



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 48 OF 2011**

**VINCENT YATICH KIPROP.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 596 of 2010 Republic vs Vincent Yatich Kiprop in the Resident Magistrate's Court at Kabarnet by H.M. Nyaga, Principal Magistrate on 8<sup>th</sup> March 2011)***

**JUDGMENT**

1. The appellant was convicted for the offence of defilement of a child aged ten 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 life imprisonment.
2. The appellant has appealed against his conviction and sentence. The petition of appeal was filed in Court on 21st March 2011. There are five grounds of appeal. First, that the plea was not taken properly; secondly, that charge was not proved beyond reasonable doubt; thirdly, that the evidence at the trial was inconsistent, contradictory and insufficient to found the charge. In particular, the appellant submitted that there was no clear medical evidence connecting him with the offence; fourthly, that critical eye witnesses were not called; and, fifthly, that the police investigations were incomplete or shoddy.
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 wholly on those submissions. The appellant also sought to rely on amended grounds of appeal filed on 20<sup>th</sup> December 2012. I have however noted from the record that *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. In a nutshell, the case for the state is that the evidence established the appellant's guilt to the required standard of proof. 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).
5. The appellant had also been charged with an alternative charge of committing indecent acts with a minor contrary to section 11(1) of the Act. Both charges were first read out to the accused on 6<sup>th</sup> July 2010. The record shows that there was a *Kiswahili* interpreter. The appellant pleaded not guilty. Bail was set at Kshs100,000 with one surety of a similar amount. I find that the plea was taken properly. The record also shows the appellant participated actively at the trial and cross-examined prosecution witnesses. The appellant cannot thus be heard to say that he never understood the proceedings at his trial. It is to turn logic onto its head for the appellant to submit

- that “*he never pleaded guilty in the first place*”. That is a truism: that is the reason why the trial was conducted. I thus find no merit in that ground.
6. At page 9 of the record, the court conducted a detailed *voire dire* examination of the complainant, PW1. It was a question and answer session. At its conclusion, the learned trial Magistrate found that the child was forthright and could tell the truth. However, the court formed the impression that she could not give sworn testimony. The minor was then affirmed and gave 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. There is also an exception in the proviso to section 124 of the Evidence Act. I thus find that the court applied proper procedures before taking the minor’s evidence.
  7. The child, PW1, confirmed to court that she was ten years old. She was in standard three at [particulars withheld] Primary School. It is consistent with a child of that age. Her teacher, T (PW2) confirmed the child was in class three. The P3 form dated 2<sup>nd</sup> July 2010 produced in evidence by PW4 confirmed the age of the minor to be 10 years.
  8. 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.
  9. PW1 testified that she was living with her grandmother. She knew the appellant who was popularly known as *Thomas*. On the night of 25<sup>th</sup> June 2010, the appellant came to her home. Her grandmother was away. The complainant was preparing some *ugali*. He told her to follow him to his house. He locked her inside. He told her he was going to get her some honey. He returned with some honey. He told her to lie down and defiled her twice. The complainant spent the whole night there. She said she felt a lot of pain. In her words the appellant performed “*tabia mbaya*” in her privates. I agree with the learned trial Magistrate that the complainant could not give graphic or detailed explanations of the sexual act. Her explanation however left no doubt of what transpired on the material night. She informed her grandmother the next morning who advised her to tell her teacher, T (PW2).
  10. Her teacher, PW2 testified that PW1 was away from school for two days on 28<sup>th</sup> and 29<sup>th</sup> June 2010. When she returned to school on 30<sup>th</sup> June 2010, she narrated to him about the defilement. He called her father who took PW1 to hospital. The appellant was arrested on 4<sup>th</sup> July 2010 by PW3, the Assistant Chief, Akorian Sub-location, who got information from PW2 and the complainant’s father.
  11. PW6, Leonard Chirchir, is a clinical officer. He recorded in the P3 form dated 2<sup>nd</sup> 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:

