



KIPYEGO RICHARD KEMOI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of A.B. Mong'are Senior Resident Magistrate at Eldoret Chief Magistrate's Court

in Criminal Case Number 2331 of 2009 dated and delivered on 14th October, 2009)

JUDGMENT

Kipyegon Richard Kemoi, (hereafter “the appellant”) was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. He also faced an alternative count of committing an indecent assault contrary to section 11(1) of the same Act. He was convicted on the principal charge of defilement and sentenced to serve 20 years imprisonment.

He has now appealed to this court against both conviction and sentence. The particulars of the charge of defilement were as follows:- That on 18th day of April, 2009, at [particulars withheld] Market, [particulars withheld] Location in Lugari District within Western Province, the appellant unlawfully and intentionally caused penetration with his genital organ namely, penis, into the genital organ namely, vagina of **WM** (hereinafter “the complainant”), a child aged 12 years.

The prosecution case was that on the material date at about 10.00p.m, the complainant was sent by her mother, **MW**, (PW2) to remove clothes from a drying line behind their shop where they were. While unhooking the clothes the appellant went where the complainant was; held her by her hand and covered her mouth. He then dragged her into a toilet and closed the door. He removed the complainant's pant and bikers and knocked her to the floor. He pushed his penis into her vagina as he continued covering her mouth. She felt pain. As the appellant did so, her mother (PW2), called out her name from outside the toilet. The appellant threw the complainant's pant into the toilet, opened the door and entered his house leaving her behind. The complainant then went to their house and told PW2 what had happened. They both went to the appellants' house who denied committing the offence.

A report was made to the police who visited the scene the same night. The complainant was taken to hospital and later a P3 form was completed by **Peter Wenani** (PW3), then a Clinical Officer at Lugari District Hospital.

PW2 on her part, testified that the complainant was her daughter aged 12 years at the time of the incident. She confirmed sending her to unhook clothes from a drying line on the material date although she gave the time as 9:00am. She further confirmed being apprehensive when she failed to find her at the drying line prompting her to start calling her. She then saw the appellant rush from the toilet and go to his house. The complainant followed shortly while crying and reported what had happened. She reported to [particulars withheld] Police Station officers who arrested the appellant. She confirmed that the P3 form issued by the police was duly completed by PW3.

Peter Wenani (PW3) the Clinical Officer, testified that on examining the complainant he observed that her hymen was torn. The examining finger also revealed blood in her vagina. Pus cells were also seen

when a urinalysis test was done. He concluded that penetration had been achieved. The appellant was also examined and found to be HIV Positive. Urinalysis showed presence of pus cells. Because of the appellant's HIV status the complainant was put on anti-retroviral treatment.

Corporal Margaret Muthi (PW4) of [particulars withheld] Police Station recalled the material date at about 9:20pm when she was informed of a defilement case. Later at the station, she confirmed the report. The appellant by then had already been arrested. She then recorded statements from witnesses and charged the appellant as already stated.

When put on his defence, the appellant asked for witness statements and applied for transfer of his case to another court. With regard to the latter application, the Learned Senior Resident Magistrate considered it an afterthought and rejected the same since the appellant had not given the basis of the same.

In the end the appellant stated that he had no evidence to offer and closed his case without testifying.

The Learned Senior Resident Magistrate carefully considered the evidence of the prosecution and found that the only direct evidence on record was that of the complainant. She believed that she was telling the truth and if corroboration was required she found the same in the testimony of the complainant's mother and that of PW3, the Clinical Officer. She accordingly concluded that the principal charge of defilement had been proved to the required standard.

The appellants amended petition of appeal and his counsel's submissions raise three issues namely, that the Learned Senior Resident magistrate failed to consider and evaluate the evidence adduced before her and thereby drew an unfair and unjust conclusion; that she misdirected herself in law and in fact in relying on contradictory evidence and that she violated the appellant's constitution rights thereby vitiating the trial. In his oral submission before me, **Mr. Marube**, Learned Counsel for the appellant, contended that the age of the complainant was not demonstrated; that there was conflict regarding the time of commission of the alleged offence and that the evidence adduced did not support the charge. Counsel further submitted that medical evidence and that of arrest was not conclusive as no investigation in reality took place. Lastly, counsel submitted that the appellant sought disqualification of the trial court which was unreasonably declined resulting in prejudice against him.

