



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 32 OF 2013

JAMES LEKICHAP.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 746 of 2012 Republic vs James Lekichap in the Senior Resident Magistrates Court at Kabarnet by E. Bett, Ag. Senior Resident Magistrate on 8th March 2013)

JUDGMENT

1. The appellant was convicted for the offence of defilement of a girl aged thirteen years contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to twenty years imprisonment.
2. The particulars of the offence were that on diverse dates between 30th November 2012 and 19th December 2012 in Mogotio District within Baringo County, he unlawfully and intentionally caused his penis to penetrate the vagina of *I.L. (name withheld)*, a child aged thirteen.
3. The appellant has appealed against his conviction and sentence. The petition of appeal was filed in Court on 15th March 2013. It raises five grounds of appeal. First, that the penetration was not proved; secondly, that the evidence of the complainant (PW1) was not corroborated; thirdly, that the charge was not proved beyond reasonable doubt; fourthly, that the prosecution relied on a single identifying witness; and, fifthly, that the appellant's defence was not taken into account.
4. At the hearing of this appeal, the appellant relied largely on detailed hand-written submissions filed in court on 24th February 2015. He added the following: that PW2 had a grudge arising out of a livestock dispute; that the evidence of PW4 exonerated him from the crime; that the age of the minor was not established by documentary evidence; that the P3 form produced did not establish penetration; and, that the evidence of PW1 contradicted that of other witnesses on the dates of the offence. In a nutshell, the appellant's case is that the prosecution failed to discharge its onus of proof.
5. The appeal is contested by the State. In a synopsis, the case for the State is that the totality of the evidence established the culpability of the appellant. 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, *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 (unreported), *Paul Ekwam Oreng v Republic* Eldoret High Court Criminal Appeal 36 of 2011 (unreported).
7. At the time the trial opened on 7th January 2013, PW1 was about to enter class eight. The trial court observed that her *apparent* age was fourteen. The court conducted a *voire dire* examination.

I think it was out of an abundance of caution. The complainant was not a child of tender years; certainly not as defined in the Children Act. The court reached the conclusion that the minor was intelligent and understood the nature of an oath. PW1 was sworn and testified as follows-

“I know the accused well even before the incident between 30th November 2011 and December 2012. On 30th of December 2012, I was at my brother’s home. He is Erick. I stayed at home and the accused came to collect me. I had been left at home to take care of his children. We talked with the accused as we had planned to get married. I left with him to Mogotio. We first went to the accused father’s home. We stayed in Mogotio. I was staying and sleeping with another woman. I have never slept with him. We stayed one week and later we started to sleep with him. I was sleeping with him at his home which he had been given by his father. We had sex with him during that period. We had sex for two days until my people came. We had agreed on everything. There are times he put on a condom and at times without. One time it was with a condom and another without a condom.” [Underlining added].

8. PW1’s testified that her age was *thirteen*. PW2 (her brother, E) and PW4 (the clinical officer) said the complainant was *thirteen*. Her birth certificate was not produced in court. But there was a letter produced by PW5 from the Headmaster of the complainant’s school. It confirmed that the complainant was *thirteen* and in class eight. The appellant contends that the age of the minor was not proved. The age of the 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). The reason is that section 8 of the Sexual Offences Act provides for graduated *minimum* sentences. The *age* of the complainant may mean the difference between a life sentence and a few years in jail. Although the birth certificate was not produced, from the evidence of PW1, PW2, PW4 and PW5, I do *not* entertain *any* doubt on the true age of the complainant. *Documentary* evidence is but just one form of evidence of *proving* a fact in issue. Its *absence* is not always *fatal*. That ground of appeal is without merit.
9. A key plank in this appeal relates to *identification* and whether the appellant *penetrated* the complainant. The appellant contends that he was convicted on the basis of a *single* identifying witness. In Wamunga v Republic [1989] KLR 424, the Court of Appeal held as follows-

“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”

10. In Republic v Turnbull & others [1976] 3 All ER 549, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. 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.”

See also Joseph Ngumbao Nzaro v. Republic [1991] 2 KAR 212, Richard Gathecha Kinyuru & another v Republic Nairobi High Court Criminal Appeal 290 of 2009 [2012] eKLR. Obwana & Others v Uganda [2009] 2 EA 333.

