



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 136 OF 2013**

**DAVID MUTAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case*

*No. 1006 of 2011 Republic v David Mutai in the Principal Magistrates' Court*

*at Eldoret by F. N. Kyambia, Principal Magistrate dated 12<sup>th</sup> July 2013)*

**JUDGMENT**

1. The appellant was convicted on three counts 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 5<sup>th</sup> August 2010, 15<sup>th</sup> August 2010 and 28<sup>th</sup> August 2010 in Eldoret East District within the Rift Valley Province, he caused his penis to penetrate the vagina of P. N. child aged 16 years.
3. The appellant has preferred an appeal. The petition was filed on 18<sup>th</sup> July 2013. There are ten grounds. They can be condensed into eight. First, that the charge sheet was defective; secondly, that the charges were not proved beyond reasonable doubt; thirdly, that the DNA test was dubious and failed to establish that the appellant had impregnated the complainant; fourthly, that the evidence of the clinical officer was uncertain; fifthly, that the learned trial magistrate erred in finding that the age of the complainant was established; sixth, that the trial court was partial; seventh, that the defence of the appellant or his *alibi* were disregarded; and, eighth, that the burden of proof was unfairly shifted to the appellant.
4. The appeal is contested by the State. The learned State Counsel submitted that the three counts were proved beyond reasonable doubt. She submitted that the charge sheet was not defective. She stated that the appellant was positively identified. The case for the State is that the medical evidence and DNA test established beyond doubt that the appellant impregnated the complainant. PW1 clearly testified that she had sexual intercourse on at least three occasions with the complainant. Her evidence was corroborated by the clinical officer and Government Analyst. In a synopsis, the case for the State is that the evidence established the appellant's culpability. I was implored to dismiss the appeal.
5. On 8<sup>th</sup> October 2015 I heard submissions from learned counsel for the appellant and the learned State Counsel. I have considered the grounds of appeal, the records of the lower court, the evidence and the rival submissions.
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. PW1 was the complainant. She testified that she was now *seventeen* years. She was in form two. She met the appellant on three different occasions before they started having sex. She was then staying in [particulars withheld] area with her father and mother (PW2). She said they had sex on three different dates: 5<sup>th</sup> August 2010; 15<sup>th</sup> August 2010; and, 28<sup>th</sup> August 2010. On 25<sup>th</sup> December 2010 her mother suspected she was pregnant. PW1 told the court as follows-

*“I never met him in the church. On 5.8.2010 the accused told me to visit him. I went with him. He took me to his house inside his bedroom. We had sex with him. He removed his clothes and told me to make love. On 15.8.2010 he also told me to visit him to get medicine but when I went we had sex again. It was around 2.00 p.m. On 28.8.2010 I went and visited him again. He told that we have sex again before he could give me drugs he had promised. On that day he gave me Kshs.300/=. On 25.12.2010 I was at home when my mother asked me why I was not eating properly.....She also asked me why I was eating soil. She insisted and asked me whether I was pregnant; who had done so. I told her on 26.12.2010, she told me to go to the person who had impregnated. I went to the accused’s house and met him. He took me to the church. I told him that I was pregnant.*

*“He asked me whether I was sure he was the one who was responsible and I confirmed to him so. He went to the house and brought me tea. He told me to go and came back at around 12.00 noon and he will give me Kshs.500/= to procure abortion. I stayed in the church until 12 noon. I went home and told my mother what David Mutai had told me. My [mother] that told me to go back and tell him to give me the Kshs.500/-. I went and found the accused with church elders. I greeted them and I told him I had come for Kshs.500/= He pretended he was not aware.”*

8. The complainant was subjected to a wide ranging cross-examination by the learned defence counsel. In answer, she added the following-

