



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 140 OF 2012**

**EDWIN OKOTH ODHIAMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 5852 of 2010 Republic v Edwin Okoth Odhiambo in the Senior Principal Magistrates' Court at Eldoret by F. N. Kyamba, Principal Magistrate dated 3<sup>rd</sup> August 2012)*

**JUDGMENT**

1. The appellant was convicted on a charge of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act, No. 3 of 2006. The particulars were that between 1<sup>st</sup> October and 13<sup>th</sup> November 2010, at Langas Estate in Wareng District of the Rift Valley Province, he intentionally and unlawfully caused his penis to penetrate the vagina of M.K. a girl aged *twelve* years. He was sentenced to *thirty* years imprisonment.
2. The appellant has preferred an appeal. The original petition of appeal was filed on 19<sup>th</sup> August 2012. On 9<sup>th</sup> July 2015, the Court granted the appellant leave under section 350 of the Criminal Procedure Code to amend the grounds of appeal.
3. The *amended petition* raises six main grounds. First, that the procedure of taking the evidence of PW1 was defective; secondly, that the evidence was inconclusive or unreliable; thirdly, that the investigation were shoddy; fourthly, that the learned trial magistrate failed to comply with section 200(3) of the Criminal Procedure code; fifthly, that the trial court failed to analyse the evidence properly which led to a miscarriage of justice; and, lastly, that the sentence handed down was harsh and excessive. In a nutshell, the appellant's case is that the charge was not proved beyond reasonable doubt.
4. At the hearing of the petition, the appellant relied on his written submissions filed on 9<sup>th</sup> July 2015. He added that the charge sheet was not in tandem with the Police Occurrence Book number; that there were discrepancies in the names of the father of the complainant and the evidence of PW1 and PW4; that the complainant's father was not called as a witness; that penetration was not proved; and, that the trial court gave undue weight to a love letter allegedly written by the appellant to the complainant.
5. The appeal is contested by the State. The learned State Counsel submitted that the charge was proved beyond reasonable doubt. She stated that the appellant defiled the complainant on at least three occasions. She submitted that the appellant was positively identified by PW1; and, that penetration was proved by credible medical evidence. She submitted further that the love letter was just but one piece of circumstantial evidence. The learned State Counsel contended that the discrepancies between the charge

sheet and Police Occurrence Book were not material; that the evidence led by the witnesses was sufficient; and, that the sentence was well within the law. 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 Orenge 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. On 27<sup>th</sup> September 2011, the trial commenced. The court conducted a brief *voire dire* examination on the complainant. The complainant said she was twelve years and a pupil in class seven. The court formed the opinion that she did *not* understand the nature of an oath. The court directed that she gives *unsworn* testimony. I disagree with the appellant that the trial court adopted the wrong procedures. 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. PW2 was six years. I am satisfied that the court complied fully with the procedure of taking evidence of the minor.

8. The complainant then proceeded to give unsworn evidence. She said the appellant defiled her on three different occasions. I will set out her testimony at length-

*"I do recall of 2/5/2010 I was at home and I went to collect a social studies book which I did not have. I went and found the person I wanted to collect the book from was not there. It is only Edwin accused who was there. When I entered the house, he locked the door and put me on the chair. He removed my pant and defiled me. He then opened the door and told me to go home. I found mother at home but I did not tell her what had happened. It was at around 4.00p.m.*

*On 8/8/2010 at around 3.00p.m. I was at home and I went where Edwin (accused) was staying. I entered the house and Edwin defiled me again. I was on the seat I went back home but I did not tell my mother as I feared she would punish me. On 5/10/2010 I was at home and Edwin called my mother and said I should go and collect some items to be taken to church. I went to his house and he was alone I entered the house and he defiled me. I went back home and I did not tell my mother what had happened. On 12/11/2010 my mother found me with a letter which Edwin had written to me. I knew my mother would punish me. I put the letter in my mouth. He had written to me a love letter. This is the letter the accused had written to me and sent his cousin to bring, it is dated 12/11/2010 [exhibit 1]. My mother managed to remove the letter from my mouth. Edwin used to teach us in church and my mother was unhappy".*