11. First and foremost, the appellant and complainant were close *friends*: nay, *boyfriend* and *girlfriend*. They had an *agreement*, albeit unlawful, to get *married*. PW1 gave a vivid account of the events. She left with the appellant for Mogotio. They first went to the appellant’s father’s home. She initially stayed and slept in a room with another woman. After a week, she started to sleep with the appellant. She was emphatic that between 30th November 2012 and 19th December 2012, she had sexual intercourse with the appellant for *two days*. The appellant on some occasions used a condom; on others he did not. From that evidence, it is evident that the appellant was

positively identified by PW1 as the person she eloped with to Mogotio; as the person who had sex with her for two days. As I will discuss shortly, the evidence of the minors was also not the *sole* convicting evidence. I cannot then say that there was non-compliance with section 124 of the Evidence Act.

12. Doubt is removed by PW3. On 1st December 2012 or thereabout, and while at Loruk Centre, he saw a motorcycle ferrying the appellant and the complainant. The complainant was *sandwiched* between the appellant and the rider. He saw them in the *daylight* at about 5.00 p.m. Later PW2 called PW3 and informed him that the complainant had gone missing. He gave PW2 the information.

13. PW2 established that the complainant was at the appellant's home. On 5th December 2012 he reported the matter at Marigat Police Station. He later got information that the complainant and the appellant were in Mogotio. On 18th December 2012, he went there in the company of police officers (PW6 and PC Abdi). They found the complainant and appellant in the compound of someone known locally as *Njemps*. PW6 testified that the appellant attempted to escape but they managed to arrest him. The appellant and complainant were taken to Mogotio Police Station and later to Marigat Police Station. The complainant was taken to Marigat District Hospital for examination and treatment.

14. The evidence of PW1 was thus consistent with that of her brother (PW2), PW3 and PW6. It placed the appellant squarely at the *locus in quo*. I accept that there are incongruities or discrepancies on dates. The reference to 30th December 2012 by PW1 would give the *erroneous* impression that the offences extended to the year 2013. I say it is erroneous because by 5th December 2012, the disappearance had been reported to the police. The appellant and complainant were arrested on 19th December 2012. The offence was clearly committed between 30th November 2012 and 19th December 2012. I do not find material discrepancies between the evidence of PW1, PW2, PW3 and PW6. In *Joseph Maina Mwangi vs. Republic* Criminal Appeal No. 73 of 1993, the Court of Appeal held-

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”

15. The next key question is whether the appellant penetrated the complainant. *Penetration* is defined in section 2 of the Sexual Offences Act as follows-

“‘penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.

16. First, the complainant's evidence was clear that during the material time, the appellant had sexual intercourse with her for *two days*; sometimes he used a condom, on other occasions he did not. That evidence was corroborated by PW4, the clinical officer. The examination did not take place until 21st December 2012. The Approximate age of injuries was *two weeks*. External genitalia had no bruises or lacerations. There was presence of blood due to her menstrual period. PW4 also carried out laboratory tests. HIV and PDR were negative; the urine had pus cells. He testified further as follows-

“On my conclusion there was an old hymen broken; it was old. I cannot tell there was defilement or no defilement since the patient was [brought] after 2 weeks. I wish to produce the P3 exhibits 2. Laboratory test I produce as exhibit 2. I also filed this P3 on 22/12/12 in respect of James Lekichep. Age of patient is 20 years. Was brought with a history of having defiled a minor. On specimens: DDC negative; urine nothing; PDR negative.”

17. Considering that a number of days had passed, the probative value of the medical evidence was *weak*. However, it did corroborate that the complainant had intercourse; that her hymen was broken; and, that there were pus cells in her urine. The complainant testified that she had had no

intercourse with any *other* person other than the appellant; and, that it was her *first* time. There was thus additional circumstantial evidence from PW4 proving penetration and pointing *irresistibly* to the guilt of the appellant. When the police arrived at the compound of *Njemps*, the appellant attempted to run away.

18. The clinical officer also examined the appellant on 22nd December 2012. As detailed above, he found no physical injuries. The appellant had no infection. This may explain the submissions by the appellant that there was no medical evidence linking him to the offence. But there is a clear link in the evidence of PW1 as corroborated by PW4. What was *material* was whether the appellant *penetrated* the complainant.