*“I washed blood stained clothes I was wearing on the material day. The accused had told me not to tell anybody about our relationship. I gave birth on 24.4.2011. I knew the accused is called David Mutai when he was called in court. It is my father who named my child B. R. I did not ask my father who R is, my father is called Z O. I am aware that the accused had reported that my uncle had assaulted him and had been arrested. I have never gone to hospital. I do not know whether the P3 from was filled at Hospital. I went to the accused to give me Kshs.500/= to enable me procure abortion. The accused had promised me to show me where to go and procure abortion.”*

9. PW2 testified that on 25<sup>th</sup> October 2010 she noticed that PW1 was pregnant. She was then four months pregnant. PW1 told her that she had sex with a pastor called David Mutai. PW1 was incensed. She told PW1 that she did not want to see her at home. PW1 left and returned the next day. PW1 said she was at the appellant’s house. The appellant told PW1 he would give her money to procure an abortion. PW2 accompanied PW1 to the church where they met the appellant. The appellant told her not to be not to be angry. The church elders said the matter should be referred to the Executive Officer.
10. PW2 produced a clinic card (exhibit 1) for the complainant. Upon cross-examination, she said the first immunization was done 27<sup>th</sup> December 1994. She denied there were alterations on the card number, gender or dates or that the immunization card had been tampered with. She reported the conduct of the appellant to his superiors at Chepsabi Headquarters.
11. PW4 was a clinical officer. The complainant told him she had her last monthly period on 25<sup>th</sup> July

2010. He produced her P3 form (exhibit 1). He testified further as follows-

*“I did not do palpation of the abdomen because the pregnancy was visible; she was 23 weeks by gestation. Her expected date of delivery was 2.5.2011. We sent her to the laboratory and we did a rapid pregnancy test which was positive and I recommended that she go for antenatal clinic.”*

12.PW6 was a Government Analyst. The appellant had made an application for a DNA test on the complainant's baby. The trial court allowed the application on 9<sup>th</sup> June 2011. PW6 said that David Kipkoech Mutai, (the appellant), the complainant and the child B. R. appeared for the test. He testified further as follows-

*“They were escorted to our Department by police officer by the name Augustine Kitembe from Kapsoya Police Station. He brought with him a police memo form with the details of the case and required us to determine the paternity of the child B. R. I did a DNA analysis on the 14 samples we obtained and generated DNA profiles from all the samples which are part of the report. Based on the DNA profile, I concluded that there are 99.99 + % chances that David Kipkoech Mutai is the biological father to B. R. who is also [the complainant's] son.”*

13.When the appellant was placed on his defence, he denied committing the offence. He denied meeting the complainant in the church precincts or having intercourse with her. He claimed it was all part of a co-ordinated strategy to remove him from his pastoral duties; and, to tarnish his name. In particular, he said that the DNA test and procedures were compromised. He said the following-

*“It is not correct that I met the complainant and took her to my house in the church. The complainant is not a member of our church. We have no relation neither [is she] a family friend. I would know if she comes to the church. There are members of CYA who are between the ages of 15 – 16 years. They are usually under my custody.*

*“I wanted DNA done because I want to clear my name. I volunteered to pay for the test and facilitate the same. When I made the request there was an order of the court. It was made on 21.6.2011. By that time I had money to fund the process. The test was to be done on me, the complainant and the child. We went on 5.7.2011. I struggled with the I.O until 5.7.2011. The I.O was Benard Simiyu of Kapsoya Police post. He is the one who signed for the money. I wish to produce the order as exhibit. We were 5 people for the test. There were two men who were not mentioned in the order. One of the Officer from Kapsoya Police Post by the name Kitembe, the other one was a stranger to me. I protested by way of an affidavit. By then then the results were not out. I was protesting because I became suspicious when in Nairobi while in the laboratory. I enquired why the person who took us did take blood sample.*

*“I have had a problem with the chief who is not a member of the church. He has been trying to remove me from the church since 2007. In 2007 he beat me and I reported the matter to D.C Uasin Gishu District. The matter was in the papers. Lastly 14.10.2011 the said chief came to church with armed police officers trying to evict me.”*

