



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO.79 OF 2012

SAMUEL CHELELGO..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 638 of 2010 Republic vs Samuel Chelelgo in the Senior Resident Magistrates' Court at Kabarnet by H. M. Nyaga, Senior Principal Magistrate dated 27th April 2012)

JUDGMENT

1. The appellant was convicted on a charge of defilement of a girl aged 14 years contrary to sections 8(1) and 8(2) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to 20 years imprisonment. The appellant has appealed against his conviction and sentence.
2. The primary grounds urged in the amended petition of appeal can be condensed into five: first, that the age of the complainant was not established; secondly, that assuming that the age of the minor was 14, the sentence handed down was irregular; thirdly, that the court dismissed off-hand the defence by the appellant; fourthly, that there was no evidence implicating the appellant; and, fifthly, that the learned trial Magistrate failed to explain to the appellant his right of appeal. In the end, the appellant submitted that the offence was not proved beyond reasonable doubt.
3. At the hearing of the appeal, learned State Counsel, Mr. Mutuku, conceded the appeal. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw my own conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses. See *Njoroge v Republic* [1987] KLR 99, *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).
4. The learned State Counsel rightly conceded that there was *variance* between the evidence in court and the particulars in the charge sheet. The particulars state that the minor was 14 years. Accordingly, the charge should have been led under section 8(3) of the Act. Instead, the appellant was charged under section 8(2) of the Act. The latter section deals with minors of 11 years and below and attracts a *life* sentence. The appellant was sentenced to 20 years imprisonment provided by section 8(3). Critical witnesses who would have verified the age of the complainant, such as her parents were not called. That variance between the charge and evidence is fatal.
5. 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 means the difference between a life sentence and a few years in jail.

6. There is no room for assumptions in a criminal trial. The charge sheet and the P3 form put the complainant's age at 14. On page 35 of the record, the court said she could not have been *more* than 15 years. There was clear variance between the charge and evidence. The age of the complainant was thus not ascertained. The benefit of doubt must go to the appellant. In addition, the appellant was convicted on a provision of law he was not charged with. The trial court did not also explain to the appellant his right of appeal. Those grounds of appeal have merit and succeed.
7. The particulars of the charge stated that on 30th June 2010, at Marigat District, the appellant defiled the complainant. At the commencement of the trial, the court did not conduct a *voire dire* examination. The learned trial Magistrate stated that the complainant was not a child of tender years. The complainant proceeded to give *sworn* testimony. There is no record to explain the conclusion by the learned Magistrate that the minor was *not* a child of tender years *or* that she comprehended the nature of an oath. I am alive to the fact that there is no statutory definition of the phrase; *a child of tender years*. It is thus always advisable to be cautious. There is nothing on the record to show the minor understood the need to be truthful in her evidence. See Republic v Peter KirigaKiune Criminal appeal 77 of 1982 (unreported), Johnson Muiruri v Republic [1983] KLR 445.
8. There are also gaps in the evidence. The complainant was not examined until 10 days later. A report to the police was not made until 9 days of the incident. The results of the examination were not reliable in the circumstances. PW5, the clinical officer recorded in the P3 form dated 10th July 2010 that there was penetrative sexual intercourse. It was 10 days from the date of the defilement. The complainant had a smelly discharge. He then testified as follows: "*there was a ruptured hymen; I cannot pinpoint the accused as the perpetrator of the offence*". The defilement was witnessed by two other minors PW2 and PW3. They gave sworn testimony. There was thus no clear cut evidence of penetration *linking* the appellant to the offence. See KainguKasomo v Republic, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).
9. The appellant denied committing the offence. The learned trial magistrate found it to be an empty denial. The burden of proof, subject to section 111 of the Evidence Act, rests with the prosecution throughout. The appellant was entitled, for example, to remain mute. The State thus rightly conceded this appeal.
10. For all of the above reasons, I find that vital *ingredients* of the offence of defilement were not proved beyond reasonable doubt. It follows, as a corollary, that the *conviction* of the appellant on the charge of defilement was *unsafe*. I have already stated that the sentence was highly irregular. I thus allow the appeal. I hereby quash the conviction and sentence. The appellant shall be set free forthwith unless held for some other lawful cause.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 25th day of October 2013

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr.....for the appellant.

Mr.....for the State.

Mr. P. Ekitela, Court Clerk.