



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 190 OF 2010**

**LAWRENCE KEBO KOKOI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 1100 of 2009 Republic v Lawrence Kebo in the Senior Principal Magistrates' Court at Eldoret by A. Onginjo, Senior Principal Magistrate dated 8<sup>th</sup> December 2010)***

**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 on 14<sup>th</sup> February 2009, at Plateau Farm within Uasin Gishu District of the Rift Valley Province, he intentionally and unlawfully had carnal knowledge of P.A. [name withheld] a child aged three years. He was sentenced to life imprisonment.
2. The appellant has preferred an appeal. The original petition of appeal was filed on 17<sup>th</sup> December 2010. On 29<sup>th</sup> April 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 seven main grounds. First, that the charge was not proved beyond reasonable doubt; secondly, that the prosecution witnesses were not credible; thirdly, that their evidence was inconsistent; fourthly, that the trial court disregarded the appellant's defence; fifthly, that no exhibits were tendered connecting the appellant with the offence; sixthly, that vital or material witnesses were not called to the stand; and, lastly, that the succeeding trial magistrate failed to comply with section 200 of the Criminal Procedure Code which prejudiced the appellant.
3. At the hearing of the petition, the appellant relied on his written submissions filed on 9<sup>th</sup> July 2015. He added that it was not true, as alleged by the medical doctor (PW5), that he had admitted the offence; that his alleged confession was inadmissible; and, that he was the victim of trumped up charges arising out of a grudge with PW3 and PW1.
4. 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; and, that there was no infraction of rules of procedure. The State submitted that penetration was proved. 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.
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 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).

6. On the evening of 14<sup>th</sup> February 2009 the complainant went missing. PW1 and PW2 joined the search team. The search party had been mobilized by the village elder. The village elder had received a report from the child's mother (PW3). PW1 and PW2 met outside the appellant's house. They took a torch and proceeded towards a stream. They heard the cries of a child emanating from a thicket. PW2 testified as follows-

*"I heard child crying in forest and those who were meeting decided to go towards where child was crying. I started running towards where we heard child crying near stream. Emmanuel was ahead of us and he fell inside stream and crossed. I entered thicket while calling the child's name. I found her placed on a tree and only had a blouse. The inner wear and skirt were not worn. She was bleeding. The child told us it is Kebo who took her to the forest. I learnt Kebo is a cobbler. The child told us Kebo had just left scene. We went to Kebo's house and found he was pretending to sleep but was still wearing his jacket."*

7. PW3 was the victim's mother. She testified that P.A.[name withheld] was born on 10<sup>th</sup> October 2006. She said the appellant was her neighbor. On the material day, the child had gone to play at the appellant's place. She later noticed the child was missing. She started a search. At 5.00 pm she reported the matter to the village elder who mobilized a search party. She testified that PW1 and PW2 traced child in a thicket. The child was half-naked and was bleeding from her private parts. PW3 told the court as follows-

*"I was present when P. [name withheld] was found on a tree in the forest. P. told me Kebo [appellant] took her to the bush and defiled her. The child was naked and was bleeding from private parts. The clothes we recovered had blood stains. I took the child to Moi Teaching and Referral Hospital the same night"*

8. PW4 was the victim. After a brief *voire dire* examination, the court formed the opinion that she did not understand the nature of an oath. The court directed that she gives unsworn testimony. She said the appellant took her to a forest and defiled her. She testified further as follows-

*"I am P.[name withheld]. My father is Arungai. My mother is Teresa. I learn at [particulars withheld] Nursery. Kebo [appellant] is known to me. He is in court. Kebo did bad manners to me. He found me at their home. He took me to a forest. He removed my clothes. I felt pain and cried. I remained in forest up to night. People came to get me from forest. I was taken to mission and another hospital."*

9. PW5, Dr. Embenzi, examined the complainant at Moi Teaching and Referral Hospital. He concluded that there was penetration. In the material part of his evidence, he stated-

*"She had tenderness above genitals. Cut on inner lip of labia majora. On the opening of vagina was hyperemia due to friction. There was laceration in same area. Hymeneal rim had tears in 2 positions 9 and 4, tear at the posterior position of vaginal opening. Colourless discharge. There was no bleeding. High vaginal swabs – no spermatozoa seen; HIV test – negative; Urinalysis – negative; Syphilis – negative"*

10. The same doctor also examined the appellant. The P3 form for the appellant (exhibit 2) indicated he had many injuries from a beating by the public. But there were no injuries on his genitals or old or new stains on his trousers. His inner wear was not submitted for examination. There were additional remarks by the doctor- *"he admits before a police escort that he actually defiled the girl and left her in the bush"*. I will deal with those remarks or purported confession later.

11. PW6 was a police officer at Eldoret Police Station. He said the complainant was taken to the station at about 12:40am on 15<sup>th</sup> February 2009. He said she was bleeding "profusely and [he] referred her to hospital". He testified that her clothes had blood stains and that her inner wear was not recovered. The appellant was arrested by the public. PW6 re-arrested him and took him to the

hospital for examination.