14.The appellant called a witness DW2. She said the door to the appellant's house is opposite the church entrance. She said that 28<sup>th</sup> August 2010 fell on a Saturday. On Saturdays there are women who clean the church from 8.00 a.m. The choir members then come in at 2.00 p.m. for practice until 4.00 p.m. Thereafter there is “praise and worship” until 6.00 p.m. She said the appellant was staying alone in the house. It had a store and an area where the pastor would host guests. On 14<sup>th</sup> October 2012 the members of the Church Council, area Chief and the police came to the church. They said they had suspended the appellant. Congregants refused to accept the new pastor.

15.Regarding the claims of vendetta and the contested DNA test, the learned trial magistrate

concluded as follows-

*“The evidence by the accused that there was a stranger who accompanied them for DNA test, his [sic] and proof [sic] that there was such a stranger. It is also important for the accused person to move the court and raise such issues to enable the prosecution respond to the same. If the same were raised, then the trial court could have dealt with the same either by ordering for a report of the DNA test or otherwise. I therefore find the accused’s complaints [are] not merited.*

*“On the issue of vendetta raised by the counsel on his submissions, it is clear that PW5 was arrested when he went to the accused’s house in the church to inquire on the defilement of the complainant. It is very clear that as at the time PW5 was arrested and charged, the issue of defilement had already arisen and I do not in my humble view see how the complainant and the uncle PW5 could have [been] driven by any vendetta to have the accused charged. Further the accused testified that there was a plot to remove him from the church as a pastor. On this part of evidence, it emerged clearly during the hearing, indeed the accused confirmed, that neither the complainant nor any of the prosecution witnesses was a member of the church and it is therefore far-fetched to allude that the prosecution witness had interest in the church.”*

16. A number of issues arise from that evidence and judgment. I will deal first with the *identification* of the appellant. The complainant and appellant were not strangers. She met him on three occasions in the church compound. The complainant would pass through the compound on her errands to buy milk. On one such occasion she was with her brother O. The appellant then invited her to visit him in his house within the church compound. The complainant was emphatic that she had unprotected sex on three occasions with the appellant. When she got pregnant, the appellant said he would give her Kshs 500 to procure an abortion. When PW2 discovered her daughter was pregnant, PW1 confessed that she had sex with the appellant. When she chased her from the house that night PW1 went to the appellant’s house. She did not return until the following day. PW2 and PW1 accosted the appellant at the church in front of church elders. She identified the appellant as the culprit.
17. The identification of the appellant was thus never in doubt. 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. I have reached the inescapable conclusion that the appellant was positively identified by PW1.
18. The next key question is whether the appellant *penetrated* the complainant. That is the crux of this appeal. The complainant was emphatic that she had sex with the appellant in his house. She said that on 5<sup>th</sup> August 2010 the appellant invited her to his house. They went together. He took her into his bedroom. They had sexual intercourse. It was consensual. He asked her to wash her bloodstained clothings. On 15<sup>th</sup> August 2010 they had sex again in the same house. At around 2.00 p.m. On 28<sup>th</sup> August 2010 she visited him again. He proposed to the complainant to have sex before he could give her some drugs he had promised. On that day he gave her Kshs 300. The complainant’s evidence was consistent. She did not waver on cross-examination. I set out earlier her answers to a withering and wide ranging cross-examination. She was clear on the dates, time and location of the offence. She got pregnant. The appellant offered her money to procure an abortion.
19. The appellant and his witness DW2 made a lot of capital on the location of the pastor’s house. They claimed that the offence could not have taken place at the pastor’s house because it was within the church compound; or, that its door faced the church entrance; or, that there were too many public activities at the church. I disagree. The complainant testified that she would pass *through* the compound on her errands to the shop. DW2 said the door to house to the pastor is opposite the church entrance. She said that on 28<sup>th</sup> August 2010 was a Saturday. On Saturdays there are women who clean the church from 8.00 a.m. The choir members then come in at 2.00 p.m. for practice until 4.00 p.m. Thereafter there is “praise and worship” until 6.00 p.m. She said the appellant was staying alone in the house. It has a store and an area where the pastor would host guests. That seems to me to be a perfect cover. The appellant was living *alone*. The sexual

