REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.22 OF 2015

PHILIP KIPKETER KOECH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and Sentence by the Resident Magistrate Hon. N. Baraza at Sotik Principal Magistrate Court dated 28th April, 2015.)

JUDGMENT

1. **Philip Kipketer Koech** the Appellant herein was charged and convicted of the offence of defilement contrary to **Section 8(1)** as read with **Section 58(3)** of the **Sexual Offences Act No.3 of 2006**.

2. The particulars in the charge sheet were as follows;

> *"The Appellant on the 28th day of March, 2013 at Sotik Township in Sotik District within Bomet County intentionally caused his penis to penetrate the vagina of N. B. a child aged 12 years"*

3. Upon conviction he was sentenced to twenty (20) years imprisonment. He has filed this appeal challenging both the conviction and sentence.

The following are the grounds of appeal;

a. *The trial Magistrate erred in law and fact in that all the ingredients of the offence with which the appellant was convicted were not proved.*

b. *The trial Magistrate failed to find that the conduct of the complainant (PW1) from the 28th day of March 2013 to her testimony in court rendered her evidence unreliable and could not sustain a conviction.*

c. *The learned trial Magistrate failed to appreciate that there was reasonable doubt as to whether the appellant was the perpetrator of the offence with which he was convicted taking into account the available evidence.*

d. *The trial Magistrate erred in law in relying on the evidence of the clinical officer (PW2) whereas his academic and professional qualifications were not established.*

e. *The trial Magistrate failed to find that the scene of crime was not conclusively identified.*

f. *The trial Magistrate did not objectively and adequately consider the appellants defence.*

g. *The sentence imposed is harsh and excessive.*

4. The Prosecution case was premised on the evidence of five (5) witnesses. The Complainant **N. B.** (PW1) who lived with PW3 and PW4 testified that on 28th March, 2013 at 4.00pm she had come from school and went to play with other children a hide and seek game.

5. While there, the Appellant whom she knew by appearance came from behind and called her. She went and he closed the door. He stripped her of her skirt and pant as he also removed his trouser. He then had sexual intercourse with her. When he was through he warned her against reporting lest he strangled her. She dressed up and went home and did not tell anyone.

6. She could not remember when she informed her aunt (PW3) but she did tell her later. She was taken to Hospital by PW3 and PW4. She said she was twelve (12) years of age.

7. PW2 **Simon Sang** the Clinical Officer examined PW1 on 2nd April, 2013 who had a history of having been defiled on 28th March 2013. His findings were that PW1 had; a perforated hymen, redness of vulva, urinalysis was negative.

   He also examined the appellant whom he found to be H.I.V positive. He produced their P3 forms as EXB1 & 2 respectively.

   This witness also did an age assessment for the Complainant whom he found to be aged 12-14 years (EXB3).

8. PW3 **Maureen Chelangat** received a report from her neighbour **Evaline Moraa** on 29th March, 2013 at 6.00pm. PW1 used to sleep at Evaline's house. The report was to the effect that, PW1 scratches her private parts. She asked PW1 who told her what the appellant had done to her. She informed PW4 and they took her to hospital, and reported the matter to the Sotik Police Station.

9. PW5 **No.61204 Corporal Jackline Kemunto** was the investigating officer. She received the report on 2nd April, 2013 at 2.00pm from PW4 who was accompanied by PW1. After the report, police officers went and arrested the appellant from his shop in Sotik. PW1 and the appellant were examined and P3 forms filled.

10. The next day they went to the scene and PW1 showed them two rooms which appeared similar. She did not seem to know which of them was the scene, of the crime.

11. The appellant made a sworn defence and called two witnesses. In his defence he denied the offence saying he was in his shop within Sotik township on the material day. He opens the shop from 6.30am to 9.00pm. His assistant Peter Kibet Sang was away.

12. On 2nd April, 2013 at 4.00pm three (3) police officers came to his shop and he accompanied them to the police station which is about 50M from his shop. At the station he found three (3) people whom he knew by appearance only. The girl among them narrated how he had defiled her.

13. He was escorted to the Sotik dispensary for examination. The result in (EXB2) shows that there was no conclusive evidence of him having recent sexual intercourse. The alleged scene of crime was visited and the appellant told the court that PW1 had earlier on showed them a premises that was not his. He also told the Court that he was on H.I.V treatment.