Mr. Chirchir, the Learned Senior State Counsel, who appeared for the respondent state, submitted that the age of the complainant was established; that the disparity in time was curable under Section 314(2) of the Criminal Procedure Code; that the appellant was recognized by the complainant and her mother, that his arrest was not disputed; that the medical evidence was sound and that the appellant was accorded an opportunity to cross examine witnesses and offered no evidence in his defence.

I have, on my own, independently evaluated and re-examined the evidence which was adduced before the Learned Senior Resident Magistrate and find on the issue of the age of the complainant, that nothing much should turn thereon. The complainant herself said she was aged 12 years. Her mother, **MW** (PW2), testified that the complainant was 12 years of age having been born on 22nd August, 1996. She even produced her Baptismal Card. Lastly, **Peter Wenani** (PW3) estimated the complainant's age as 12 years. The record shows that the appellant did not challenge the testimony on the age of the complainant. Given the said testimony, I have no difficulty in concluding that the age of the complainant was conclusively determined. This case is therefore distinguishable from the cases of **Hillary Nyongesa -Vs- Republic (Eldoret HCCR Appeal NO. 123 of 2009 (UR))** and **Geoffrey Ogoyo - Vs- Republic (Kisii HCCR Appeal NO. 232 of 2009) (UR)** upon which the appellant relied.

With regard to the disparity in the evidence on the time of the commission of the offence, I, indeed find that the complainant's mother gave the time of the commission of the offence as 9:30am which sharply differed with the time given by her daughter, the complainant. The Learned Senior Resident Magistrate concluded that the offence was committed at night at about 9:30(a.m.). It is therefore clear that although the learned magistrate wrote 9:30a.m., she in reality meant 9:30p.m. as she was in no doubt that the witnesses who testified before her spoke of the offence having been committed at night. The complainant spoke of the offence having been committed at 10:00pm. **CPL. Margaret Muthoni** spoke of receiving a

report of defilement at about 9:20p.m. of the material date.

In my judgment, the disparity in the testimony with regard to when the offence was committed was not fatal to the charge and was in any event curable under the provisions of section 346 of the Criminal Procedure Code.

With regard to the challenge raised against the medical testimony adduced before the Learned Senior Resident Magistrate, I have come to the conclusion that the challenge was not well taken. I say so, because the testimony of **Peter Wenani** (PW3), the Clinical Officer, was categorical that the complainant's hymen was torn. He added that his examining finger drew blood and concluded that penetration had occurred. He produced the P3 form which documented those findings. Given PW3's testimony, I have no difficulty in finding that the medical evidence adduced before the learned Senior Resident Magistrate was conclusive that the complainant was defiled.

With regard to the complainant regarding the arrest of the appellant, the same was in my judgment also not well taken. PW2 testified that on the material date, she reported to [particulars withheld] Police Officers who arrested the appellant and took him to [particulars withheld] Police Station. **CPL Margaret Mithui** (PW4) confirmed that the appellant was arrested the same night of the incident.

With regard to the appellant's complaint that his constitutional rights were violated, the record shows that on the conclusion of the case for the prosecution, he applied that his case be transferred to another court. He gave no reason for that application. In my judgment, the Learned Senior Resident Magistrate was, in the circumstances justified in declining the application. I have no basis to fault that exercise of judicial discretion. The appellant has not alleged that the Learned Senior Resident Magistrate did anything dishonourable or improper when handling his case. Her impartiality was not questioned either. In those premises, I find no basis for the challenge that the appellant's constitutional rights were violated.

In the end, I find no merit at all in this appeal. It is therefore dismissed in its entirety.

Judgement accordingly.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF JUNE, 2012

F. AZANGALALA
JUDGE

Read in the presence of:-

Mr. Marube for the Appellant and

Mr. Chirchir for the Respondent

F. AZANGALALA
JUDGE
28TH JUNE, 2012