REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 228 OF 2013

ELIJAH KIMAYAI……...…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 398 of 2013 Republic v Elijah Kimayat in the Principal Magistrates Court at Kabarnet by S.O. Temu, Principal Magistrate dated 28th November 2013)

JUDGMENT

1. The appellant was convicted on a count of defilement of a girl aged five years contrary to sections 8(1) and 8(3) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to life imprisonment. The particulars were that on 24th June 2013 at *[particulars withheld]*, Village, Marigat District within Baringo County, he intentionally and unlawfully caused his penis to penetrate the vagina of J. K., a girl aged five.

2. The appellant has appealed against his conviction and sentence. The original petition of appeal was filed on 2nd December 2013. On 2nd July 2015, the Court granted the appellant leave under section 350 of the Criminal Procedure Code to amend the grounds of appeal. The *amended petition* raises six main grounds. First, that the charge sheet was defective by referring to section 8 (3) of the Act instead of section 8 (2). That accordingly, there was variance between the charge, the particulars and the evidence. Secondly, that the sentence was irregular; thirdly, that the charge was not proved beyond reasonable doubt; fourthly, that the appellant was not positively identified; fifthly, that the investigations into the evidence were shambolic. In that regard, the appellant stated there was no DNA evidence connecting him with the offence. Lastly, the appellant contended that vital witnesses were not called to the stand.

3. At the hearing of the petition, the appellant relied on detailed hand-written submissions filed on 2nd July 2015. He added that he was denied access to witness statements; that the trial court forced him to proceed with the trial when he was indisposed; and, that a number of questions he posed to the witnesses were not recorded.

4. The appeal is contested by the State. The case for the State is that the prosecution proved the charge beyond any reasonable doubt. It was submitted that the appellant was positively identified; and, that there was clear and corroborated evidence linking the appellant to the offence. The Republic submitted that the charge sheet or proceedings were not defective; that the age of the minor was never in doubt; that the appellant never raised the matter in the lower court; and that no prejudice was occasioned to the appellant. In any case, the State's position was that minor discrepancies could be cured by sections 187 and 382 of the Criminal Procedure Code. The State submitted that all material witnesses were called to the stand;

and, that the issue of failure to provide witness statements was being raised too late in the day. I was urged to dismiss the entire appeal.

5. 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 very careful because I have neither seen 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).

6. PW1 was the victim. The trial court conducted a detailed *voire dire* examination. The minor gave unsworn evidence. She could only talk a little. She told the court she did *not* know her age. Her grandmother and guardian said the minor was aged *two* years. PW1 did not testify on any of the elements of the charge. The key evidence in this case was thus given by the *adult* witnesses. I will revisit the matter of the procedure of taking the minor's evidence; and, whether it was fatal to the prosecution's case.

7. The trial court noted that the apparent age of the minor was about five years. On the first day the minor started testifying but was crying uncontrollably. When the trial resumed on 8th October 2013, the minor started to cry again. Under the Children Act, it was open to the trial court to find the child was vulnerable; and, to appoint an intermediary. That is exactly what the learned trial magistrate did. The trial court observed as follows-

> *"The court notices that the minor cannot talk. She is crying when talked to over this matter. The minor looks tender and due to her age she is unable to talk in court. I thus declare the minor child vulnerable and her evidence to be given by her mother who is before the court to avoid subjecting the minor to more torture and suffering"*

8. PW1 was the intermediary and the mother to the complainant. She testified that the complainant was aged five. On 24th June 2013, she was at Loboi Trading Centre. One of her daughters (PW3) informed her that she had passed by their house and found the house open, two children (the complainant and her brother) asleep but without the mosquito net. PW3 suspected something; she saw that the complainant was naked and had been defiled. She went to call her mother. PW1 and PW3 went to the house. PW1 found the complainant naked; her pants and t-shirt (exhibits 3 and 4) were on the bed. She noted that her private parts had been injured. She also found a red cap and t-shirt on the bed (exhibit 1). She informed some neighbours who said the cap and t-shirt belonged to the appellant.