*“Both labia were intact. The hymen was perforated. The vaginal walls were reddish and tender. There was vaginal secretion or discharge. Vaginal swab revealed epithelial cells. Urynalysis test was normal. HIV test negative. Pregnancy negative. VDRL test for syphilis negative”*
  12. PW5, Isaac Kaptum, another clinical officer, had examined the appellant on 5<sup>th</sup> July 2010. He detected nothing abnormal. That is why the appellant has submitted that there was no medical evidence connecting him to the offence. I agree with the learned trial Magistrate that PW1 gave a *vivid account* of the events of the material night. She knew the appellant. There was no doubt about his identification. There was no reason for the ten year old to frame up the appellant. Her narrative was confirmed by PW2. Her evidence on defilement was corroborated by PW6, the clinical officer. The P3 form for the complainant confirmed that PW1’s hymen was torn, her vulva

was inflamed and she had a discharge. There were epithelial cells. The appellant was examined nearly nine days later. That is why the appellant contends that there was no penetration and no connection between him and the injuries to the complainant. I think that is simplistic. First, there is the unchallenged evidence of the complainant. Secondly, it was confirmed by the medical evidence. The appellant was positively identified by the complainant as the person who defiled her.

13. The injuries to the minors' private parts and the infection causing a 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”.*

14. I have then considered the defence of the appellant in the trial court. He stated as follows:

*“The complainant claimed I took her to my house and defiled her. She claims she did not go to school. Why didn't her grandmother alert her relatives or the authorities? Teacher T said he learnt of the incident on Wednesday yet he took the girl to hospital after 2 days. He is a knowledgeable person and ought to have acted fast.... I took myself to the police station.... The girl's clothes were not analysed. There is nothing to link me to the offence. I was examined. I had no injury at all. No DNA testing was done on me and the complainant. The P3 form says that she was defiled on 25<sup>th</sup> and 26<sup>th</sup> June 2010....date of defilement is not clear”*

15. The particulars state that the offence was committed on the nights of 25<sup>th</sup> and 26<sup>th</sup> June 2010. That is consistent with the evidence of the complainant. She testified that the appellant picked her up from her home at 7.00p.m or thereabouts on 25<sup>th</sup> June 2010 and defiled her twice. She spent the whole night in the appellant's house. That obviously spilled over to the 26<sup>th</sup> of June 2010. There is thus no doubt on the dates of the defilement. It would have been preferable to examine the complainant immediately or to have some more detailed medical analysis. However, the available medical evidence on the complainant established *penetration*. The complainant clearly *identified* her assailant. I agree with the appellant that the complainant's grandmother was a relevant witness. She was not called. But the court had sufficient evidence to convict the appellant. 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, *Bernard Kiprotich Kamama v Republic*, High Court, Eldoret, Criminal Appeal 123 of 2010 [2013] eKLR.

16. The learned trial Magistrate considered the appellant's defence. He found that the evidence of the complainant was categorical that the appellant defiled her. The learned trial Magistrate correctly found that under the proviso to section 124 of the Evidence Act, he could have convicted the appellant on that evidence alone. However, he found there was corroborating evidence in the evidence of PW6, the clinical officer. He was also cognizant that the examination of the minor was done a number of days later but that all the available evidence pointed *strongly* to the guilt of the appellant. I agree with those findings.

17. 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. The fact that he went to the police station of his own volition did not absolve him of the offence. I also note that the appellant was a neighbor of the complainant. He did not deny being at the *locus in quo* on the material night. He thus had clear opportunity to commit the offence. The complainant's grandmother or guardian was away. Since the appellant had a clear opportunity to commit the offence, in the circumstances of this case, it would also amount to further corroboration. See *Opo v Republic* [1976-80] 1 KLR 1669.

18. Upon re-evaluation of all the evidence, I have come to the conclusion that the main charge of defilement had been 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.

19. Under section 8(2) of the Sexual Offences Act, defilement of a child below eleven years attracts

imprisonment for life. The complainant was ten years. She was in class three. This is a grave offence perpetrated against a *defenceless* child. The complainant was a vulnerable person as defined in section 2 of the Sexual Offences Act. She will carry the scars for life. It is thus fitting that the appellant spends the rest of his life in jail. In the end I uphold the conviction and sentence imposed by the learned trial Magistrate. This appeal is accordingly dismissed.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 28<sup>th</sup> 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.