REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 64 OF 2011

D K R.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 4671 of 2010 Republic vs D R in the Resident Magistrates' Court at Eldoret by I. Maisiba, Resident Magistrate, dated 5th April 2011)

JUDGMENT

1. The appellant was convicted for the offence of defilement of a child aged nine years contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to life imprisonment.

2. The particulars of the offence were as follows-

> *"On the 10th day of July 2010, in Uasin Gishu District of the Rift Valley Province, did intentionally and unlawfully cause his genital organ (penis) to penetrate the genital organ (vagina) of [name withheld], a girl aged 9 years."*

3. The appellant has appealed against his conviction and sentence. The original petition of appeal was filed on 12th November 2011. On 15th July 2014, the Court granted the appellant leave under section 350 of the Criminal Procedure Code to amend the grounds of appeal.

4. The amended petition of appeal raises six grounds of appeal. First, that there was insufficient evidence to prove penetration. In particular, the appellant questioned the absence of bloodstains on the minor. Secondly, that there was no medical evidence connecting the appellant to the offence; thirdly, that the evidence at the trial was contradictory or insufficient; fourthly, that the charge sheet was defective; fifthly, that the trial court did not adhere to the provisions of sections 85 and 197 of the Criminal Procedure Code; and lastly, that the charge was not proved beyond reasonable doubt.

5. From the handwritten submissions of the appellant, the following further arguments were made. The charge sheet is impugned for charging the appellant under both sections 8 (1) and 8 (2) of the Act. The appellant also contended that failure to call the investigating officer was fatal. He also submitted that failure to produce the complainant's birth certificate (which had been marked for identification) invalidated the charge. The appellant highlighted contradictions between the evidence of PW1 and PW3.

Lastly, the appellant submitted that the prosecution was led by a police officer below the rank provided by the law.

6. The appeal is contested by the State. The learned State Counsel submitted that there was clear evidence linking the appellant to the offence which was corroborated by medical evidence. The State submitted that the evidence from the six witnesses was consistent; and, that the appellant was positively identified and placed squarely at the *locus in quo*. The State 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 section 382 of the Criminal Procedure Code.

7. 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).

8. The appellant contends that the age of the complainant was not established. 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.

9. PW3, the mother of the complainant, testified that the complainant was nine years old. The record of the trial court states as follows*: "my child is 9 years old. This is her birth certificate. MFI 1"*. The birth certificate was not formally produced as an exhibit. It is the folly of the prosecution *marking* documents for identification for *production* at the end of the trial by an investigating officer. That is why the appellant contends that failure to call the officer was fatal. I do not think so. The failure to produce the exhibit did not mean the age of the child was not established. For starters, the birth certificate was before the court; secondly, the mother was emphatic her child was nine; and thirdly, the P3 form (exhibit 2) produced by the doctor (PW6) recorded the age as nine. I find no merit in that ground. I am satisfied that in this case the age of the minor was clearly established at the trial by both documentary and oral evidence to be nine years.

10. I will now turn to the identification of the appellant. PW1 knew the appellant. He is her in-law. On 10th July 2010 at about 11.00 a.m. she was sent by P, PW4, to fetch a basin from the house of the appellant. PW4 confirmed she sent the complainant to get the basin. The complainant testified that the appellant pulled her into a store, locked it and defiled her. She testified that he told her not to scream or he would kill her. When the complainant left the store, she narrated the incident to C, PW2, and to her mother, PW3. PW2 confirmed that the complainant met her on the road at about 11.00 am on the material day.

11. From that evidence, I have reached the conclusion that the appellant was positively identified as the person who defiled the complainant. The appellant was in the store in his compound. The appellant was thus placed squarely at the *locus in quo*. From the time lines in that evidence, he had a clear *opportunity* to defile the complainant. In the circumstances of this case, it would also amount to further corroboration. See *Opo v Republic* [1976-80] 1 KLR 1669. The appellant's cross-examination of PW1, PW2, PW3 and PW4 did not shake their evidence.

12. I have then considered the defence proffered by the appellant at his trial. He stated as follows:

> *"I stay at M village. I am a businessman. I do not know [complainant]. On 9/10/2010 I was at Nandi District at the house of Samson Sambu. On 24/8/2010 I was arrested from there on*

allegations of defilement. My area chief led the arresting officers to the home of Sambu. I was taken to Kobiyet. I was transferred to Eldoret Police Station and charged. I deny the charge."

