



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CRIMINAL APPEAL NO. 36 OF 2014**

**DOMINIC KIPYEGON .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal against the Conviction and Sentence by the*

*Honourable Z. Abdul, Resident Magistrate at Narok in*

*Criminal Case No. 759 of 2012 on 6.9.13)*

**J U D G M E N T**

1. **Dominic Kipyegon**, the appellant was charged with the offence of defilement contrary to **Section 8(1)(4)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars being that the appellant on 27<sup>th</sup> day of June, 2012 at [particulars withheld] Reserve in Narok South District within Rift Valley Province unlawfully and intentionally caused his penis to penetrate into the vagina of S C a child aged eighteen (18) years old.

2. He faced an alternative count of Indecent act contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars being that on the 27<sup>th</sup> day of June, 2012 at [particulars withheld] Reserve in Narok South District within Rift Valley Province committed an indecent act with S C a girl aged eighteen (18) years old by rubbing his genital organ (penis) against the said S C genital organ (vagina).

3. He pleaded not guilty and the matter proceeded to full hearing and he was eventually convicted of the principal count and sentenced to fifteen (15) years imprisonment.
4. He filed this appeal against both conviction and sentence and raised the following grounds:
  - a. *The learned magistrate erred in fact and in law in that he/she convicted the appellant on the offence of defilement yet the complainant was eighteen (18) years.*
  - b. *That the learned magistrate erred in law an in fact in failing to consider the fact that the prosecution evidence lacked corroboration and that the evidence was fabricated to suit the complaint.*

- c. *That the learned Resident Magistrate erred in law and in fact that he/she shifted the burden of proof in seeking the defence to challenge the prosecution's case in several instances including the real person who may have defiled the complainant if any.*
- d. *That the learned magistrate erred in law and in fact in that he/she failed to consider the fact that the defence raised an alibi which was never discounted or challenged by the prosecution.*
- e. *That the complainant was taken for medical examination after six(6) days and this period was long enough for any other person either to have defiled the complainant or had sex with her hence concluding that the appellant was the one who defiled the complainant was not proved beyond reasonable doubt and in any event the complainant's evidence was never corroborated and hence it was unsafe to convict on such evidence alone.*
- f. *That the learned magistrate erred in law when he/she considered extraneous circumstances in arriving at the decision that he/she made.*
- g. *That the learned Resident magistrate erred in law and in fact in convicting the appellant of the offence of defilement whereas there is no evidence to support the charge for the appellant was not taken to hospital for medical examination to rule out the involvement of third parties.*
- h. *That the learned magistrate erred in law in considering the evidence of a single witness (PW1 the complainant) to arrive at his/her judgment.*
- i. *That the judgment was bad in law and never considered the defence of the appellant. It was biased and never analyzed evidence before court.*
- j. *That the sentence awarded was harsh and excessive in all the circumstances of the case.*

5. Brief facts of this case are that PW1 who was born in 1994 met the appellant in the year 2012 and they got into a sexual relationship. She was by then a student in Form 2 at Olmegenyo Secondary School.

6. On 27<sup>th</sup> June, 2012 when she is alleged to have been defiled she was eighteen(18) years of age. In her evidence she said 27<sup>th</sup> June, 2012 was the third time she was having sex with the appellant. Even after the arrest of the appellant she continued meeting with the appellant and this resulted in a pregnancy.

7. Her father (PW2) and the doctor (PW3) confirmed that PW1 was eighteen (18) years old as at 3<sup>rd</sup> July, 2012 (EXB 1 and 3).

8. In his sworn defence the appellant denied the charges. He called three witnesses who denied knowing PW1 save for DW4 who said the appellant and PW1 had a relationship.

9. When the appeal came for hearing Mr. Motanya for the appellant submitted on the particulars of the charge sheet which showed that the complainant was a child aged eighteen (18) years.

It was his submission that the charge should not have been a defilement but something else.

10. He further submitted that the evidence of PW1 showed that she consented to the intimacy and she had the capacity to consent.

11. M/S Kivali the learned state counsel conceded the appeal for two reasons;

- i. *The particulars in the charge sheet as submitted by Mr. Motanya were indeed misleading.*
- ii. *The findings by the Doctor at page 9 of the record of appeal showed that there had no penetration*

12. This being a first appeal this court has a duty to reconsider the evidence on record together with the grounds of appeal and arrive at its own conclusion. I am alive to the fact that I did not have the opportunity to see or hear the witnesses. See **Okeno V R [1972]E.A 32; Ajode V R [2004] 2 KLR 81; Mwangi V R [2004] 2 KLR 28.**

13. I have considered the evidence on record together with grounds of appeal. I have equally considered the submissions by both the state and the appellant's counsels.

14. I will only deal with ground No. 1 of the appeal which I believe will dispose of this appeal. **Section 2** of the **Children's Act No. 8 of 2001** defines a child as ***“any human being under the age of eighteen(18) years”***. **Section 2** of the **Sexual Offences Act** confirms this by stating ***“child” has the meaning assigned thereto in the Children's Act.***

15. In the present case the appellant was charged under **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offence Act** which provides;

**Section 8(1)**

*“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”*

**Section 8(4)**

*“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years”.*

16. The particulars indicate that PW1 was a child aged eighteen (18) years. Was PW1 a child given that as at 27<sup>th</sup> June, 2012 she was eighteen(18) years? The Children's Act defines a child as one under the age of eighteen(18) years.

17. PW1, PW2 and PW3 confirmed that PW1 was eighteen (18) years having been born in 1994.

PW3 who did the age assessment on 3<sup>rd</sup> July, 2012 told the court that the girl was eighteen(18) years (EXB3). Besides the age assessment there was no other document or evidence to show which day and month of 1994 PW1 was born. The bottom line is that as at 27<sup>th</sup> June, 2012 she was eighteen (18) years.

18. The issue then is whether PW1 was under the age of eighteen(18) years. The answer is **NO**. I therefore find that she was not a **child** and the appellant should not have been charged with the offence of defilement.

19. Could he then have been charged with rape contrary to **Section 3** of the **Sexual Offences Act**? The answer again is **NO** based on the evidence of PW1 herself. Being eighteen(18) years she was able to give consent. From her narrative of what she and the appellant used to do, it is clear they were consenting parties in the whole affair.

20. My finding therefore is that the court proceeded on a defective charge.

**Section 382** of the **Criminal Procedure Code** provides;

***“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or regularity has***

*occasioned a failure of justice:*

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings”***

21. In this case the court and prosecution ought to have dealt with the issue of age before the close of the prosecution case. The court should have called for an amendment of the charge sheet. This was not done.

22. This failure denied the appellant an opportunity to prepare himself well for his defence. It could not have been clear to him in the circumstances to know he was accused of defiling a minor or raping an adult.

23. My finding is that this irregularity cannot be cured by **Section 382** of the **Criminal Procedure Code**. This was a mistrial.

24. I therefore allow the appeal. The conviction is quashed and the sentence set aside.

The appellant to be set free unless lawfully held under a separate warrant.

The learned trial magistrate must get a copy of this judgment.

**Dated, signed and delivered this 27<sup>th</sup> day of March, 2015**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of :**

M/S Kivali for State

Mr. Motanya for Appellant – present

Appellant – present in person

Lagat – Court Assistant

Interpretation – English/Kipsigis