- escapades were obviously *brief*: The complainant had to return to her parent's house. The appellant had a clear opportunity to defile the complainant. He was hiding in plain sight.
20. Under section 124 of the Evidence Act, the evidence of the complainant would have been sufficient. But in this case it was corroborated by concrete medical evidence. PW4, the clinical officer, testified that at the time of examination, PW1 was *twenty three weeks pregnant*. Laboratory tests confirmed the pregnancy. Her expected date of delivery was 2<sup>nd</sup> May 2011. That tallies with or lends credence to the sexual activity in August 2010.
21. There was also a smoking gun: a baby was delivered on 24<sup>th</sup> April 2011. PW6, the Government Analyst, testified that DNA profiles established that the baby was 99.99+% the *biological son* of the appellant. The appellant tried to discredit the test. It is instructive to keep in mind that it is the appellant who *applied* for and footed the bill for the tests. In my re-appraisal of the evidence, the presence of a third party in the examination room was a red herring. The report was from government records. True, PW6 did not make the report or take the samples. But he was competent under the Evidence Act to produce it in evidence. The learned trial magistrate concluded as follows-

*“The evidence by the accused that there was a stranger who accompanied them for DNA test, his [sic] and proof that there was such a stranger. It is also important for the accused person to move the court and raise such issues to enable the prosecution respond to the same. If the same were raised, then the trial court could have dealt with the same either by ordering for a report of the DNA test or otherwise. I therefore find the accused's complaints [are] not merited.*

22. PW6 was emphatic that the results presented were the samples from the appellant, complainant and the baby. Here, I concur with the trial court. It is the appellant who claimed there was a stranger in the laboratory. I would not say any burden was shifted to him. The evidence of PW6 combined with that of the clinical officer established *penetration* beyond reasonable doubt. It also sealed any loopholes. The appellant is the person who *penetrated* and *impregnated* the complainant. I do not believe the protestations by the appellant that he did not know the complainant; or that he did not penetrate the complainant. The appellant had also raised issues about the names given to the baby. It was not material to the offence. The entire defence set up was feeble and a red herring.
23. The fact that the sex was *consensual* would not be a defence to the offence of defilement. The offence of *defilement*, unlike that of *rape* takes place even when sex is consensual, so long as the complainant is a *minor*. The next key question is thus 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.
24. The complainant testified she was *seventeen* years at the time she gave evidence. She appeared in court on 24<sup>th</sup> May 2012. She was in form two. At the *time* of the *offence* she was thus *sixteen* years. Her mother (PW2) said the complainant was born on 2<sup>nd</sup> October 1994. PW2 produced the contested clinic or immunization card (exhibit 2). The appellant contends it is a forgery or tampered with. PW2 denied the claims. I have studied the original card closely. It is on the record of exhibits. There is an *obvious* interference with the details of the child's name, the date of birth and the date of the first immunization. It is not clear who did it but it destroys the credibility of the document. I am prepared to *disregard* that evidence.
25. That does *not* mean age was *not* proved. First documentary evidence is just but one of the ways of proving a fact in issue. Age in this case was proved in three other ways: first, by the evidence of the complainant who testified she was *seventeen* at the time she gave evidence. That means she was *sixteen* at the time of the offence; secondly, by her mother PW2 who was emphatic that the complainant was born on 2<sup>nd</sup> October 1994; and, thirdly by the medical examination and P3 form (exhibit 1). The P3 stated the age of the complainant to be *sixteen years and two months* at the

time of the examination. In section C of the report it stated the date of birth as 2<sup>nd</sup> October 1994 and that the age of the complainant was sixteen years and two months. I have thus entertained *no* doubt on the *true* age of the complainant at the *date* of the offence. The cases cited by learned counsel for the appellant of Weldon Rono v Republic, High Court, Eldoret, Criminal Appeal 45 of 2012 (unreported) and Thomas Dzombo v Republic, High Court, Mombasa, Criminal Appeal 167 of 2009 [2010] eKLR are not exactly on point and can accordingly be distinguished.