9. The complainant's mother, M.K., was PW3. She said the complainant was now thirteen. She testified that her daughter was born in March 1998. A birth certificate was produced (exhibit 3). On 12<sup>th</sup> November 2010, she was at home with the complainant. A cousin to the appellant called Rael came to visit. In the evening, PW3 found the complainant reading a love letter (exhibit 1). The complainant started to chew the letter. She forced it out of her mouth. PW3 discovered the letter was authored by the appellant. She testified that she was shocked because the appellant was the complainant's Sunday school teacher.

10. The love letter was produced in evidence by PW4, the investigating officer. He did not know the appellant before this incident. Upon cross-examination by the appellant, he said the author of the letter signed off as E.O.O. He testified that he did not consult experts on the letter. He conceded that the

complainant's name does not appear on the letter but was recovered from her. He said the complainant confirmed the letter was addressed to her.

11. PW2 was a clinical officer. He examined the complainant. He found that her hymen was torn and partially healed. There was no vaginal discharge. The HIV test was negative and so were other tests. His conclusion was that there was vaginal penetration. He prepared the P3 form on 15<sup>th</sup> November 2010 (exhibit 2).

12. When he was placed on his defence, the appellant denied committing the offence. He denied authoring the love letter to the complainant. In the relevant parts of his testimony, he said as follows-

*“I am aware of the letter produced in court. I am not the one who wrote the letter. I have not had conversation with [complainant].....I was a teacher of PW1 at Pathfinder Club. There were other children in the club. None of the other children attended court. They were more than 25 children in the club. The children I was teaching were between 10 years and 15 years old. [PW1] was 12 years at the time. I did not have love relationship with any of the children”.*

13. A number of matters arise from that evidence. Like I stated earlier, I am satisfied that the court complied fully with the procedure of taking evidence of the minor. The submissions by the appellant on that aspect are without legal foundation. The more important question is whether the unsworn testimony of the complainant was consistent and reliable; or, whether there was corroborating evidence. From the evidence, the complainant and appellant were not strangers. He was her Sunday school teacher. The appellant admitted as much. From the evidence of the complainant, they were also intimate friends. The identification of the appellant was thus beyond question. That was evidence of recognition; stronger than simple 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.

14. The next key question is whether the appellant penetrated the complainant. From the evidence of the complainant, she had sexual intercourse with the appellant on three occasions: on 2<sup>nd</sup> May 2010 at 4:00pm; on 8<sup>th</sup> August 2010 at 3:00pm; and, on 5<sup>th</sup> October 2010. On all those occasions, she did not inform her mother or any other person. The affair unraveled only on 12<sup>th</sup> November 2010 when her mother recovered the love letter from her mouth. That was nearly seven months later. The complainant however came across as a consistent and truthful witness at the trial. She did not dither under cross-examination by the appellant.

15. The appellant was charged with defilement that occurred between 1<sup>st</sup> October and 13<sup>th</sup> November 2010. From the evidence of PW1, that would only cover the defilement that occurred on 5<sup>th</sup> October 2010. The complainant was not examined until 15<sup>th</sup> November 2010, ten days from that date. The examination revealed a partially torn hymen. It was healed. The tears were at position six o'clock. PW2 concluded that there was vaginal penetration. I have thus reached the inescapable conclusion that penetration was proved beyond any 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”.*

16. PW1 was categorical that she had sexual intercourse with the appellant in his house. In particular, she had intercourse with him on 5<sup>th</sup> October 2010 which fell within the dates in the charge sheet. Her unsworn evidence was corroborated by the clinical officer (PW2) and the P3 form (exhibit 1). In addition, there is the love letter. PW1 was emphatic that the letter was written to her by the appellant. Although the appellant denied it, the rest of the evidence pointed very strongly to him as the only person who had sexual inter course with the complainant. In this case, there is strong circumstantial evidence that pointing *irresistibly* to the accused. The test in a matter of this nature was well stated in R v Kipkering arap Koske & another 16 EACA 135 where the court held-

