



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CORAM: F. AZANGALALA

HCCRA NO. 195 OF 2010

BETWEEN

CHEROP ARAP KIPYEGONAPPELLANT

AND

REPUBLIC.....RESPONDENT

***[Being an appeal from the Judgment of the Principal Magistrate - Hon. H.M. Nyaga, dated 10/12/2010
at Kabarnet in CRC. No. 854 of 2010]***

JUDGMENT

The appellant – **Cherop Arap Kipyegon**, was charged in the Principal Magistrate’s Court at Kabarnet 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. The allegation was that the appellant, on the 8th October, 2010, at Motoi sub-location within Baringo District of Baringo County, did intentionally and unlawfully cause his penis to penetrate the vagina of **H. K**, a girl aged 2 years 3 months. The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the same Act. The allegation being that the appellant, on the same date, same place unlawfully and indecently did an indecent act by touching the vagina of **H.K**, a girl aged 2 years and 3 months.

The prosecution called a total of five (5) witnesses in support of their case. The complainant was a girl aged 2 years and 3 months and the learned Principal Magistrate (**Hon. Nyaga**) determined that she could not testify at the trial after failing to respond to his questions. Her mother, **L.A** (P.W.1) however testified that on 8th October, 2010, at about 9.00 a.m., she left the complainant at home with her father, **Z.A.K**, (P.W.3) and the accused. She returned at about 4.00 p.m. of the same day and found that the

complainant could not eat anything and when she tried to urinate, she cried. On checking, P.W.1 noticed blood stains on her panties. She examined her vagina and noticed tears and blood therein. When she asked her what had happened, she cried saying Taramito which is the other name of the appellant. The complainant cried the whole night. The next morning, she took her to Kabarnet Hospital where she was taken to theatre for an operation and was admitted for one week.

P.W.1 reported to Kabarnet Police Station where she was given a P.3 form which was duly completed by **Dr. Daphne Ngunjiri** (P.W.2) of Kabarnet District hospital. The doctor observed that the genitalia was swollen and a pass-like discharge oozed from the vagina. She also noticed a tear on the labia minora. A Laboratory analysis disclosed an infection but no spermatozoa. In the doctor's opinion, there had been an attempt or penetration into the vagina.

Wilson Kipkwang, P.W.4, the Local Assistant Chief, was informed of the defilement and arrested the appellant who was subsequently re-arrested by P.C. **Caroline Wangari**, P.W.5 and charged as already stated.

At the close of the prosecution case, the appellant was found to have a case to answer and was put on his defence. He elected to give a sworn statement in which he denied the charge.

On 10th December, 2010, the learned Principal Magistrate delivered his judgment in which she convicted the appellant of the principal charge of defilement. After regarding the appellant's mitigation, the learned trial magistrate sentenced him to life imprisonment. The appellant was not satisfied with his conviction and sentence and so has filed this appeal.

The appellant, who was unrepresented at the trial and in his appeal, submitted that the charge was framed against him and that his appeal should be allowed. **Mr. Oluoch**, the learned Senior Prosecution Counsel, while supporting the appellant's conviction and sentence, identified a few short comings on the record.

Having carefully examined the record of the trial before the learned principal Magistrate, I have been able to identify certain material inconsistencies and anomalies which lead me to conclude that the appellant's conviction was not based on sound evidence. The learned Principal Magistrate convicted the appellant on circumstantial evidence. In his own words:-

“However, the evidence available point to no one else apart from the accused. His defence is just a denial. There is no reason why any one of his family would want to implicate him for nothing”

There was therefore no direct evidence connecting the appellant with the offence. The standard required to prove a case on circumstantial evidence was stated in **Kipkering Arap Koske –vrs- Kimure Arap Matata [1949] 16 EACA 135.** There, Willis on circumstantial evidence 6th Edition pg 311 was cited as follows:-

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

P.W.1, **L.A**, the mother of the complainant, left the latter at her home with the appellant and **Z.A.K** (P.W.3), her father. That was at 9.00 a.m. So initially, the complainant was left with the two old men. It is not clear from the evidence whether the appellant was left to look after the complainant. At the appellant's age, I doubt whether he could have been left in charge of the complainant. P.W.3 testified that at 9.00 a.m., when P.W.1 left home, the complainant was playing outside. The record does not indicate

with whom the complainant played. P.W.3 then went to his farm nearby leaving the appellant sitting outside his house. According to P.W.3, at about one O'clock, another of his grand children returned from nursery school shortly followed by others from Primary School. It is significant that P.W.3 noted nothing amiss with the complainant and after making lunch for the children, he went back to his farm. It must be assumed that the complainant was left with the other children some of whom were primary school going. It is further significant that their ages were not given. There is no evidence as to where the appellant was at that time. But when P.W.1 returned at 4.00 p.m., she noticed that the complainant did not want to eat and cried on urinating. On examining her, she noted blood stains on her panties and tears on her vagina. By that time, the appellant was already asleep.

In view of that evidence, I am puzzled at the conclusion made by the learned Principal Magistrate that no one else apart from the appellant could have defiled the complainant. There were others who could have. There were her playmates, the primary school children or strangers who could have sneaked into the home between 9.00 a.m. and 4.00 p.m. Her own grandfather also had the opportunity to commit the offence.

In those premises, the prosecution did not prove that the exculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of the appellant's guilt.

The record does not also show that the learned Principal Magistrate appreciated the provisions of Section 124 of the Evidence Act. I say so, because he found that the complainant could not testify. The only testimony of the defilement came from her mother. Corroboration was therefore a mandatory. **Dr. Daphne Ngunjiri** could have furnished the corroboration but unfortunately did not examine the appellant to confirm that the infections he found on the complainant could have come from the appellant. In this regard, the testimony of **P.C. Caroline Wangari** (P.W.5) was significant. She re-arrested the appellant from the Assistant Chief (P.W.4) and took him to hospital for examination. Unfortunately, the results of the examination were not produced and I can only conclude that if the same had been produced, they would have been adverse to the prosecution case.

In the circumstances, the conviction of the appellant was unsafe and cannot be upheld. I therefore quash the same. His life sentence is also set aside. The appellant to be set at liberty forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT ELDORET THIS 12TH DAY OF APRIL, 2011.

F. AZANGALALA

JUDGE

Read in the presence of:-

The appellant and **Mr. Chirchir** holding brief for **Mr. Olouch** for the State.

F. AZANGALALA

JUDGE

12/4/2011.