26. I am fortified 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.”*

27. There is then the question whether the charge sheet was defective. The appellant faced three counts of defilement on the dates particularized earlier. The charge sheet correctly indicated the names of the complainant and the appellant, the dates of the offences and the particulars. It set out the penal provisions under the Sexual Offences Act. Each act of penetration on the diverse dates constituted an offence. The trial court correctly found that on all the three occasions, the appellant penetrated the complainant. But since it was a series of the same offence, the learned trial magistrate ordered that the sentences run *concurrently*. I am then unable to find that the charge sheet was defective or that the appellant was prejudiced. See Martin Wanyonyi Nyongesa v Republic, Eldoret, Criminal Appeal 661 of 2010 (unreported).

28. Finally, the appellant said he was framed up due to a vendetta. There was no bad blood between PW1, PW2 and the appellant prior to the offence. They were not relatives. They were not members of his church. It would be far-fetched to say they were part of a scheme to remove the appellant from his pastoral duties. The mother of the complainant was incensed about the defilement of her daughter in the church precincts. She confronted the appellant in front of church elders. I do not have an answer why she complained to the church hierarchy.

29. The relevant evidence on the vendetta is this: PW5, the complainant's uncle, engaged in a scuffle or fight at the pastor's house on 28<sup>th</sup> December 2010. He had gone there with his wife and the complainant's mother to follow up on the complaint of defilement. He was charged and convicted for the assault. What is material is that by the time of the altercation, the complaint on defilement had *already* been made. There may as well have been a scheme to remove the appellant from his position; but I am unable to find the connection with PW1 or PW2. The conflicts between the appellant and area Chief or provincial administration were irrelevant to the charge of defilement facing the appellant. By defiling the complainant in the church compound, the appellant may have unwittingly played into the hands of his detractors. The alleged vendetta neither created *doubt* about the defilement nor offered any plausible *defence* to the conduct of the appellant.

30. Although the appellant contended that the trial court was partial, no such complaint was ever raised before the learned trial magistrate. I am unable to find from the record that the court was *unfair* to the appellant. The appellant had been given the witness statements; he was granted a fair opportunity to cross-examine the prosecution witnesses; he called a witness in his defence; his application for a DNA examination was considered and allowed by the court; and, his counsel made extensive written submissions. It is not true that his defence was not considered: the trial court dealt with the discrepancies in the documentary evidence or the DNA report; the court dealt with the question of the alleged vendetta and so forth. As notice of an *alibi* had not been given, it was open to the trial court to weigh it against other evidence. See Wang'ombe v Republic [1976-80] KLR 1683, Karanja v Republic [1983] KLR 501. The truth is that the lower court found the defence was hopeless. I have myself found on the totality of the evidence that the entire defence is

feeble and a red herring.

31. In the end I have reached the conclusion that the prosecution proved all the elements of the offence beyond reasonable doubt. It follows as a corollary that the conviction was *safe*. 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.

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

**DATED, SIGNED and DELIVERED** at **ELDORET** this 29<sup>th</sup> day of October 2015.

**GEORGE KANYI KIMONDO**

**JUDGE**

***Ruling read in open court in the presence of***

The appellant (in person).

Mrs. Mwanguni for Mr. Mwetich for the appellant.

Ms. R. N. Karanja for the State.

Mr. J. Kemboi, Court Clerk.