it happened but I denied. I told him mine was to only pass the information. He told me that because I incited his wife and children and then my parent that I would see how his family will hate me. I did not hear anything on 14th yet I was at home. On 15th five men including the father to the complainant came to the farm with one John and one China. They told me there was a case at the Chief. I did not know anything and the chief's place was near; I did not deny. I only walked with them as usual and was not tied up……."*
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> *"I am a parent; I have children. I know myself. I cannot do any such acts to a child. That girl is like my child……."*
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> *"I feel the pain of parents and I did not do any such act. We have never had disagreements for long. I am surprised that I have now wronged after I told them to move. We gave these people a place to stay. We as a family expected high respect from them. They now want to kill me."*

17. A number of matters arise from that evidence. The first relates to *identification*. The appellant and complainant were *not* complete strangers. The complainant's parents were evicted from a Government forest or reserve. The appellant's parents gave them refuge. The appellant was thus living in the same homestead with the complainant. The appellant confirmed it in his evidence. The offence took place at night. There was no light. The complainant was asleep. She only reacted to searing pain in her private parts. She woke up and held onto the jacket of her assailant. The assailant identified himself as *Edwin Kibet* and sought her forgiveness. The complainant testified that *"he really disturbed [her] until [she] told him [she] will not report him"*. She then heard him get into his house. She said she recognized him by his *voice*. She said she *knew* his voice.

18. In *Limbambula v Republic* [2003] KLR 683, the Court of Appeal stated that evidence of voice identification is receivable so long as the person giving the evidence is familiar with it, recognizes it and there is no *mistake in testifying to that which was said and who said it*. The appellant engaged in a

conversation with the complainant seeking forgiveness. The complainant then heard the appellant open the door to his house in the compound. The appellant submitted that it was highly unlikely for an assailant to disclose his name. But I am satisfied the complainant positively identified him. It was evidence of *recognition*. See Wamunga v Republic [1989] KLR 424, Republic v Turnbull & others [1976] 3 All ER 549, Obwana & Others v Uganda [2009] 2 EA 333.

19. I am also fortified in that finding because the complainant was consistent and never wavered upon cross-examination. The appellant also gave himself away by trying to entice the complainant with sweets the following morning. The complainant, in answer to cross-examination stated as follows-

> *"I felt pain so I did hold the person to know who it was inflicting that pain. It was dark I couldn't see him. I knew it was him from his voice. All the while I have been with [him]; I knew his voice. After that he did go. I told him to go I had forgiven him, he did ask me to forgive him and not to tell anyone……He told me that night he will give me sweets. The following day he brought sweets I refused. As he went outside [it] was dark I didn't see him from our house to his. I heard noise of door I knew he had got into [his] house."*

20. The complainant gave testimony on oath. I thus find that the complainant positively identified the appellant as the person who gained ingress into her bedroom. The next key question is whether the appellant *penetrated* the complainant. The complainant was emphatic that the appellant penetrated her and that she felt pain in her vagina. She told her parents about it. PW5 said that when the complainant was taken to the police station the following day she told him she felt pain when urinating. Under section 124 of the Evidence Act, the evidence of the complainant would have been sufficient.

21. But in this case the penetration was corroborated by Dr. Kimosop (PW2); and, the P3 form (exhibit 2). There were *no* bruises on the labia majora and minora; but the hymen had a *slight tear* and in the process of healing. In his opinion, there was evidence of *penetration* by a blunt object evidenced by the torn hymen. I am alive that the complainant was taken to hospital three days later on 16th April 2011; and, had already taken a bath. The appellant tried to make capital of the absence of bruises on the vulva. But what is critical is whether there was partial or full penetration. In this case there was ample primary evidence proving 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"*.

22. From the evidence of PW1, I am satisfied that the appellant is the person who penetrated her. Like I have said, the defence by the appellant is that there was a vendetta or a simmering land dispute; and, that he was framed up. He denied committing the offence. He said that on 12th April 2011 (the date of the offence) he went to the farm with his wife until 6:00 p.m. He had supper and spent the night with his family. He said he did not hear anything. The following day while making lunch he received a call from his father who was at Chesoi. He told him to tell the complainant's father to find another place to live as he intended to bring a herdsman to live in his house.

23. It is true that the appellant's family had given refuge to the complainant's family. Evicting them from the appellant's compound would obviously prejudice them. But there is no tangible evidence that the appellant was framed up by the complainant or her family. As I said, the sworn evidence of the child was consistent. She did not wither on the cross. Even assuming there was a disagreement over land; or, a feud between the appellant and the complainant's father, it would not justify defilement of an innocent child.

24. I am also alive that the appellant was raising an *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 implausible. The appellant was living in the same compound with the complainant. He was there on the material night. The complainant recognized his voice. They were not strangers. The appellant engaged in a conversation with the complainant seeking forgiveness. The complainant then heard the appellant open the door to his house in the compound. I find that he had an opportunity to defile the

complainant. It amounts to further corroboration. See *Opo v Republic* [1976-80] 1 KLR 1669, *Armstrong Kisuya v Republic*, Eldoret, High Court, Criminal Appeal 88 of 2011 [2016] eKLR.

25. In the end 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.

26. 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.

27. From the evidence of the complainant's father and the clinic card, I find the complainant was born on 15th December 1999. That made her *eleven years and five months* or thereabouts at the time of the offence. There are a few discrepancies: the complainant said she was aged *ten* years; the original charge sheet and P3 form put the age at *ten*; the amended charge sheet stated the age as *eleven*. The names on the charge sheet gave her names as *I.J.Y. [particulars withheld]* but *J* standing for *Jelagat*. The clinic card has one name *Jelagat*. The complainant told the court she was *Chelagat*. There are also discrepancies between the dates in the P3 form and the dates given by the doctor. He said he examined her four days later. But I note she was presented to the hospital on 16th April 2011. The offence occurred on the night of 12th April 2011. That far is consistent with the doctor's evidence. The only departure is that he signed the report on *18th April 2011*. I find that the discrepancies were minor and did not prejudice the appellant. They are also curable under section 382 of the Criminal Procedure Code.

28. I am alive that in any trial there are bound to be discrepancies. See *Joseph Maina Mwangi vs. Republic* Criminal Appeal No. 73 of 1993. In *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Court of Appeal, Criminal Appeal 661 of 2010 (unreported). The learned judges of appeal 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. 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, 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 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 *eleven years five months* at the time of the offence. She had *not* achieved the age of *twelve* years. The appellant was thus properly sentenced under section 8 (2) of the Act. 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 18th day of August 2016

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant (in person).

Ms. B. Oduor together with Ms. G. Mokua for the Republic.

Mr. J. Kemboi, Court Clerk.