



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 177 OF 2011

FELIX KOSGEI KANDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1224 of 2010 Republic vs Felix Kosgei Kanda in the Resident Magistrate’s Court at Iten by B. N. Mosiria, Senior Resident Magistrate on 18th August 2011)

JUDGMENT

1. The appellant was convicted for the offence of defilement of a girl aged twelve contrary to the Sexual Offences Act, No 3 of 2006. He was sentenced to twenty years imprisonment. The appellant has appealed against his conviction and sentence.
2. There are five grounds in the petition of appeal dated 1st September 2011. Those grounds can be compressed into four. First, that the age of the minor was not established; secondly, that there were discrepancies in the date and time of the offence; thirdly, that the minor’s evidence was not corroborated; and finally, that the evidence was insufficient, inconclusive and contradictory. Accordingly, the appellant contended that the charge was not proved beyond reasonable doubt.
3. At the hearing of the appeal, learned counsel for the appellant submitted that the age of the minor was unclear. He cited the following examples: the charge sheet stated the minor was twelve years; at page 5 of the record, the court stated the minor seemed to be more “mature” than twelve; PW4 put the minor’s age at five; and, lastly, PW2, the mother of the minor said the girl was twelve years. The appellant contends that the court should have called for an age assessment report.
4. Learned counsel submitted that there were inconsistencies in the names and details of the complainant and her mother. The P3 form states the name of the complainant is M C. The P3 states that the minor was sexually active. In the charge sheet, the minor is described as M J. The same name appears in her clinic card, exhibit 2. But in that document, her mother’s name is stated as A K. In the court record at page 10 of the record of appeal, the mother’s name is given as A K. It was submitted that those are not one and same persons.
5. Regarding the dates, the charge sheet stated the offence occurred on 11th November 2010. The evidence of PW3, J C, puts the date at 11th October 2010. It was submitted that the results of the medical examination in the P3 on 11th November 2010 were thus not reliable and could not corroborate the evidence of the complainant. The appellant contended that the evidence of PW2 and the complainant was contradictory. Due to those gaps, counsel submitted that the conviction of the appellant was unsafe.
6. The appeal is contested by the State. 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 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.
7. Age is always material in offences of this nature. See John Wagner vs Republic [2010]eKLR, Macharia Kangi v Republic Nyeri, Court of Appeal, criminal appeal 346 of 2006 (unreported). I have studied the P3 form dated 11th November 2010. It places the age of the minor at 12 years. The charge sheet also indicates the age at twelve. The clinic card, exhibit 2, gives the minor's date of birth as 18th April 1998. At the time of the offence, she was 12 years old or thereabouts. Her mother, PW2 was clear in her evidence on 21st March 2011 that her daughter would be thirteen the following month. That would make her daughter about 12 years at the time of the offence in November 2010. The mother to PW1 was working at a hotel. She would know the age of her daughter. At the time she testified on 10th December 2010, the complainant was then well above 12 years.
 8. But what the court said at page 5 of the record is material. It stated as follows:

“The witness is twelve years old but does not understand nature of oath [sic] and although she looks mature than [sic] twelve years she does not understand the nature of oath. To give unsworn evidence.”
 9. It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case that raise material doubts must be interpreted in favour of the accused. The learned trial Magistrate formed the clear impression that the girl looked *“mature [sic] than twelve years”*. Although the P3 form indicated her age as 12, PW4 testified that the age of the child was *five* years. That is material because the child she examined was sexually *active*. I will return to that matter shortly.
 10. The complainant testified she was in standard four at [particulars withheld] Primary School, a fairly low level for a girl of her age. It is of course possible that she started schooling late. When considered against the discrepancies of names in the documents indicating her age, I am left in some doubt that her *true* age was established at the trial. From the precedents I have cited, age is material to a charge under the Sexual Offences Act. One reason is that section 8 provides for graduated *minimum* sentences. The *age* of the complainant may mean the difference between a life sentence and a few years in jail. If for example the complainant here was older than 12, or outside the 12 to 15 age bracket, the validity of the sentence may be called into question. In a synopsis, the complainant may as well have been 12. She could also have been much older from the trial court's *own* observation. The benefit of doubt must go to the appellant. That ground of appeal has merit and succeeds.
 11. From the verbatim record of the court that I set out earlier, it is also clear that the court did *not* conduct a proper *voire dire* examination. The court formed an impression that the girl aged twelve, though mature, did not comprehend the nature of an oath. The complainant proceeded to give unsworn evidence. The true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth. In sum, the court would be trying to establish whether the child possesses sufficient intelligence to understand the duty of speaking truthfully. There is no record of any questions put by the court to the minor or her answers to explain the conclusion by the learned Magistrate that the minor did not comprehend the nature of an oath. There is *nothing* on the record to show the minor understood the need to be truthful in her evidence. See Republic v Peter Kiriga Kiune Criminal appeal 77 of 1982 (unreported), Johnson Muiruri v Republic [1983] KLR 445.
 12. Ideally, the questions by the court and answers in the *voire dire* examination should be placed on record. That way, the appellate court does not have to assume the questions or answers in the examination. It enables the superior court to gauge the basis of the conclusions reached by the trial court. See Johnson Muiruri v Republic [1983] KLR 445. That failure of mandatory procedure casts a long shadow of doubt on the minor's evidence.
 13. I will now turn to the evidence. This case is unique in many ways. The appellant was living in the complainant's house. It was a separate room from that of the complainant across a corridor or verandah. He was caught red handed in the complainant's bedroom. The complainant said she was asleep in her bed. The house has two rooms. She said

