REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 66 OF 2015

MICHAEL KIPKEMBOI TARUS...……..……..….APPELLANT

VERSUS

REPUBLIC……..…….……..……..…..……..RESPONDENT

[Being an appeal from the original conviction and sentence in Criminal Case No. 2869

of 2014 at Kapsabet by G. Adhiambo, Senior Resident Magistrate, dated 15th May 2015]

JUDGMENT

1. The appellant was convicted for *defilement* contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act. The appellant was sentenced to *life* imprisonment.

2. The particulars of the amended charge sheet were that between the 2nd and 15th September 2014, ***particulars withheld*** within Nandi County, of the Rift Valley Province, he intentionally caused his penis to penetrate the vagina of *F. J. [name withheld]* a girl aged *five* years.

3. The appellant is aggrieved by the conviction and sentence. The original petition of appeal was filed on 29th May 2015. There are ten grounds of appeal. They can be condensed into *seven*. First, that the charge was not proved beyond reasonable doubt; secondly, that the evidence tendered by the appellant was dismissed off-hand; thirdly, that the evidence of the prosecution witnesses was contradictory, inconclusive or unreliable. Fourthly, that the trial court misapprehended the evidence; fifthly, that the legal burden of proof was shifted to the appellant; sixthly, that the appellant's mitigation was not taken into account; and, seventh, that the sentence of life was too harsh in the circumstances. In a nutshell, the appellant's case is that the charge was not proved beyond reasonable doubt.

4. At the hearing of the petition, learned counsel for the appellant submitted that the appellant did not comprehend the proceedings; that the *voire dire* examination was improper; that the identification of the appellant was doubtful; that penetration was not proved; and, that the evidence of the complainant and the doctor was inconsistent or unreliable. He submitted that the conviction was unsafe.

5. The appeal is contested by the Republic. The learned Prosecution Counsel submitted that the charge was proved beyond reasonable doubt. She submitted that the appellant was positively identified by the complainant; and, that penetration was proved through credible medical evidence. The learned Prosecution Counsel contended that the defence and mitigation proffered by the appellant were taken into account by the trial court. In a synopsis, the case for the State is that the evidence established the

appellant's guilt to the required standard of proof. 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 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.

7. I will first deal with some preliminary matters. On 25th September 2014, the trial commenced in the lower court. I have compared the hand-written transcript of the learned trial magistrate and the typed record. While the typed record merely states that interpretation was *English/Kiswahili/Nandi*, the *hand-written transcript* has a clear tick for *Nandi* language and the name of the *interpreter*. When the charge was read, the appellant replied: *it is not true*. A plea of not guilty was entered. When the charge was amended on 27th October 2014, a *Nandi* interpreter, *Samuel Kiplagat* translated the proceedings. The appellant denied the charge. I find that the trial court applied correct procedures in taking the plea; amending the charge; and, that the appellant comprehended it. See *Adan v Republic* [1973] EA 445.

8. Furthermore, the appellant actively participated in all the subsequent proceedings which were translated from *Nandi* to *Kiswahili*. For example, when the complainant testified, the proceedings were translated by Jane Wendot from Nandi. He cross examined the witnesses; tendered his defence in *Nandi* and, even mitigated before sentence. 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.

9. The other preliminary matter relates to the procedure of taking the evidence of the two minors. The court conducted a detailed *voire dire* examination on the complainant (PW1) and her sister (PW2). The questions by the court and the answers by the two minors are all on the record. For PW1, the *voire dire* examination runs from pages 6 to 8 of the record; for PW2 from pages 11 to 13. The court was satisfied about their intelligence; and, the value of telling the truth. However, the court was of the opinion that they did no comprehend the nature of an oath. They thus gave *unsworn* evidence.

10. 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 am satisfied that the court complied *fully* with the procedure of taking the evidence of both minors.

11. I will now turn to the evidence. The complainant knew the appellant. It was not the first time he had defiled the complainant. On the latest occasion, the complainant was on her to school when the appellant diverted her to his house; instructed her to remove her pair of shorts and defiled her. Here is her narrative to the trial court-

> *"I know this one [points to the accused]. He is called Kipkemboi. Kipkemboi told me to remove my shorts. I was on the road when he told me to remove my shorts. I was on the way to school. I met Kipkemboi on my way to school. Kipkemboi told me to remove my shorts. He first took me to his house and told me to remove my shorts. Nobody else was at Kipkemboi's house. It was only me and Kipkemboi. Kipkemboi then lay on me. Kipkemboi was the one who removed my shorts. Kepkemboi then removed his trouser. He lay on top of me on the bed inside his house. He did something here pointing at her vagina. He touched me here points at her vagina."*

12. PW1 was emphatic that the appellant penetrated her; told her not to scream; helped her to put on back her shorts; and, she proceeded to school. When she reached the school she disclosed the matter to PW2. She said as follows-

> *"I felt as if it was finger getting inside here [pointing at her vagina]. I felt pain here [pointing at her vagina]. I screamed. Kipkemboi told me to stop screaming and I stopped. Kipkemboi*

continued lying on top of me. I do not know what he was doing here [pointing at her vagina]. After that I stood up after Kiepkemboi stood up. Kipkemboi helped me to put on my shorts. He then told me to leave. I then went to school. I told C [particulars withheld] that Kipkemboi lay on me but I told C [particulars withheld] on a different day. I did not tell [my] mother that day. I was taken to hospital."

