



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 123 OF 2010

BENARD KIPROTICH KAMAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 234 of 2009 Republic vs Benard Kiprotich Kamama in the Resident Magistrate's Court at Iten by B. N. Mosiria, Senior Resident Magistrate on 29th July 2010)

JUDGMENT

1. The appellant was convicted for the offence of defilement of a girl aged thirteen years contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to 40 years imprisonment. The appellant has appealed against his conviction and sentence. There is a detailed petition of appeal dated 9th August 2010 raising 41 grounds of appeal. The principal grounds urged can be compressed into ten. First, that the charge was not proved beyond reasonable doubt; secondly, that the evidence of the minor was not properly taken or corroborated; thirdly, that the age of the minor was not established; fourthly, that there was no clear medical evidence connecting the appellant to the offence; fifth, that the charge arose out of a vendetta over a land dispute; six, that the police investigations were incomplete or shoddy; seven, that the charge was defective; eight, that evidence of character prejudicial to the accused was introduced; nine, that the appellant raised a valid *alibi*; and, lastly, that the sentence handed down was manifestly excessive.
2. The offence occurred on 2nd April 2009 at a place called [particulars withheld]. The appellant's case is that on that date he was at his farm at Tot mending a fence. He said he never saw the complainant on the road. Later, he travelled to his home in [particulars withheld] Trans Nzoia District. He claimed to have been with his neighbor, DW2, R C. The accused was arrested 14 days later [particulars withheld] Trading Centre by the Chief of Marakwet District. That was on 13th April 2009. The appellant submitted that the motive for his arrest was a land dispute between his family and that of the complainant. The arresting Chief got information on the offence from a village elder. The appellant's case is that the elder comes from a different village. The appellant contended that critical witnesses were not called. He gave the example of administration police officers who arrested him in the company of the chief. He wondered why he was not arrested at [particulars withheld] in the first place. In sum, the appellant cast aspersions on the police investigations.
3. The appellant submitted that he was prejudiced by the evidence of PW3, the Chief, that the appellant was a cattle rustler. The appellant's case is that that evidence of character was introduced improperly and prejudiced him. The appellant submitted that critical sections of the two P3 forms were not filled out by the clinical officer. Accordingly, the conclusions on the parts

- numbered 3 and 5 on the forms were not reliable. Since the appellant was not examined until the 18th of April 2009, he contended that the results in his P3 form were unreliable. He also stated that no laboratory tests were taken. In his opinion, there was no connection between him and the offence. He attacked the veracity of the evidence of PW2 and PW5. The appellant's position was that the charge sheet was defective due to discrepancies in the place of the offence. In sum, the appellant submitted that there were obvious gaps in the trial that made his conviction unsafe.
4. The appellant stated that the plea was not taken properly and that the language of the court was not specified. Regarding the age of the minor, the appellant submitted that no evidence was led to confirm her age of thirteen. Lastly, the appellant submitted that the trial court placed unnecessary weight on the complainant's evidence. He contended that he was convicted without corroborating evidence.
 5. 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, *KariukiKaranja v Republic* [1986] KLR 190.
 6. The particulars of the charge sheet in count 1 stated that the offence was committed at *Marakwet District, Rift Valley Province*". The details of the alternative charge disclosed the same location of the offence. Learned counsel for the appellant submitted that no evidence was led to show the offence took place at [particulars withheld] . I have looked at the testimony of the complainant. She said she goes to school at [particulars withheld] school near *Marakwet*. In cross-examination she said she met the appellant on the material day at "[particulars withheld] but there is no centre there". She was taken to hospital at *Tot*. From the evidence of PW3, the Chief, I discern that *Tot* is within *Marakwet District*. I have then formed the impression that the charge sheet was correct in the particulars of the *locus in quo*. The charge sheet contains the details of the offence, the penal section, the particulars, the date of offence and the names of the appellant and complainant. I have not seen anything capable of impeaching the charge sheet.
 7. The appellant's submission that the plea was not properly taken is not true. The charge was read out to the accused. The record of appeal at page 17 shows the language of the court was English with Kiswahili interpretation. Failure to state the language would have been fatal. See *Lusiti v Republic* [1976-80] 1 KLR 585, *Desai v Republic* [1974] EA 416, *Adan v Republic* [1973] EA 445, *Feisal Adan v Republic*, Mombasa High Court criminal appeal 77 of 2008 [2008]eKLR. I thus disagree with the appellant that the language of the court was not certain or clear. PW1(the complainant), PW3, PW4 and PW5 all testified in Kiswahili. PW2 testified in *Marakwet* with an interpreter present. The record at page 31 shows that the appellant testified in Kiswahili. When the charges were read to the appellant, he pleaded not guilty. The court entered a plea of not guilty. The appellant participated actively at the trial. He cross-examined all the witnesses proffered by the prosecution. It is thus a little odd for the appellant to contend now that he was prejudiced by the language used at the trial. It is a red herring.
 8. I will now turn to the procedure and veracity of the evidence. The complainant was a minor. At page 18 of the record of appeal, the learned trial Magistrate conducted a detailed *voire dire* examination. 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. See *Republic v Peter KirigaKiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445. The learned trial Magistrate found that the girl of thirteen understood the nature of an oath. She proceeded to give sworn testimony.
 9. The complainant testified that on 2nd April 2009 at noon she was on her way to her sister's place when the accused confronted her with a *panga*. He said he would cut her. He forced the complainant to follow him to his house 100 metres away. He opened his house and forced her inside. He again threatened to cut her. He then defiled her. She reported the matter to her father. Her father made a report to the area chief and to the police at *Tot*. He testified at the trial as PW2. His evidence was supported by PW3, the Chief, and PW4. The complainant was taken to hospital at *Tot* on 5th April 2009. Her evidence was firm even under cross-examination. She clearly identified her attacker. It was in broad daylight. The learned trial Magistrate in her judgment found that the complainant was "sincere, coherent and credible". I find no reason to depart from her findings.