“I do not know how accused got into the house then my mother woke me up and asked why I

had slept with Kosgei [the appellant] me [sic] I said he came we slept. Kosgei was in that house then [sic] where I was sleeping the accused did bad manners to me [sic] he did his man organ [sic] and put it in my private parts. It was my first time.....”

14. The complainant’s evidence was that the appellant entered her room uninvited and defiled her. She said she had slept without any clothes on. The room was unlocked and had a connecting door. At 3.00 a.m on 11th November 2010, the complainant’s mother was woken up by a noise – she said of a broken plate - in the adjoining room where her daughter was sleeping. On checking with a torch, she found the appellant and complainant in bed. She called J C (PW3) to witness. She locked the appellant and complainant in the room and called the police. The appellant was arrested and taken to Tot Police Station. Those facts were confirmed at the trial by the complainant and J C. PW2 then took the daughter to hospital. She said the daughter had sperms on her thigh and her under garments were wet.
15. There are material discrepancies in the evidence. The complainant said that the appellant came into her room that night. She said she was defiled and that that was the first sexual activity in her life. She was less than candid. While the mother said she had a torch, the complainant said she was holding a lamp. The mother testified that she caught the appellant in the complainant’s bed. The complainant said that when she was woken up by her mother, the accused was standing next to her bed with his trousers on.
16. The medical evidence of PW4, the clinical officer, was clear that the sex was consensual. She also established that the complainant was sexually active. That of course does *not* invalidate the charge. The complainant was still a minor and incapable in *law* of giving the consent. If all other relevant ingredients of the offence were present, the appellant would still be liable for defilement. The offence of defilement, unlike that of rape, may occur even when the act is consensual. There was no evidence consistent with non-consensual sex. The clinical officer also made the following remarks on the P3 form:

“There was penetration [and] ejaculation but is more of a love affair caught [sic] by the mother.”

17. I can imagine the anger of a mother discovering that her teenage daughter was sleeping with the cook or house boy. The appellant was employed to make *chapatis* at her hotel. PW3 said the material date was 11th October 2010. That was clearly erroneous. The correct date of the offence was 11th November 2010. It was confirmed by the complainant, by PW2, PW4, PW5 and PW6. But it remains a minor discrepancy in the evidence. I think there are serious variations and contradictions that cast doubt on the entire prosecution’s case. Key among them was the fact that the complainant was lying about her sexual history and the relationship with the appellant. See *Benard Ngaruiya v Republic* Nairobi High Court Criminal Appeal 238 of 2007 (unreported).
18. I will return to the evidence of PW4, Esther Cheptoo. Like I have said, she was a clinical officer at Tot Sub-District Hospital. She produced the two P3 forms for the appellant and complainant. The one for the complainant showed she had been sexually active. She said there was a love affair. I do not know the basis of that statement. What is clear from her evidence is that the complainant had engaged in consensual sex. She found spermatozoa in the complainant’s vagina. There was no evidence of forced entry or venereal disease. There was no infection. That evidence is consistent with penetration. I have already stated that the complainant was over 12 years. She could not give consent for sex.
19. 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”.

20. The appellant was also tested. The medical examination did not reveal any injuries or venereal disease. The clinical officer formed the impression that the sex was consensual. But like I have observed, the complainant could not *legally* give consent. What is material is that there was no clear medical offence *connecting* the appellant with the offence. Considering that the appellant was less than truthful about the events of the material night, serious doubt of criminal liability is

cast.

21. The accused gave an unsworn statement. He said he had worked for the complainant's mother for eight months. He used to make *chapatis* at her hotel. He said that on 9th November 2010, he went to ask her for some money. She told him to wait until 11th November 2011. He confirmed he was woken up by the complainant's mother at 3.00am on 11th November 2010. He lit a lamp. He used to make the *chapatis* at that time. At 4.00am he was arrested. He denied the offence.
22. The learned trial Magistrate found that the appellant did not deny he was in the complainant's room. The learned Magistrate said that the appellant was clearly identified by PW1, PW2, PW3 and the arresting officers. There was clear evidence of penetration. I however disagree with the trial court that *all* the ingredients of the offence of defilement were proved *beyond* reasonable doubt. The defence put forward by the appellant may have been feeble in the circumstances. But the burden of proving the charge never shifted to him. I have already found that the complainant was not a truthful witness. The appellant should not then have been convicted on the false testimony of the complainant and in the absence of sound corroborating evidence.
23. For all of the above reasons, I find that the conviction of the appellant on the charge of defilement was *unsafe*. I 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 24th 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.