12. When the appellant was placed on his defence, he said as follows-

*“I can recall on 14<sup>th</sup> February 2009 I woke up at 8.00 pm and proceeded to my kiosk in Nyaru. I worked up to 8.00 pm and closed kiosk and proceeded to where I stay 1 km away.....”*

*“During the same week, I had differed with Emmanuel [PW1] over his sister Elizabeth. Elizabeth committed suicide when I was arrested. I told him I was tired and I could not accompany him to village elder. I promised to see village elder the following morning, Emmanuel had threatened me if I don't seize [sic] relationship with his sister. Emmanuel was with his friend Peter Lokomojong [PW2].....”*

*“I learnt Chumba also wanted to have an affair with the deceased Elizabeth and she declined that is why I was fabricated. It was a way of removing me from my place of business and to lose touch with my lover Elizabeth who committed suicide consequent to my arrest.”*

13. A number of matters arise from that evidence. First, the evidence of the doctor (PW5) or the P3 form (exhibit 2) in respect of the appellant suggests that the appellant admitted the offence. I agree with the appellant that the confession was not admissible. But I note that the conviction of the appellant was not based on the confession. From my reappraisal of the evidence, I am satisfied that there was *direct* evidence from the complainant *connecting* the appellant to the crime. I will now turn to that evidence.

14. PW4, the victim, knew the appellant. Although she was a child of tender years, her unsworn evidence was clear and consistent. She knew him as a neighbor. She identified him by name in her evidence and recognized him at the dock. She said he is the one who took her to the thicket, defiled her and left her in the bush before she was rescued by the public. I am alive that that a child of that age could not describe sexual acts in a graphic manner. I understood her to say she was defiled when she said *“Kebo [appellant] did bad manners to me. He found me at their home. He took me to a forest. He removed my clothes. I felt pain and cried”*. To hold otherwise would be unreasonable and a travesty of justice.

15. When PW1 and PW2 found the complainant in the forest, she only had a blouse and was bleeding from her private parts. Her mother PW3 confirmed it. The defilement was corroborated by Dr. Imbenzi's (PW5's) evidence and the P3 form for the complainant (exhibit 1). The doctor found a cut on the inner lip of the labia majora. On the opening of vagina, there was hyperemia due to friction. There was laceration in same area. hymeneal rim had tears; there were also tears at the posterior position of vaginal opening and a colourless discharge. I have reached the inescapable conclusion 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”.*

16. The next key question is whether the appellant is the person who *penetrated* the complainant. From the unchallenged evidence of PW4, the appellant is the person who took her from his compound to the forest and defiled her. PW3, her mother said the child had gone to the appellant's place to play. The appellant was known to the complainant. They were neighbours. The complainant identified him as “Kebo”. I have thus no doubt that the appellant was positively identified as the person who penetrated the complainant. See *Wamunga v Republic* [1989] KLR 424, *Republic v Turnbull & others* [1976] 3 All ER 549, *Obwana & Others v Uganda* [2009] 2 EA 333.

17. I am alive to 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 PW4 was consistent and believable. I have no doubt that it is the appellant who defiled the complainant.

18. I am also not satisfied of the allegations of a grudge with PW3. It would not excuse the offence. And I see no reason or evidence why the young child of three years would frame up the appellant. The other allegation that the appellant was fixed by PW1 over an affair with PW1's sister (Elizabeth, now deceased) was a red herring. It is also not true that the defence was disregarded by the trial court. The trial court did not simply believe the appellant. The trial court, for example, found that-

*“The issue of Elizabeth was not raised by accused with prosecution witnesses. Allegations that Elizabeth committed suicide because accused had been arrested is a police case, if it was true police at Plateau should have known and started inquiries into the death. Again accused person didn't feel it was important to question P.C Chumba about the issue. It is therefore strongly doubted if there existed any one with such a name or even if it is true PW1 had such a sister.”*

19. 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.

20. From the evidence of the mother PW3, and the doctor, PW5, I am satisfied that the complainant was aged *three* years. The appellant submitted that the age was not proved. Age is a fact, and can be proved by other evidence other than documentary evidence. In the present case PW3 said her daughter was born on 10<sup>th</sup> October 2006. I draw strength in that conclusion from the recent decision of the Court of Appeal in Martin Wanyonyi Nyongesa v Republic, Eldoret, Criminal Appeal 661 of 2010 (unreported). The learned judges delivered themselves as follows-

*“From the evidence, besides the evidence of PC Paul Mwangi, who we consider was incompetent to ascertain the child's age, all other evidence indicated that ZN was either 12, 13 or 15 years. When this is considered against the backdrop of the charge sheet which specified the complainant's age as 12 years, it is evident that the ages indicated, all fell within the age bracket specified under Section 8 (1) and (3) of the Act, and concerned the defilement of a child within the particular age bracket. As such, we find that, the charge and the sentence preferred were sound, and no prejudice could be held to have been suffered by the appellant. At any rate, we consider that the discrepancies are not material and curable under Section 382 of the Criminal Procedure Code.”*

21. The appellant in ground 7 of the amended petition claimed that material witnesses were not called by the State. That could be the case. But I am satisfied that the evidence tendered by the six witnesses 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.

22. 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 Ms. Atieno Alego, Senior Resident Magistrate, who heard two witnesses, the doctor and the mother of the child. On 27<sup>th</sup> May 2010, the trial was taken over by A. Onginjo, Senior Principal Magistrate. The trial started *afresh*. The two witnesses who had earlier testified were called back to the stand as PW3 and PW5 respectively. The succeeding magistrate thus took *all* the evidence in this case and delivered the judgment. There was thus no infraction of section 200 of the Criminal Procedure

Code.

23. In the end, I am satisfied that the prosecution proved the offence beyond reasonable doubt. The appellant was sentenced to life imprisonment. Under section 8 (2) of the Sexual Offences Act, the minimum sentence is *life imprisonment*. Granted those circumstances, I am also unable to disturb the sentence.

24. The upshot is that the entire appeal is devoid of merit. It is hereby dismissed.

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.