



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO.64 OF 2012

KELVIN KAMINYA SHIRAMBA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 433 of 2011 Republic vs Kelvin Kaminya Shiramba in the Senior Resident Magistrates' Court at Eldama Ravine by M. Kasera, Senior Resident Magistrate dated 28th March 2012)

JUDGMENT

1. The appellant was convicted on a charge of defilement of a girl aged 15years contrary to sections 8(1) as read together with section 8(3) 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 petition of appeal was filed on 23rd April 2012. The primary grounds urged in the amended petition of appeal can be condensed into four: first, that there was no medical evidence or exhibits connecting the appellant to the offence; secondly, that the evidence of the prosecution was inconsistent, contradictory, or insufficient to found the charge; and thirdly, that the appellant was held in custody for many days in violation of his constitutional rights. In a synopsis, the appellant submitted that the offence was not proved beyond reasonable doubt.
3. At the hearing of the appeal, learned State Counsel, Mr. Munene, 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 complainant testified that on the night of 28th April 2011, at about 10.30p.m, she left her house to meet the appellant . It was a pre-arranged meeting. They went to the complainant's house and had consensual sex. It was the third time they were having sex. At 4.25 a.m the next morning, she was escorted by the appellant back to her house. Her sister H, PW2 opened the door for her. PW2 alerted their mother (PW3) who had been looking for the complainant earlier. The complainant

- told her mother that she had gone out to the toilet. Her mother beat her up. She then opened up and said she was at the appellant's house. The appellant was arrested immediately by PW4, an administration police officer.
5. The appellant stated he was held in police custody from 29th April 2011 to 3rd May 2011. He submitted that his constitutional rights were violated. Under the present Constitution, the true remedy for such delay or breach of constitutional rights is not an acquittal on the criminal charge. It does not vitiate the trial in the lower court. An action for damages may lie for unlawful confinement. See *Lovone v Republic*, Eldoret, High court Criminal appeal 127 of 2010 (unreported). That ground lacks merit.
 6. Both the complainant and appellant were examined at Eldama Ravine District Hospital. The two P3 forms were produced in evidence by PW6, a clinical officer from the hospital. The complainant was examined *five* days after the incident on 5th May 2011. The record in the P3 form for complainant stated that there were “*no injuries to both labia minora and majora, vagina or cervix*”. PW 6 testified there was no infection or discharge. There were moderate epithelial cells but no traces of spermatozoa. The P3 examination on the appellant was also *negative*. From that medical evidence, there was no clear finding of *penetration*. The only evidence was that of the complainant. Fundamentally, the medical evidence did not connect the appellant to the complainant.
 7. Penetration is a key ingredient of the offence. It 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”.

8. It is instructive that the appellant was charged with defilement that took place on 28th April 2011. From the complainant's testimony, she said they had had sex on two previous occasions. Which was the actual date of the defilement? The complainant first told her mother that she had gone out to the toilet. It is only after the beating that she disclosed she was in the appellant's house. The record states that she testified she was 15 years and in class *five*. During her *voire dire* examination at page 23 of the record, she said she was in class *seven*. Her younger sister H (PW2) was 12 years and in class 5. There were more inconsistencies: PW 5 Corporal Tamar, who was the investigating officer, said that “*accused forced complainant to have sex with him. They had sex three times till 3.00a.m*”. That was not the evidence of the complainant.
9. The complainant did not come across as a reliable witness. I can imagine the anger of her mother discovering that her teenage daughter was sleeping with the complainant. That largely explains the prosecution. 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.
10. The age of the complainant was also in question. The complainant and her mother said she was 15 years. PW4, Corporal Tamar, said the complainant was below 18 years. 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 may mean the difference between a life sentence and a few years in jail.
11. The age of the appellant is relevant in this appeal. PW5 said the age of the appellant “*was less than 18 years but the doctor found he is about 18 years*”. PW6, the clinical officer, stated at page 42 of the record that “*the patient [appellant] is 17 years*”. The P3 form of the appellant clearly indicated he was a minor aged 17 years. The appellant had protested that he was a minor. In his defence, he stated he was a student in class 7 at [Particulars Withheld] Primary School in Kakamega. The learned trial Magistrate however proceeded with the trial and to sentence the appellant as an *adult*. The learned Magistrate in sentencing said at page 49 that “*I note he is already 19 years*”. There was no such evidence of age of the appellant. The sentence handed down in the circumstances was thus *unlawful*.

12. There were serious gaps in the prosecution evidence. In particular there was no clear cut evidence of penetration *linking* the appellant to the offence. See *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported). However, there is no room for assumptions in a criminal trial. See *Kaingu Kasomo v Republic*, supra. The appellant denied committing the offence. The learned trial Magistrate found the defence to be an empty denial. 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.
13. 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*. In view of the fact that the appellant was a minor, the sentence handed down was also unlawful. The State has thus rightly conceded this appeal. I allow the appeal. I 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 28th day 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.