REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Criminal Appeal No. 142 Of 2011

David Khisa……..…….……Appellant

Versus

Republic…….…..….Respondent

(*Being an appeal from the original conviction and sentence in Criminal Case No. 6563 of 2008 Republic vs David Khisa in the Chief Magistrate's Court at Eldoret by A. B. Mongare, Senior Resident Magistrate on 2nd September2009)*

JUDGMENT

1. The appellant was convicted for the offence of defilement of a child aged eight 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 15 years imprisonment. The particulars of the offence were that the appellant defiled the minor on 26th December 2008 at Jua Kali Estate in Uasin Gishu District.
2. The appellant has appealed against his conviction and sentence. The petition of appeal was filed in Court on 9th September 2009. There are five grounds of appeal. First, that the trial magistrate colluded with the prosecution and violated the appellant's rights at the trial; secondly, that that there was no medical evidence connecting the appellant to the offence; thirdly, that the evidence at the trial was insufficient to found the charge that the charge; and lastly, that the charge was not proved beyond reasonable doubt
3. The appellant has filed written submissions in support of the appeal. At the hearing of the appeal, the appellant stated that he would rely on those submissions. I granted him an opportunity to address the court on the key highlights of those submissions. The appellant also sought to rely further on amended grounds of appeal. I have however noted from the record that although the appellant had applied to amend the grounds of appeal, *no* leave was granted by the Court. Accordingly, the amended grounds are incompetent for offending section 350 of the Criminal Procedure Code.
4. The appeal is contested by the State. The State also gave notice to the appellant that it would seek enhancement of the sentence. I warned the appellant of the consequences of proceeding with the appeal. The appellant stated that he understood the consequences but wished to proceed with the appeal. In a nutshell, the case for the State is that the evidence established the appellant's guilt to the required standard of proof. The State submitted that the minimum sentence for the offence of defilement of a child of 11 years and below is life imprisonment. It was submitted that the sentence handed down to the appellant was thus illegal and should be enhanced.
5. 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, *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).

6. On 10th March 2009, the appellant's trial in the lower court commenced. The record of appeal shows that a *voire dire* examination was conducted. The questions and answers are on the record. The record states as follows:

> *"Court: What is your name? My name is [minor's name withheld].*
>
> *Court: How old are you? I am 10 years.*
>
> *Court: Do you go to church? No.*
>
> *Court: Do you go to school? No.*
>
> *Court: I have considered the questions put to the witness. She will give unsworn evidence."*

7. The minor then 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. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445. If the court proceeds to take unsworn evidence, the accused should not be convicted in the absence of *corroborating* testimony. There is an exception for sexual offences. From the above verbatim record of the court, I am satisfied that the court complied fully with the procedure of taking evidence of a minor. See *Macharia v Republic* [1976-80] 1 KLR 260, *JohnsonMuiruri v Republic* [1983] KLR 445. As I will discuss shortly, the evidence of the minor was not the *sole* convicting evidence. I cannot then say that there was non-compliance with section 124 of the Evidence Act.
8. The child (PW1) gave a vivid account of the events of 26th December 2008. She knew the appellant. He found her at about 8.00 to 9.00p.m on the material night outside her parents' house. She was waiting for her sister, A. The appellant asked her where her sister was. He carried her on his back to Agui's house which was 500 metres away. Agui was not in. He took her behind the house and defiled her. She screamed but the appellant covered her mouth. He then carried her back to her home. She reported the incident to her mother (PW2). Her mother saw her being carried back to the house by the appellant. The mother summoned some people including PW3, M K. The complainant was taken to Turbo Police Station and later to Turbo Hospital. At the end of PW1's testimony, the appellant said he had no questions in cross examination.
9. PW2 confirmed her daughter was born in 2001. The P3 form produced by PW7 stated the age of the minor as *eight* years at the time of the offence. The age of the minor was thus not in doubt. 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. I am satisfied that in this case the age of the minor was established at the trial.
10. PW2 testified that the appellant was working for her brother-in-law, PW4. She saw the appellant bringing back the complainant to her house. He did not talk to her. She noticed her daughter had difficulties walking. On examining her privates, she found some deposits of semen. PW3 was present and also saw the semen on the complainant's privates. They called the village elder (PW5). PW5 testified that the complainant had grass on the back of her clothes and hair. He and PW4 went to the appellant's house. They found him asleep. He was also drunk. They took him and the complainant to the police station.
11. PW7, Dickson Korir, is a clinical officer at Turbo Health Centre where the complainant was taken

on 26th December 2008. He filled in a P3 form. He testified as follows-

> *"She [complainant] had tenderness on the neck and abdomen; on genitalia, hymen was broken. She had bruises on majora. Urinalysis was done it showed moderate pus cells. HIV was negative gave her some antibiotics. I signed P3 form. I wish to produce it as exhibit."*

12. The appellant was not medically examined. However, 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".*

The complainant's hymen was a broken. She had moderate pus cells in her urinalysis. The evidence of the complainant was thus corroborated by PW7 and the P3 examination report. When I add the evidence of PW2 and PW3, I am left in no doubt about the veracity of the complainant's evidence. The totality of that evidence points strongly to the guilt of the appellant.

13. Granted those circumstances, I am at a loss why the appellant would contend that the learned trial Magistrate colluded with the prosecution. When the appellant was first put on his defence, he requested for three weeks to prepare his defence. When his trial resumed, he said he had written to the Chief Magistrate and was awaiting a reply. He sought, quite unjustifiably in my view, to have the trial start *de novo*. There was no basis and the trial Magistrate rightly declined the application. The appellant then said he had no evidence to offer. Those matters are dealt with at length in the judgment of the court at page 26 of the record. I have not seen any evidence of grudges between the appellant and the complainant's family or why they or the complainant would want to fix him on a criminal charge.
14. Faced with that evidence from the prosecution, the defendant offered no evidence in his defence. The record at page 22 states as follows; *"accused- I have no evidence to offer"*. The burden of proof, subject to section 111 of the Evidence Act, rested entirely with the prosecution. The appellant was entitled, for example, to remain mute. But from the evidence tendered at the trial, 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 to the accused. The evidence was *inconsistent* with the *innocence* of the appellant.
15. In the end, I uphold the conviction by the trial magistrate. The appeal is accordingly dismissed. Under section 8(2) of the Sexual Offences Act, defilement of a child of eleven years or below attracts imprisonment for *life*. I find that the learned trial Magistrate erred in sentencing the appellant to 15 years imprisonment. 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 appellant was given a warning that the State would seek enhancement of the sentence. The sentence of fifteen years was thus an *illegal* sentence. I will set aside the sentence of the lower court. I hereby substitute it with life imprisonment

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 28thday of November 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.