



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 17 OF 2012

CHRISTOPHER KIPTUM CHEBOSWONY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 915 of 2010 Republic vs Christopher Kiptum Cheboswony in the Senior Resident Magistrates Court at Iten by B.N. Mosiria , Senior Resident Magistrate dated 12th October 2012)

JUDGMENT

1. The appellant was convicted on a count of defilement of a girl aged five years contrary to sections 8(1) and 8(2) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to life imprisonment. The offence was committed on the night of 20th and 21st July 2010 at [particulars withheld], Keiyo District in the Rift Valley Province.
2. The appellant has appealed against his conviction and sentence. The primary grounds in his petition can be broken into five. First, that the charge was not proved beyond reasonable doubt; secondly, that the investigations into the evidence were shambolic. In that regard, the appellant stated there was no DNA evidence connecting him with the offence, and that the medical evidence was dubious. Thirdly, the appellant contended that the evidence of the minor was not taken; and, that the totality of evidence was contradictory and uncorroborated; fourthly, that the appellant was denied access to witness statements; and, fifthly, that the appellant's fundamental rights guaranteed by section 77 of the repealed Constitution as read with Article 49 of the present Constitution were violated. At the hearing of the appeal, the appellant relied on detailed handwritten submissions filed on 25th November 2012.
3. The learned State Counsel, Mr. Job Mulati, conceded the appeal.
4. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw my own conclusions. In doing so, I have been very cautious 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.
5. The complainant was aged five. She did not testify. On 23rd September 2010, the trial court found that she was a *vulnerable* witness and allowed her to testify through an *intermediary*. The intermediary was her mother, PW1. She testified that the minor was now seven years. She produced a clinic card, Exhibit 1, showing the minor was born in 2005. She said that on 20th July 2010, the minor was playing with the children of the accused. She did not return home. PW1 never went for the child. She collected the child the next day. She said the complainant went to school on 23rd July 2010.
6. On 23rd July 2010, at about 3.00 p.m, PW2, a teacher, found the complainant sleeping near the

school gate. The complainant said a thorn had pricked her and she could not walk. He carried her to Cheptebo Dispensary. He asked PW3 to accompany them to dispensary. PW3 was an aunt to the complainant. They were received by PW8, the nurse in charge. The nurse could not find the thorn; but upon interrogating the minor, the latter said that *Christopher* had defiled her. The minor was given some treatment. PW2 and PW3 were advised by the nurse to take the minor to Tambach Hospital and to report the matter to the police.

7. The matter was reported to Tambach Police Station. The appellant was arrested by the Assistant Chief (PW4) on 24th July 2010. PW4 testified that when he arrested the appellant, at about 11.00 p.m, he found the appellant sharing a bed with his four children. The appellant's house is a one-roomed structure. PW4 handed over the suspect to PW5 and PW6, police constables based at Tambach Police Station. PW6 was the investigating officer.
8. PW7 was a clinical officer at Iten. His evidence, in the material part, went as follows-

“On looking at the labia majora and minora were [sic] intact but hymen was not intact. I did send her to lab for tests. Blood was taken and urine but there were [sic] no significant findings. All were negative. Due to obliteration of hymen due to may be partial penetration. I signed P3 (exhibit 3) on 26th July 2010.”

9. The P3 form stated as follows: *No injuries caused to labia majora, labia minora, obliterated hymen (not intact)*. The appellant in his defence denied committing the offence. The learned trial Magistrate found that the defence was a sham. She concluded as follows-

“His defence is an afterthought, if he was at home working then he should have had witnesses to support his claims, further the accused has not challenged evidence given that the child recognized him as person who defiled her and since she knew him could not mistake him for someone else. The doctor found hymen not intact this shows that child was defiled and accused didn't give any explanation how hymen of 5 years old could break if not him [sic] to have penetrated her since accused does not say the minor had sex with any other person before”

10. With great respect to the learned trial Magistrate, that was a serious misdirection. The trial court shifted the onus of proof to the appellant. The appellant was entitled to keep mum; he was not obligated to call witnesses to seal the gaps left by the prosecution. Subject to section 111 of the Evidence Act, the legal burden of proof rested throughout with the prosecution. There is no room for presumptions in a criminal trial. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).

11. From the evidence of PW7 (the clinical officer) and the P3 form (exhibit 3) I am unable to state conclusively that *penetration* or *partial penetration* was proved or that it was committed by the appellant. PW7 testified that “*may be*” there was partial penetration. She said that the labia majora and minora were intact but the hymen was broken. The lab results were negative. What is critical in this matter is that *no witness positively* identified the appellant as the person who *defiled* the complainant on the night of 20th and 21st July 2010.

12. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal had this to say-

“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.”

13. The offence was committed on the night of 20th and 21st July 2010 at [particulars withheld], Keiyo District in the Rift Valley Province. The offence allegedly took place in the appellant's house. The minor did not make a disclosure until the 23rd July 2010. The disclosure was made to the nurse, PW8. The minor claimed it was the appellant who defiled her, a fact the appellant denied. There were discrepancies in the names she gave to witnesses. PW2 said the minor stated that it was *Baba Victor* or *Christopher* or *Too* who defiled her; PW3 said the child said her assailant was *Tom*, a nickname for the appellant. PW8 testified that the minor was defiled by

Christopher. The names of the minor on the Child Health Card (exhibit 1), the P3 form (exhibit 3) and the charge sheet are all different. There was no clear medical evidence *linking* the appellant to the defilement. The intermediary, PW1 did not see the minor on the material night. When she saw the minor on 23rd July 2010, the minor had no complaints. She sent her to school. It is only at 3.00 pm that day that PW2 found the minor sleeping at the school gate. Serious gaps and doubts thus emerge in the prosecution's case. Granted the paucity of evidence of identification, I cannot then say that the conviction of the appellant was safe. The learned State Counsel thus rightly conceded the appeal.

14. The upshot is that the appeal is allowed. The conviction and sentence are hereby set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 19th day of February 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

The appellant.

Mr. Mulati for the State.

Mr. J. Kemboi, Court Clerk.