14. DW2 **Samuel Sang** who is the appellant's neighbour at their business place and has Lodges

behind his premises said he was in his shop on 28th March, 2013 and did not open the gate for the appellant.

In cross-examination he said the room PW1 alleged to have been defiled in belonged to his shop assistant and it is him who kept the keys. Further, the back door to the lodges could not be opened without his knowledge. He lives in one of the rooms in the Lodges.

15. DW3 works for the appellant and he had travelled to Nairobi on 27th March 2013, for a graduation taking place on 28th March, 2013. He returned and was called when the appellant was arrested by the Police. In cross-examination he said he lived in a room behind the shop.

16. When this appeal came for hearing, Mr. Mitey for the appellant submitted that;

- *There were a lot of discrepancies in the prosecution case which made it to be quite weak. He cited the age of the complainant in the P3 from (EXB1) which was eight (8) years while she said she was twelve (12) years.*
- *Her conduct upto the time she testified was wanting, as she had not told anyone about what had happened. She told PW3 that the appellant had been doing bad things to her severally, but in court she said it was just once.*

17. He took issue with the evidence of PW2 (clinical officer) who he said never gave his qualifications to the court. He found him incompetent as he was not sure of PW1's age.

18. It was not until 2nd April, 2013 that a report was made. What had been happening until then, he asked. He submitted that there was no conclusive evidence that the appellant was the culprit.

19. Counsel took issue with the identification of the scene and said DW2 had disputed seeing the Appellant there. That PW1 had not positively identified the scene of crime.

20. He submitted finally that the defence was sworn with two witnesses being called. It was a strong defence. The children who were with PW1 were not called to testify. They should have been compelled to testify he said.

21. The appeal was opposed by the State through M/s Mwangi who submitted that the age of PW1 and penetration of her had been proved.

She further submitted that the appellant had been identified by PW1 as she knew him by appearance and not by name.

22. She said the evidence of PW1 was credible and reliable, and she had identified the scene of crime (House.)

On the qualifications of PW2, she submitted that the witness introduced himself and the defence counsel had not raised the issue in cross-examination.

23. This is a 1st appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. I am alive to the fact that I did not see nor hear the witnesses testify and that I must give an allowance for that.

24. In the case of **MWANGI V R (2004)2 KLR 28** the Court of Appeal stated thus;

> *1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.*

2.The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.

3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness.

25.I have considered the evidence on record, and grounds of appeal. I have equally considered the submissions by both counsel for the Appellant and the State.

What I find to be issues falling for determination are;

(i) Whether the ingredients for the offence of defilement were proved.

(ii) Whether the Appellant was the culprit in this case.

DETERMINATION

Issue No.1 Whether the ingredients for the offence of defilement were proved.

This issue covers ground 1

26.The Appellant was charged with defilement contrary to **Section 8(1)** as read with **Section (3)** of the **Sexual Offences Act** which provide as follows;

"8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8. (3) A person who commits an offence of defilement with a child

between the age of twelve and fifteen years is liable upon conviction

to imprisonment for a term of not less than twenty years"

The two ingredients to be proved are:

(a) Age

(b) Penetration

27.**AGE**

This is a very important ingredient in a case of this nature because sentences under this section are pegged on age.

In **HILLARY NYONGESA Vs. R ELD H.C.R.A No.123 of 2009 Justice Mwilu** (*as she then was*) stated thus;

"Age is such a critical aspect in sexual offences that it has to be conclusively proved.....And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."

28.Has the age of the minor been proved in this case? PW1 told the Court she was twelve (12) years old. In fact in cross-examination she stated this at page 6 lines 136-137

"I am aged twelve (12) years, my mother who lives in Kitale has been adding up the years for me. When I recorded statement (sic) I was not certain of my age..."

From this statement it is clear she did not know when she was born. PW3 and PW4 with whom she stayed did not mention anything about her age.

29. The only other witness who talks about her age is PW2 the clinical officer.

In the P3 form (EXB1) which was filled by him at page 2-4 he indicated at page 8 that she was eight (8) years old. This was on 2nd April, 2013.

30. Later, on 15th May 2013 he did an age assessment for PW1 and placed her age in the bracket of 12-14 years. He produced his report as EXB3.

I must quickly point out that age assessments are done by Medical Officers and not Clinical Officers. The Medical Doctors will in his/her report explain the formula used to arrive at the stated age.