9. PW2 was a brother of the complainant. He was aged ten at the time of the trial. After a brief *voire dire* examination, the trial court formed the opinion that he could tell the truth. The true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445. The Children Act defines a child of tender years to be one of ten years or below. I find that the trial court adopted the right procedure of taking the minor's evidence.

10. PW2 was sharing a bed with the complainant. He testified that on 24th June 2013 at about 8:00pm, the appellant came into their house and slept between the complainant and PW2. He saw the appellant because PW2 lit a torch. He knew the appellant. The appellant was wearing a red cap and t-shirt. The appellant removed the complainant's clothes and moved on top of her. PW2 screamed. The appellant threatened to stab PW2 with a knife and covered him with a blanket. His sister screamed. The appellant ran away. PW2 said the appellant left his t-shirt and red cap on the bed. He said he used to see the appellant wearing the red cap as he sold his charcoal. PW3 also said she used to see the appellant wearing the t-shirt and cap.

11. PW2's aunt and mother later came to the house. He informed them of the incident. His mother, PW1, took the complainant to the hospital. PW4, Police Constable Musa, received the complaint the same night.

The complainant and accused were brought at 11:00pm. He took the appellant to Marigat Police Station. PW6 testified on behalf of the investigating officer. He produced the child's clothes and age assessment report as exhibits. He also produced the appellant's t-shirt and red cap (exhibits 2 and 3).

12. PW5 is a clinical officer. He examined the complainant at Marigat District Hospital on 25th June 2013. He filled in a P3 form. He confirmed the complainant was aged five years. He found that "the child had tears to the private parts and her hymen had been broken". he said that the tears to the vulva and lacerations showed the complainant had been defiled. He produced the P3 (exhibit 3).

13. I have then considered the defence proffered by the appellant in the trial court. He denied committing the offence. He said on the night of 24th June 2013, he was in his house when he was woken up by some people. He feared for his life. He said the people accused him of defiling the complainant. One lady had a knife and threatened to stab him. The appellant told them to take him to the Administration Police camp. He was taken there at 11:00pm and handed over to PW4. He said he was held at the station overnight. He was charged five days later with the offence.

14. I will deal first with the supply of witness statements. The appellant was entitled to a disclosure of evidence in the prosecutor's hands. See section 77 of the repealed Constitution, *George Ngodhe Juma and 2 others v The Attorney General* Nairobi, High Court Miscellaneous Application 345 of 2001 (unreported), *Cholmondley v Republic* [2008] KLR 190. I have studied the record carefully. When the trial opened on 24th September 2013 [page 14 of the record] there were three witnesses. The trial could not proceed because the minor was crying uncontrollably. The court adjourned the matter and ordered that *"statements be supplied also"*. There is no record that the appellant later indicated he never got the statements. There is also no record to support the allegations that he was forced to proceed when he was unwell; or, that the trial court did not record his questions in cross-examination. I have studied the record. At page 12, the trial court adjourned the matter to allow the appellant to get treatment. The record of his cross-examination of witnesses (where applicable) is *extensive* for example of PW1, PW2, PW3 and PW5. I find no merit in those grounds of appeal and submissions.

15. I will now turn to the evidence of identification and penetration. The appellant and PW2 were not complete strangers. PW2 testified that on 24th June 2013 at about 8:00pm, the appellant came into their house and slept between the complainant and PW2. He saw the appellant because PW2 lit a torch. The appellant was wearing a red cap and t-shirt. The appellant removed the complainant's clothes and defiled her. When the complainant and PW2 screamed, the appellant took off. But he left behind vital evidence; his t-shirt and red cap. PW2 and PW3 testified they used to see him wearing those items of clothing at bthe place he sold charcoal. That to me is evidence of recognition; stronger evidence than that of identification. See *Wamunga v Republic* [1989] KLR 424, *Republic v Turnbull & others* [1976] 3 All ER 549, *Obwana & Others v Uganda* [2009] 2 EA 333. It was corroborated by the in criminating evidence of the red cap and t-shirt. It was a smoking gun. I disagree with the submission by the appellant that a DNA examination or other forensic evidence was required to establish the link between him and the clothes. I cannot also say that the investigations in this case were shambolic.