*“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”*

17. When that is combined with the *direct* evidence of the complainant and the *medical* evidence, it leaves me in no doubt that the appellant *penetrated* the complainant between 1<sup>st</sup> October and 13<sup>th</sup> November 2010; and most certainly on 5<sup>th</sup> October 2010 in his house. The evidence of the complainant was not shaken by the cross-examination. So much so that even if the love letter was not admitted into evidence, there was sufficient direct evidence proving the charge. I have found the appellant’s defence to be feeble and untenable in that respect.

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 PW3, the birth certificate (exhibit 3), and the P3 form (exhibit 1) I am satisfied that the complainant was aged *twelve* years at the time of the offence.

19. The appellant in his submissions claimed that material witnesses were not called by the State. One such witness is the father of the complainant. That may be the case. But I am satisfied that the evidence tendered by PW1, PW2 and PW3 was sufficient and established the culpability of the appellant. 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. I do not also agree with the submissions by the appellant that the investigations in this case were shambolic.

20. The appellant referred to discrepancies between the dates in the charge sheet and the Police Occurrence Book number. The number in the latter appears in the charge sheet as OB/13/5/12/2010. The OB number should reflect the date the complaint was made. To that extent, there is a discrepancy. But what is material are the particulars of the charge sheet. The particulars in this case are not at variance with the charge or evidence. The charge sheet refers to the wrong penal section 8 (2) of the Act. Since the complainant was twelve, the correct penal section was 8 (3). I note however that the appellant was properly sentenced under section 8 (3) of the Act. I find that those discrepancies are not material. 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.”*

21. Lastly, the appellant contended that the trial court failed 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. The trial was first conducted by Mr. Shiundu, Senior Resident Magistrate. He heard all the prosecution witnesses. He found the appellant had a case to answer and explained to him his rights under section 211 of the Criminal Procedure Code. On 30<sup>th</sup> March 2012, the trial was taken over by Mr. F. N. Kyambia, Principal Magistrate. The typed record at page 17 (page 22 handwritten pagination) clearly shows that the succeeding trial magistrate explained to the appellant his rights under section 200 (3) of the Criminal Procedure Code. The accused through his counsel of record, Mr. Obudho, informed the court he would proceed from the point at which the trial had reached. The succeeding magistrate then heard the defence case and wrote the final judgment. There was thus no transgression of section 200 of the Criminal Procedure Code.

22. In the end, I am satisfied that the prosecution proved the offence beyond reasonable doubt.

23. I will now turn to the appeal on sentence. The appellant was sentenced to *thirty years* imprisonment. Under section 8 (3) of the Sexual Offences Act, the minimum sentence is *twenty years imprisonment*. Sentencing is at the discretion of the trial court. But power still reposes in an appellate court to review the sentence if material factors were overlooked; or, the sentence was founded on erroneous principles. See Amolo v Republic [1991] KLR 392, Omuse v Republic [1989] KLR 214, Macharia v Republic [2003] 2 E.A 559.

24. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

*“The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may.....(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or..... ”*

25. In Macharia v Republic [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

*“The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. ...The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence.”*

26. The learned trial Magistrate upon convicting the appellant called for his mitigation. The appellant pleaded for leniency. He was a teacher and breadwinner for his family. He was a *first offender*. True, the offence was a serious felony and called for a custodial sentence. But the sentence of thirty years was too harsh in the circumstances. I will thus disturb the sentence. The appeal on sentence is allowed. The sentence passed against the appellant is set aside. The appellant shall now serve imprisonment for a term of *twenty years*.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 24<sup>th</sup> day of September 2015.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

The appellant (in person).

Ms.....for the State.

Mr. Kemboi, Court Clerk.