13. When cross examined by the appellant, she told the court he is the one who removed her shorts. She said she did not tell her mother immediately; and, she could not remember the date she did so. Her narrative was confirmed in part by PW2. PW2 reported the matter to their mother (PW3). PW2 told the court that PW1 disclosed to her that Kipkemboi took her to his house; placed her on the bed; and lay on her belly. PW2 knew Kipkemboi and where he lived. She identified him in court. When PW3 confirmed the details from PW1, she took her to Kapsabet District Hospital. She then reported the matter to Kabiyet Police Station. The appellant was then arrested by a village elder (PW4) with assistance from the public. The police gave her a P3 form which was filled out at the hospital. She identified the P3 form and treatment notes in court. PW8 was the investigating officer. He produced the complainant's immunization card dated 15th July 2009. It showed the complainant was born in the year 2009

14. Charles Murkomen was PW5. He is an Administration Police officer. On 24th September 2014, the appellant was brought to his office from Kamongei Location. He escorted him to Kabiyet Police Station. He said the appellant had been arrested by a village elder assisted by members of the public. He recorded a statement and left the suspect in the hands of the police.

15. PW6 was Paul Ng'etich. He is a clinical officer. He examined the complainant on 22nd September 2014. Her hymen was broken. The injury was about one month old. Lab tests were conducted at Kapsabet District Hospital on 18th September 2014. The urinalysis showed there was protein in the urine. There was evidence of bleeding in the vagina or inflammation. He filled out the P3 form (exhibit 2B).

16. PW7 was Wilson Kirwa. He is also a clinical officer. On 24th September 2014, he examined the appellant at Kabiyet Sub-county Hospital. There were no injuries to his penis. He took some specimens for further examination. The results were negative. He filled out a P3 form in respect of the appellant (exhibit 3).

17. When he was placed on his defence, the appellant protested his innocence. He spoke in the *Nandi* language. He said the charges were driven by vendetta. In the material part of his evidence, he said-

"I am still denying the charges. I was framed up. I was taken to the APs office and then to Kabiyet Police Station. I then recorded my statement. My finger prints were taken. I was then brought to court. I told the court that I knew nothing about the charges facing me. When the person brought charges against me I was working at a hotel that belongs to the complainant's family. I have lived at father's home for a period of 3 years. When these allegations were made against me I had asked for my money they owed me that I would stop working."

18. A number of matters arise from that evidence. Like I stated earlier, I am satisfied that the court complied fully with the procedure of taking evidence of both minors. For the reasons I gave earlier, I am also satisfied that he grasped all the proceedings; and, that he received a fair trial. The more important question is whether the unsworn testimony of the complainant was consistent and reliable; or, whether there was corroborating evidence.

19 . I will deal first with the question of *identification*. From the evidence, the complainant and appellant were *not* strangers. He was employed at a hotel by relatives of her parents. None other than the appellant confirmed he had worked as such for *three* years. PW2 and PW3 also knew him. The appellant did not contest that he knew the complainant. The complainant *identified* the appellant as *Kipkemboi*. The latest incident took place in the morning as the complainant went to school. She disclosed to PW2 in school that *Kipkemboi* had defiled her. The latter in turn told their mother, PW3.

20. It is not lost on me that the complainant disclosed the *name* of her assailant *immediately* after the incident. The identification of the appellant was thus beyond question. That was evidence of recognition; stronger than simple 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.

21. The next key question is whether the appellant penetrated the complainant. 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 the complainant, the appellant had defiled her on more than one occasion. On the latest occasion, the appellant removed the complainant's shorts; dropped his trousers; and, penetrated her. She did not waver upon cross examination. The complainant was aged only *five*. First, I am alive that a child of the complainant's age may not describe sexual acts in a *graphic* manner. But in this case, she sufficiently described the act in the following terms: that when the appellant lay on top of her, she *"felt as if it was finger getting inside here [pointing at her vagina]. I felt pain here [pointing at her vagina]. I screamed"*. She gave her sister the same details.

23The evidence of the complainant was corroborated by the clinical officer, PW6. The examination revealed that her hymen was broken. The injury was about *one month* old. The urinalysis showed there was protein in the urine. There was evidence of bleeding in the vagina or inflammation I have thus reached the inescapable conclusion that penetration was proved beyond any reasonable doubt.

24. 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). From the evidence of the complainant's mother; and, the immunization card (exhibit 1) I am satisfied that the complainant was born in *2009*. She was thus aged *five* years or thereabouts at the time of the offence.

25. I am satisfied that the evidence tendered by PW1, PW2, PW3 and PW6 was consistent and corroborative. It *sufficiently* establishes the *culpability* of the appellant. The defence set up by the appellant is a sham. I am not satisfied about the allegations of a vendetta made by the appellant. True, the appellant was employed at a hotel ran by the complainant's relatives. There may have been arrears of his wages. However, there is no tangible evidence that the appellant was framed up by the complainant or her immediate family. As I said, the evidence of the child was consistent. She did not wither on the cross. Even assuming there was a feud with other relatives over unpaid wages, it would not justify defilement of an innocent child.

26. 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. 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*.

27. 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 *five years* at the time of the offence. The record shows that the mitigation tendered by the appellant was considered; including the fact that he was a first offender and aged 22 years. I am thus unable to disturb the sentence.

28. 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 13th day of December 2016.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant.

Mr. Isiji for Mr. Kagunza for the appellant.

No appearance by counsel for the Republic.

Mr. J. Kemboi, Court Clerk.