16. From the evidence of PW2, PW3 and PW5 there is no doubt about penetration. The examination by the clinical officer (PW5) revealed the child had suffered tears to her vulva; and, that her hymen was broken. I find that penetration was proved beyond reasonable doubt. Section 2 of the Act defines *penetration* as follows-

> *'"Penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person".*

17. The next key question is whether the appellant *is* the person who *penetrated* the complainant. From the unchallenged evidence of PW2 and the incriminating t-shirt and red cap left behind by the appellant, I am satisfied that the appellant is the person who entered the complainant's house and penetrated her. I am alive of the defence by the appellant. He was setting up an *alibi*. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The appellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution's case. It was thus open to the trial court to weigh

it against the evidence already tendered. See *Wang'ombe v Republic* [1976-80] KLR 1683, *Karanja v Republic* [1983] KLR 501. The *alibi* in this case was a red herring. The evidence of PW2 was consistent and believable. I have no doubt that it is the appellant who defiled the complainant.

18. The age of a 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. From the evidence of the mother PW1, PW5 and the age assessment report (exhibit 6) I am satisfied that the complainant was aged five years.

19. That takes me to the charge sheet, the particulars and the sentence in this case. The charge sheet framed an offence of defilement of a girl aged five years contrary to sections 8(1) and *8(3)* of the Sexual Offences Act, No. 3 of 2006. Since the complainant was five, the proper penal section was *8 (2).* The learned trial Magistrate found the offence proved as charged under sections 8(1) and *8(3)* of the Act and sentenced the appellant to *life* imprisonment. The correct penal section should have been *8 (2)* of the Act. Since the complainant was *five*, the trial court nevertheless imposed the right mandatory sentence of *life*.

20. I am of the view that the discrepancy in the penal provision cited in the charge sheet was *not* material. No prejudice can be said to have been suffered by the appellant. The defect in the particulars of the charge sheet was also *curable* by section 187 as read with section 382 of the Criminal Procedure Code. See *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Criminal Appeal 661 of 2010 (unreported).

21. I have already found that the trial court applied the proper procedures in appointing the mother of the complainant as an intermediary; and in finding the minor to be a vulnerable witness. The evidence of the six witnesses called was consistent and sufficient to establish the offence. I disagree with the appellant that there were discrepancies on the date of the offence. It occurred on 24th June 2013; and the complainant was examined by the clinical officer the next day on 25th June 2013. The dates in the occurrence book are immaterial and cast *no* doubt about the culpability of the appellant.

22. I agree with the appellant that the State should have called the complainant's aunt or the aunt's brother to the stand. But it would not have changed the picture or *exonerated* the appellant. There was sufficient evidence proving the charge. I also 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.

23. From my analysis and re-evaluation of all the evidence, I am satisfied that the charge and all its elements were proved beyond reasonable doubt. I cannot say that the burden of proof was shifted to the appellant at any point. The defence mounted was feeble and a sham. It follows as a corollary that the conviction was *safe*.

24. Under section 8(2) of the Sexual Offences Act, defilement of a child of eleven years or *below* attracts imprisonment for *life*. The sentence is *mandatory*. The complainant was *five years*. This is a grave offence perpetrated against a helpless child. The complainant is a *vulnerable* person as defined by section 2 of the Act. She will carry the scars for life. I am thus unable to disturb the sentence.

25. The upshot is that the entire appeal has no merit. It is dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 24th day of September 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

The appellant.

Ms……..for the State.

Mr. J. Kemboi, Court Clerk.