13. The appellant was in a sense raising a defence of 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. From what I have stated earlier, the appellant was an in-law of the complainant. The complainant knew him. He was positively identified by the complainant and placed at the scene of the crime. He had an opportunity to commit the offence. There is also another telling matter: the appellant went into hiding after the incident. On the night of 23rd and 24th August 2010 he was arrested at 2.00 a.m. sleeping in a maize store. The totality of that evidence points strongly to the culpability of the appellant.

14. The burden of proof, subject to section 111 of the Evidence Act, rested entirely with the prosecution. I agree with the learned trial Magistrate that the defence put forward was feeble. When juxtaposed against the prosecution's evidence, the defence was completely unbelievable.

15. PW3 took the complainant to Mobet Dispensary. They were referred to Moi Teaching and Referral Hospital. She had a P3 form that was filled out by PW6. The doctor testified that the complainant had reddish genitalia, a perinium tear; her hymen was torn; and, there was a whitish discharge from her private parts. The appellant has taken issue with the doctor's view that the complainant had no *physical injuries*. The appellant's view is that if the complainant was defiled, there should have been bloodstains on her clothes or she should have had problems walking. The appellant also submitted that the fact that only pain killers were administered shows there were no such injuries. I do not agree. The medical evidence clearly established penetration. That is the key element of the charge; not the nature of medication or form of treatment that was given to the complainant.

16. The P3 form stated that the age of injuries was six hours. The examination revealed the following-

"Perineal erythema, abrasions at perineum, laceration at the posterior fornix, hymen tear at position 7 o'clock, whitish discharge noted."

17. The appellant was also examined. His DTC was negative, urinalysis normal and VDRL non-reactive. That does *not* mean he did not *penetrate* the complainant. The injuries to the minor's private parts were *consistent* with penetration. Penetration is defined in section 2 of the Sexual Offences Act as follows-

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

18. The evidence of PW1 was thus corroborated by the doctor (PW6) and the P3 examination report. The fact that there were no bloodstains on the minor's clothes, or she only received analgesics, or she did not have problems walking does *not* negate the *penetration*. I thus find that all the key ingredients of the offence were proved. The appellant's submission before this Court that the prosecution's evidence was *inconsistent* or that it did not *link* him to the offence is without foundation. All the evidence was *consistent* with his guilt. There was solid medical evidence confirming the defilement.

19. The language of the trial court was indicated in the Coram as English with Kiswahili translation. The appellant concedes he followed the proceedings which were translated into Kiswahili. The record shows he participated fully in the trial and cross examined all the witnesses. What he takes up issues with is that the trial court did not record the language of every witness. There was no departure in my view from the requirements of section 197(1) or 198 of the Criminal Procedure Code.

20. The appellant's reading of section 85(1) of the Criminal Procedure Code is also mistaken. Under the 2007 amendments to that section, so long as Corporal Adalo was gazetted as a prosecutor, he did not require to have the rank of an assistant inspector of police or above to prosecute a charge of defilement. That ground lacks merit.

21. The charge was not defective either. The appellant was charged with defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act, No. 3 of 2006. The appellant contends that he should not have been charged under both sections. Section 8 (1) defines the offence of defilement: *a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.* Section 8(2) then provides that if the child is below eleven years, the sentence shall be for life. There is thus no duplicity in the charge. The age of the minor in this case was established to be nine years. The appellant was properly charged under section 8(1) as read with section 8 (2) of the Sexual Offences Act. That aspect of the appeal is without any merit.

22. It is true that the investigating officer was not called to the stand. I do not think it weakened the case for the prosecution. The evidence from the six witnesses proved all the primary ingredients of the charge and connected the appellant to the offence. There is no condition in a criminal trial that *all* or a certain *number* of witnesses be proffered to prove the charge. See section 143 of the Evidence Act, *Bernard Kiprotich Kamama v Republic*, High Court, Eldoret, Criminal Appeal 123 of 2010 [2013] eKLR.

23. From the totality of the evidence, I find that all the *ingredients* of the offence of defilement were proved beyond reasonable doubt. I have reached the same conclusion as the trial court that the evidence of defilement was clear-cut and pointed *only* to the accused. The evidence at the trial was *inconsistent* with the *innocence* of the appellant.

24. In the end, I uphold the conviction by the learned trial Magistrate. 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 *nine years*. This is a grave offence perpetrated against a child. The complainant is a vulnerable person as defined in section 2 of the Act. She will carry the scars for life. I am thus unable to disturb the conviction and sentence. For all those reasons, the entire appeal is dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 16th day of September 2014

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

The appellant.

Mr. J. W. Mulati for the State.

Mr. Kemboi, Court clerk.