31. In EXB 3 the witness says he used the available procedures. Which are these available procedures? Secondly, he does not explain the disparity between his findings on age in EXB1 and those in EXB3.

32. This issue of age was dealt with by the learned trial Magistrate in her judgment and she explained why she accepted the age of twelve (`12) years as PW1's age. I would not want to interfere with that finding as she had the advantage of seeing the witness (PW1).

33. PW1 explained in her evidence that the person who defiled her inserted his penis in her vagina.

The medical examination which was done about 5-6 days later confirmed penetration as the hymen was perforated and there was redness of the vulva. The medical evidence does not however indicate when this could have occurred.

Issue No. ii Whether the Appellant was the culprit in this case.

This issue covers grounds 2, 3, 5 & 6.

34. It is alleged that this offence was committed on 28th March, 2013.

PW5 a Police officer from Sotik Police Station only received the report on 2nd April, 2013.

Page 1 of the P3 from (EXB1) confirms this as it shows the report was made on 2nd April, 2013 at 1400hrs and thats when PW1 was sent to Hospital.

35. Was this child ever treated prior to the filling of the P3 form? PW3 stated this in her evidence at page 9 lines 211-214

"We took the child to Kapkatet Hospital on 30/3/2013 the doctor told us the incharge of such problems was not present. On Monday 2/4/2013 we went to Kapkatet but since we were not assisted we went to Sotik Dispensary and later to Sotik Police Station and accused was summoned."

Further in cross-examination at page 10 lines 220-225 she says

"I went to Kapkatet on 30/3/2013 and went back on 2/4/2013. After Kapkatet on 2/4/2013 we went to Sotik Dispensary. I had a document showing I went to Kapkatet which

complaint and I gave the doctor(sic). The incident was one time incident. We went to see the house and the child showed first house as where she was defiled. She showed Sangs house, we went to Kapkatet on 1/4/2013 not on 2/4/2013."

PW4 who is PW3's husband in his evidence stated that the child received no treatment at Kapkatet Hospital and they then went to the Police Station on 2nd April, 2013.

36. From the evidence of PW3, PW4, PW5 it is clear that though this child was allegedly defiled on 28th March, 2013 it was not until 2nd April, 2013 that she received treatment. The general appearance of this child is not even given by PW3 or the clinical officer.

37. PW3 said she received a report from a neighbour about PW1 scratching her private parts. She did not examine the child. If indeed this child was scratching did she continue scratching until 2nd April, 2013 when PW2 saw her? The neighbour who first noticed the scratching did not testify. What was PW3 and PW4 doing with this child in the house upto 2nd April, 2013 without reporting and having the child treated?.

38. Still on the medical evidence, PW2 testified that he examined the appellant and found him to be H.I.V reactive. In his P3 report (EXB1) at page 4 bottom he says "*The alleged defiler is H.I.V positive hence the girl was also infected with the same H.I.V."* This is a strongly worded statement yet the witness (PW2) had given the child proplasis for H.I.V prevention belatedly and had at the same time tested her for H.I.V and found her to be negative. In cross-examination he admitted that it was wrong for one to conclude that the girl had been infected. So how did he conclude she was infected with the virus with no report of testing?.

39. The defence had demanded that PW1 be taken for H.I.V retesting at their expense. Though she was taken the results were never filed in court by the prosecution. What is in the file is a receipt showing she went there for re-examination. Why would such results have been important?

40. Taken that the appellant was H.I.V positive and PW1 was placed on exposure proplasis way outside the recommended 72 hours the results would either link or exonerate the appellant from this act.

The Court was deliberately denied the opportunity of seeing the results and using them in its judgment.

41. Identification of the appellant as the culprit was very crucial. It is the evidence of PW1 that she was playing with other children among them Steve, Kim and Becky next to their school compound. She had just come from school while playing when the appellant allegedly came from behind and called her and she went. The other children were hiding as they were playing the hide and seek game. This means she did not go to identify their hiding place. Didn't these children wonder where she had gone to and look for her?

Where is it exactly that they were hiding and seeking? How far was the alleged scene of crime from the school compound? Finally, none of these children testified. Their evidence was crucial.

42. It is PW3's evidence that PW1 did not know the name of the culprit save for the appearance. This is what PW3 was told by PW1 at page 9 lines 208-210;

"I called the child and I asked her what had happened. She said whenever I go to the shop there is a man who does bad things to her. She showed me the man because she did not know the name."