10. The appellant said he was embroiled in a land dispute with the family of the complainant. That was in his unsworn evidence. He did not elaborate or give details of the dispute or the particulars of the land in question. He did not for example raise it in cross-examination of PW3, the area chief. The trial court found that even the appellant's witness, DW2, said he was unaware of any land dispute. It was a fact especially within the knowledge of the appellant. I have formed the impression that it is possible but highly improbable that such a dispute existed. Certainly, the appellant failed to show that he was being framed up on criminal charges to cover up the land dispute. I have not seen any evidence to show that the complainant was lying. She testified in cross-examination that she did not even know the appellant before the material day.
11. The complainant in the course of the *voire dire* examination stated she was 13 years. The appellant did not contest that fact in cross-examination. The complainant was a student at [particulars withheld] Primary School. It is consistent with a child of that age. The P3 form produced at the trial placed her age at thirteen. It is thus not true that the age of the child was not established at the trial.
12. The appellant attacked the medical evidence. There are two P3 forms. They were both made by Chepkiyeng Musa, PW6, a clinical officer at Tot District Hospital. They were both made several days after the incident. That may partly explain the blank sections in the forms. The evidence thus needed to be treated with caution. Nevertheless, the P3 for the complainant established lacerations on her vaginal wall and a bacterial infection. She had bruises on the abdomen and the hands. The subsequent examination on the appellant revealed he was suffering from a *similar* venereal disease with that of the complainant. The clinical officer testified that there was penetration. He could not ascertain who had infected the other with the venereal disease. Although the trial court relied on the proviso to section 124 of the Evidence Act, I am of the view that there was sufficient corroborating evidence from PW6. But in any event, the sworn evidence of the complainant was solid enough to ground a safe conviction.
13. I have also taken into consideration that the appellant disappeared from the area of the crime for two weeks. That is clear from the evidence of PW3, the area Chief. On 17th April 2009, in the course of dealing with a separate incident at Tot Centre, he found the appellant there. The conduct of disappearing from the area of the crime was inconsistent with the innocence of the appellant. The Chief testified that the appellant was a cattle rustler. On cross-examination, he elaborated on past conduct of the appellant. That evidence was irrelevant and should not have been allowed. See section 57 of the Evidence Act. What is critical is that the lower court convicted the appellant purely on the basis of evidence linking him to the charge of defilement. There was no adverse comment by the court on past conduct of the appellant. I will however revisit the matter when I deal with the impugned sentence.
14. The appellant had set up an *alibi* that he was away at his farm fencing his land on the material day. He then left for his home in Cherangany. 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. I have studied the judgment in the lower court. The learned trial Magistrate considered the *alibi*. At page 37 of the record of appeal, she reasoned that the accused had not given a full account of his movements on that day. She found that it was possible that the accused left the farm, defiled the complainant and took off. I agree that the appellant had an opportunity on 2nd April 2009 to commit the offence. Fundamentally, the learned trial Magistrate found the evidence of the complainant to be truthful and partly corroborated by PW6 as well as the medical report. The onus of proof of the offence lay with the prosecution throughout. But faced with the evidence of the prosecution, the appellant put forward a feeble defence. There was no proven grudge or land dispute between him and the parents of the child. There was no plausible reason for the child of thirteen years to frame him up.
15. Ideally, all relevant witnesses and evidence should be presented at the trial. But there is no requirement that *all* or a certain *number* of witnesses must be proffered to prove the charge. See section 143 of the Evidence Act. The protestations by the appellant that administration police officers or the village elder should have testified lacks merit. The appellant did not apply to the lower court to have such witnesses called. From the witnesses presented and their evidence, I am unable to say the investigations by the police were incomplete or shoddy as urged by the appellant.

16. The injuries to the minor's private parts, the traces of spermatozoa and the bacterial discharge 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”.

17. In the end, I agree with the findings of the learned trial Magistrate that the offence of defilement was proved beyond reasonable doubt. The defence put forward by the appellant at the trial was *inconsistent* with his plea of innocence. I find that on the totality of the evidence, all the ingredients of the offence of defilement were proved.

18. Under section 8(3) of the Sexual Offences Act, defilement of a child between the ages of 12 and 15 years attracts imprisonment for a term *not less than 20 years*. This is a grave offence perpetrated against a defenceless child. She is a vulnerable person as defined in section 2 of the Act. She will carry the scars for life. The trial court took into account the mitigation of the appellant. That is clear at page 39 of the record of appeal. The appellant was using an offensive and dangerous weapon, a *panga*. The court took that and the age of the minor into consideration.

19. The trial court may have been unfairly swayed by the evidence of past criminal conduct of the appellant. I have stated that the evidence led by PW3 that the appellant was a *cattle rustler* was irrelevant. There was no evidence of a prior conviction. The prosecution confirmed that the appellant was a first offender. Considering the age of the appellant and all the circumstances, I find that the sentence was excessive. I will reduce it to the minimum sentence provided by the law. In the end I uphold the conviction. The appeal on conviction is accordingly dismissed. I set aside the original sentence imposed by the learned trial Magistrate and substitute it with a sentence of 20 years imprisonment.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 22nd 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. Eketela, Court Clerk.