



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 220 OF 2013

SAMMY KIMALINY..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 67 of 2013 Republic v Sammy Kimaliny in the Senior Resident Magistrates' Court at Kabarnet by E. Bett, Acting Senior Resident Magistrate dated 25th April 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 14th February 2013, at Vocational Rehabilitation Centre in Kabarnet Division within Baringo County, he caused his penis to penetrate the vagina of R.C. *[name withheld]* a child aged 17 years.
3. The appellant has preferred an appeal. The petition was filed on 26th November 2013. There are four grounds. First, that the charge was not proved beyond reasonable doubt; secondly, that the conviction was based on the evidence of a single witness and which was never corroborated; thirdly, that the appellant was not positively identified; and, fourthly, that there was no proof of penetration.
4. At the hearing of the petition, the appellant relied entirely on his handwritten submissions filed on 2nd July 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 there was sufficient light; and, that the complainant confronted and recognized the appellant. The case for the State is that the appellant was a watchman at the institution and was known to the complainant. In addition, the trial court had warned itself of the dangers of relying on a single identifying witness under difficult conditions. The State submitted that penetration was proved by the evidence of PW1 and the stained bed sheets and undergarments produced by PW5. 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 14th February 2013 at about 10:00 p.m. the complainant had retired to bed in a dormitory at Vocational Training Centre in Kabarnet. She felt someone enter her bed. The person covered her mouth with a pillow, removed her underwear and inserted his penis into her vagina. After struggling for about thirty minutes, she managed to push the intruder away. The assailant tried to escape. The dormitory lights were on. She followed him into the corridor. She confronted him; he pleaded with her to forgive him. She recognized the assailant as the school watchman.
 8. The complainant immediately reported the matter to a teacher (PW2). They were later joined by Benson Ochieng, the house master. The next morning, they reported the matter to Elizabeth Sian, another teacher at the institution. The manager of the school advised them to report the matter to Kabarnet Police Station. The bed sheet and panties were surrendered to the police. The complainant was taken to Kabarnet District Hospital for treatment. The appellant was then arrested.
 9. That narrative was confirmed by PW2 and PW4. PW5 was the investigating officer. She produced the bed sheets (exhibit 2) and the panties (exhibit 1) in court.
 10. PW3 was the clinical officer at Kabarnet District Hospital. He examined the complainant and appellant. Regarding the complainant, he testified as follows-

“From the findings of long time (sic) broken hymen and the reddish brownish discharge which had been there for a week; on lower abdomen pains and inconclusive laboratory result I could not conclude there was any element of penetration.”

11. The examination on the appellant did not yield anything positive. When the appellant was placed on his defence, he testified that he was on duty at the school on the material night but he denied committing the offence. The learned trial magistrate found that the appellant was positively identified; and, that penetration was proved. He convicted the appellant.
12. A number of issues arise from the evidence. The first question is identification. In Wamunga v Republic [1989] KLR 424, the Court of Appeal held as follows-

“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”

13. In Republic v Turnbull & others [1976] 3 All ER 549, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. In Kiarie v Republic [1984] KLR 739, the Court of Appeal had this to say-

“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.”

See also Joseph Ngumbao Nzaro v. Republic [1991] 2 KAR 212, Richard Gathecha Kinyuru & another v Republic Nairobi High Court Criminal Appeal 290 of 2009 [2012] eKLR, Obwana & Others v Uganda [2009] 2 EA 333.

14. The complainant and appellant in this case knew each other. The appellant was working at the complainant's school as a watchman. In his defence, the appellant admitted that he was working at the school on the material night. Although it was at night, the dormitory lights were on. There was sufficient light on the corridor where the complainant confronted the appellant. They had a brief conversation; the appellant sought forgiveness. I thus find that this was a case of recognition. I have reached the inescapable conclusion that the appellant was positively identified as the person who attacked the complainant. His admission that he was working at the school that night provided further corroboration. He had a clear opportunity to commit the offence. See Opo v Republic [1976-80] 1 KLR 1669.
15. The next key question is whether the appellant penetrated the complainant. The complainant was

emphatic that the person who crept into her bed removed her underwear and inserted his penis into her vagina. That was not corroborated by medical evidence. PW3, the clinical officer testified that he “*could not conclude there was any element of penetration*”. The complainant’s hymen was long broken. He noted that some dried blood on the complainant’s thigh related to her menses. He also noted an older scar from an earlier delivery. There are then the stained bed sheets and under garment. I am alive that under section 124 of the Evidence Act, the evidence of the complainant was sufficient. She came across as a truthful and consistent witness. Despite the dearth of medical evidence, I have no doubt that the appellant *penetrated* the complainant that night. The defence tendered by the appellant was thus feeble and a red herring.

16. The next key question is 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.

17. The charge sheet stated that the age of the complainant was *seventeen*. Although the complainant did not testify about her age, PW3, the clinical officer, testified that the complainant was *seventeen*. He also produced the P3 form (exhibit 3) which indicated the age as *seventeen* I am satisfied that the complainant was *seventeen*. 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.”

18. The appellant was sentenced to fifteen years imprisonment. Under section 8 (4) of the Sexual Offences Act, the minimum sentence is *fifteen* years. Granted those circumstances, I am unable to disturb the sentence handed down to the appellant.

19. 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 24th 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.