19. I have then considered the defence proffered by the appellant at his trial. The appellant told the court that he did *not* know the complainant. He denied being in Mogotio. He said he was taking care of his uncle's cattle. While out buying some airtime, a motorcycle suddenly stopped; he was arrested. He testified further as follows-

“When I was brought to court they said I raped the girl. They framed me up and I am calling for justice. They said I took the girl from Kiserian. The complainant says it was on 27th. The complainant says I took her to my place. If she was wife [sic], I could have taken her to my place.

“They said I took her away. Why didn't they charge me with abduction and not rape. This [sic] people are malicious against me. I am thus telling the court that it is the brother of the complainant who took away the girl. If I had committed an offence the chief or the assistant chief could have been informed. Even the father of the complainant did not come to testify in court. This [sic] people wanted to merely frame up [sic]. There is a day I met with the complainant's brother driving away goats. I questioned him and reported this incident to the chief and this was the beginning of our dispute.” [Underlining added]

20. I have interrogated that defence. First, the appellant's shield was that he did not *rape* the complainant. The offence of *defilement*, unlike that of *rape*, occurs even where the sex is *consensual* so long as the complainant is *below* eighteen. Secondly, the appellant thought it would have made better sense to charge him with *abduction*. I think he is mistaken. He was facing a charge of *defilement*. Thirdly, his defence was that PW2 took the girl. PW2 was the brother of the complainant. There was no evidence he abducted her or defiled her. The evidence was that the appellant and complainant eloped; and in the course of cohabitation, the appellant *penetrated* the complainant. Fourthly, it is true that the Chief of the area or the complainant's father did not testify. I remain alive that under section 143 of the Evidence Act, no particular number of witnesses is necessary to establish a fact. See *Joseph Njuguna Mwaura and others v Republic* Court of Appeal Criminal appeal 5 of 2008 [2013] eKLR, *Bernard Kiprotich Kamama v Republic*, High Court, Eldoret, Criminal Appeal 123 of 2010 [2013] eKLR. The evidence of PW1, PW2, PW3 and PW4 sufficiently proved the charge of defilement.

21. The other element of the appellant's defence was that he was *framed* up. In that regard, the appellant said there was a dispute over livestock. He said he found the complainant's brother driving away some goats. When he questioned him, he reported the matter to the Chief marking the genesis of their conflict. I think that was a red herring.

22. The trial court considered that defence at length at page 32 of the record (typed page 18). The trial court considered whether the appellant was at *Mogotio* and whether he was arrested *alone* without the complainant. It considered whether the *grudge* with PW2 had led to trumped up charges. The trial court found no merit in the defence. It held as follows-

“As for the accused's defence I find the same to be a pure denial and does not address itself to the issues raised by the prosecution witnesses. For instance whereas the prosecution witnesses point to the fact that he was found in Mogotio with the complainant the accused simply denies this despite PW1, PW2 and PW6 confirming and giving a consistent account on this part.”

23. On my part I find that the grudge was not a plausible answer to the defilement. Even assuming the grudge existed, and even discounting the evidence of PW2, there was still the cogent evidence from PW1, PW3 and PW4 establishing the offence. Lastly, from the paragraph I have cited above

in the judgment of the lower court, it is *untrue* that the appellant's defence was dismissed *without assigning reasons*.

24. I find no glaring gaps in the evidence of PW1, PW2, PW3, PW4 and PW6 that cast doubt on the prosecution's case. The defence tendered was feeble and a sham. Of course the burden of proof fell squarely on the shoulders of the prosecution. It did not shift to the appellant. See *Kiarie v Republic* [1984] KLR 739, *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). See also section 111 of the Evidence Act. On the *totality* of the *evidence*, I am satisfied that the charge was *proved* well beyond reasonable doubt.
25. Under section 8(3) of the Sexual Offences Act, defilement of a child of between twelve and fifteen years attracts a *minimum* sentence of *twenty* years imprisonment. I have said that the *age* of the complainant was established at the trial. She was *thirteen*. The appellant was sentenced to *twenty* years imprisonment. The sentence handed down to the appellant was the *minimum* provided by the law. I will thus not disturb it.
26. In the end, I uphold the conviction and sentence. The entire appeal is accordingly dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 26th day of March 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

The appellant (in person).

Ms. Karimi Mwaniki for the State.

Mr. J. Kemboi, Court Clerk.