How was she shown the man? Her evidence is so vague. Was she taken to the shop or to the

scene, where the defilement had occurred? It is PW1's evidence that this was the first time such a thing was being done to her, but from PW3's evidence the report was that it had been done whenever she went to the shop so did this one also take place in a shop?

43. The appellant gave a sworn statement of defence and called witnesses. DW2 was categorical that the appellant had not gone to the Lodges behind the shops as he keeps the keys and had not opened for him. It also came out through the defence evidence that the appellant, DW2 and DW3 occupy rooms in the Lodges. I want to believe that all the Lodges have beds. Was PW1 able to clearly identify the room in which she was defiled? The investigating officer at page 12 lines 274-278

> *"The following day we visited the scene and complainant led us to a room behind the shop and another shop adjacent had a room behind and said she was defiled in the said room. I formed an opinion that the complainant was confused as to which room she was defiled in as the two were similar they were behind the shop and same entrance."*

In cross-examination she said PW1 identified the appellant's room to be the one from where she was defiled.

44. The evidence of a child (victim) in sexual offences can without corroboration be used to found a conviction *(proviso to Section 124 of the Evidence Act)*. The trial court must however record the reasons for believing the alleged victim to be telling the truth.

45. In the present case the learned trial Magistrate rejected the defence evidence saying she found no basis on which the complainant and/or her guardian would have fixed him over this matter. On the other hand, she found PW1 to be a credible witness given her age and consistency while testifying and she believed her identification of the appellant as the perpetrator.

46. In re-evaluating the evidence of PW1, PW2, PW3 and PW4. I find a few things not adding up as explained in the above paragraphs for example it was never explained why this girl was not treated from 28th March 2013 to 2nd April, 2013.

- *No report was made to the police or administration until 2nd April 2013.*
- *PW1 did not know the perpetrator by name. She gave no description save saying the shopkeeper who does bad things to her when she goes to the said shop, was the culprit.*
- *It turned out that she had not been defiled before.*
- *How was the appellant identified by PW1 to PW3?*
- *The defence of the appellant and the evidence of DW2 was not analyzed by the learned trial Magistrate at all.*

In the case of **KIILU & Anor. V R (2005)1 KLR 174** the Court of Appeal stated this of witnesses;

> *"The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence".*

I find PW1, PW2 and PW3 not to be reliable witnesses. Their evidence would require some other independent evidence like the results of the re-testing of PW1 to assist the court in determining whether the appellant was the culprit or not.

47. Before I conclude I wish to point out a few procedural mistakes I noted in the proceedings by the learned trial Magistrate. These are;

- *The appellant was represented by an advocate right from the date of plea. When the matter came for the 1st hearing on 23rd May, 2013 Mr. Kipngetich for appellant was not present. There is nothing on record to show if the appellant agreed to proceed in the absence of his advocate. He had to cross examine PW1 by himself yet PW1 was the key witness in this case.. Later its noted that cross-examination of PW2 was by Mr. Kipngetich. Its not clear at what point he came to court. It is important that the court takes note of such occurences. Denying an accused person the right to legal representation is a violation of his right to a fair hearing as enshrined in Article 50 of the Constitution.*
- *The appellant gave sworn evidence on 19th March, 2014 and was stood down for a scene visit. After several adjournments the scene was visited on 9th May, 2014. At page 25 lines 579 its noted;*

> ***"DW1 reminded that the is still under oath."***
>
> *It had taken about three (3) months since the last time the appellant testified. What the Court ought to have done was to have the appellant take a fresh oath.*

- *The Defence called three witnesses to testify before closing its case. It had the right to begin in summing up its case and making submissions and not vice versa. See Section 161, 213, 307 & 311 of the Criminal Procedure Code.*

48. From my analysis of the evidence on record I do find that the evidence does not irresistibly point to the appellant as the person who committed this offence. The appeal succeeds and the conviction is quashed. The sentence is set aside.

The appellant to be released unless held under a lawful warrant.

Dated, Signed and Delivered in Open Court this 23rd day of July 2015.

H.I ONG'UDI

JUDGE.

In the presence of:

M/s Kivali for state.

Mr. Maengwe for accused.

Accused – Present.

Hillary/Robert – Court Assistant.

Interprates English/Kipsigis.