



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 115 OF 2013

JAMES LOKALE EMUTOSI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 25 of 2013 Republic v James Lokale Emutosi in the Resident Magistrates' Court at Eldama Ravine by M. Kasera, Resident Magistrate dated 12th June 2013)

JUDGMENT

1. The appellant was convicted on a charge of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to fifteen years imprisonment.
2. The particulars were that on diverse dates between April 2012 and 7th January 2013, at Esageri Trading Centre in Koibatek District within Baringo County he caused his penis to penetrate the vagina of F. J. K. [particulars withheld] a child aged 16 years.
3. The appellant has preferred an appeal. The original petition was filed on 28th June 2013. On 7th May 2015, leave was granted under section 350 of the Criminal Procedure Code to amend the grounds of appeal. There are four *amended grounds*. First, that the learned trial magistrate erred by holding the age of the minor to be fifteen in the absence of clear evidence; secondly, that the succeeding trial magistrate failed to comply with the requirements of section 200 of the Criminal Procedure Code; thirdly, that the learned trial magistrate erred in her finding that the age of the complainant was *seventeen*. The appellant faults the trial court for relying on the age assessment produced by an officer whom he contends was an incompetent witness; and, fourthly, that there were no proper investigations or a DNA test to prove that the appellant had impregnated the complainant.
4. At the hearing of the petition, the appellant relied entirely on his handwritten submissions filed on 7th May 2015.
5. The appeal is contested by the State. The learned State Counsel submitted that the charge was proved beyond reasonable doubt. She submitted that the appellant was positively identified. The case for the State is that the appellant and the complainant were cohabiting together. They had sexual intercourse on many occasions. The complainant got pregnant. Her evidence was corroborated by medical evidence of PW7, a clinical officer. 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, *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), *David Khisa v Republic* Eldoret High Court Criminal appeal 142 of 2011 (unreported).

7. The complainant and appellant were intimate friends. The complainant said she met the appellant in April 2012 before she went to a place called Tenges. The appellant used to ride her sister's motor bike. In June 2012 she moved into his home in Esageri. She got pregnant. I will set out her evidence *in extenso*-

“I left school in February. We began having sex in April. We were [having] sex without condoms. We [had] sex severally in his home. I only [had] sex with James [the appellant]. James came to his home; found me there in June. We lived in his home as I visited [sic] our home. I told him I was expectant. He told me to go to our home but he would buy for me clothes for the baby. I used to go to our home for 1 or 2 weeks then I go to their home for 1 or 2 weeks till 7.1.2013. We were not playing sex after that. We were sleeping on his bed at his home. My parents knew I used to go to James’ home. My mother asked me where I was going and I told her that I was going to James’ home. I told him I would stay at his home till I deliver the baby, then I go to school. On 7.1.2013 police from Esageri came to his home arrested us and took us to police station in Eldama Ravine. We were taken to the cell. I was taken to Eldama Ravine District Hospital.”

8. PW2 was the mother of the complainant. She had noticed her daughter was expectant. Her husband made a report to the area Chief. On 7th January 2013 the complainant and accused were arrested in the house of the appellant. PW2 said she had the complainant’s clinic card at home. She testified that she had no grudge against the appellant.

9. PW5, a police constable, arrested the appellant and complainant at Esageri Trading Centre on 7th January 2013. He told the court that he was accompanied by other officers. They split into two groups. He knew the appellant. He entered the appellant's house. He found him with the complainant. When he interrogated the appellant, he replied that the complainant was his wife. The complainant was interrogated by another officer. They booked them at Eldama Ravine Police Station.

10. PW6, the investigating officer, produced the age assessment report of the complainant (exhibit 4). It indicated she was seventeen years. She charged the appellant with this offence.

11. I have then considered the defence proffered by the appellant. He told the trial court as follows-

“I did not defile the child. I do not know the child. Dickson Komen first [sic] was not present where [sic] I was arrested. I was arrested at our home not at the Centre. I lived alone at the Centre. I denied having been arrested together with complainant. I did not hear complainant say that we lived together as husband and wife. I do not know if she became pregnant.”

12. A number of issues arise from that evidence. The complainant and appellant were *intimate* friends. They were *lovers*. Their friendship dated back to April 2012. From the evidence of the complainant, her mother was aware of the relationship. The complainant was emphatic that she had unprotected sex on a number of occasions with the appellant. When she got pregnant, the appellant said he would buy clothes for the baby. They were living a lie of a married couple. The appellant and complainant were arrested in Esageri Trading Centre in the house of the appellant. I have reached the inescapable conclusion that the appellant was positively identified, and, that he had sexual intercourse with the complainant on a number of occasions between April 2012 and 7th January 2013.

13. From the medical examination carried out on 7th January 2013 by PW7, a clinical officer, the complainant was *thirty seven* weeks pregnant. Working backwards, the complainant must have gotten pregnant after April 2012. The question of *penetration* was thus beyond doubt. PW1, the complainant, was emphatic that she had *not* had sex with any other person *except* the appellant. I do not believe the

protestations by the appellant that he was *not* arrested *together* with complainant; or that he did not penetrate the complainant; or that he did not know whether the complainant was pregnant. It is feeble and a red herring.

14. The offence of *defilement*, unlike that of *rape* occurs even when sex is consensual, so long as the complainant is a *minor*. The next key question is thus whether the complainant was below *eighteen*. 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.

15. The complainant testified she was *sixteen* years. Her mother (PW2) said the complainant was born on 24th April 1996. She did not have a clinic card or birth certificate. The complainant's father (PW4) also confirmed the date. The doctor who filled out the age assessment placed her age at *seventeen* years. The learned trial magistrate accepted the latter age. However, the doctor did *not* testify. Instead, the report was produced by PW6, police constable Sarah Situma. I think she was ill placed to do so. For a complainant who was approaching the age of majority, it was critical to have clear cut evidence of her age. I have thus entertained some doubt on the *true* age of the complainant at the *date* of the offence. The burden of proof, subject to section 111 of the Evidence Act, rested entirely with the prosecution. The appellant was entitled, for example, to remain mute.

16. Before I leave this matter, I will address the alleged failure by the trial court to comply with section 200 of the Criminal Procedure Code. The section mandates a succeeding magistrate to explain to the accused the right to proceed with the trial or to recall any witnesses. From the typed record, the trial had proceeded before Mr. Ochieng, Acting Senior Resident Magistrate. Ms. M. Kasera, Senior Resident Magistrate took over the proceedings on 7th May 2013. At that stage, the prosecution had already called five witnesses. But I have compared the typed record with the hand-written transcript of the lower court. Page 1 of that record has been plucked out. From page 3, where PW1 began testimony, to the final judgment, the proceedings were *all* conducted and signed by Ms. Kasera Senior resident Magistrate. I am unable to make a conclusive finding because the original handwritten court record *seems* to have been *interfered* with at pages 2 (missing), 20 and 21 to create the impression that the succeeding magistrate went *straight* to take the evidence of PW6. There is a foolscap that does *not* rhyme with the rest of the record. The signatures of the presiding magistrate, on the face of it, are dissimilar. I call for *urgent* investigations into that matter.

17. However, in view of the doubts on the *actual* age of the complainant on the *material dates*, and considering she was on the verge of age majority, it was *unsafe* to convict the appellant. In all the circumstances of this case, I cannot say that all the ingredients of the offence were proved beyond reasonable doubt. The upshot is that I allow the appeal. I quash the conviction and sentence. The appellant shall be set free forthwith unless held for some other lawful cause.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 15th day of June 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

The appellant (in person).

Mr. J. W. Mulati for the State.

Mr. Kemboi, Court Clerk.