



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA  
AT NAKURU  
Criminal Appeal 79 of 2004**

**(From original conviction and sentence in criminal case No. 2598 of 2003 of the**

**Senior Resident Magistrate’s Court at Molo – R. K. Kirui {S.R.M.})**

**ELIJAH KIPRONO KOECH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant Elijah Kiprono Koech was charged with two counts of defilement and two counts of indecent assault of a female. In the cause of the trial the prosecution withdrew count No. 1 and 3 which were in respect of another complainant who was not able to give evidence. The appellant was therefore tried for count No. 2 and particulars stated that on the 12<sup>th</sup> day of October 2003 at [particulars withheld] within Nakuru District Rift valley province had unlawful carnal knowledge of N C a girl under the age of sixteen (16). The particulars of the 4<sup>th</sup> count stated that on the 12<sup>th</sup> day of October 2003 at [particulars withheld] within Rift valley province unlawfully and indecently assaulted N C a girl of the age of under sixteen (16) years. The appellant pleaded not guilty to all the offences and after a full trial he was convicted and sentenced to fifteen (15) years imprisonment.

Being dissatisfied with the conviction and sentence the appellant has appealed and raised two grounds. The appellant argued that he was charged and convicted based on framed up charges. There was no evidence to support the charge of rape and defilement and there was no information that the complainant or the witnesses knew the appellant’s name as he was described by his nickname.

This appeal was opposed by **Mr. Mugambi** the learned counsel for the State. He submitted that the appellant was found with the complainant when he committed the offence by B C a young lad of twelve (12) years who reported the matter to the complainant’s mother. The evidence by the complainant and her mother was duly collaborated by the medical evidence. The complainant was able to identify the appellant by his nickname.

This being a first appeal this court is mandated to consider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether to uphold the conviction. In doing so, the court should bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of **Njoroge –vs- Republic [1987] KLR at page19.**

I now wish to review the evidence that was before the trial court which led to the conviction and sentence of the appellant. The prosecution relied on the evidence from a total of six (6) witnesses. **N C PW1** is

the mother of the complainant. She testified that on the 12<sup>th</sup> October 2003 she had left the complainant at home and when she arrived at about 6.00 p.m. she found several children peeping at the appellant's house. At that moment she did not bother but at about 7.00 p.m. **B C PW6** a boy aged twelve years came and informed her that the complainant is crying because she had been defiled by the appellant. PW6 also said that it happened when the children were peeping through the appellant's house. PW1 inspected the complainant and found that she was injured in her private parts. She decided to inquire from the appellant what had happened. The next day she took the complainant to the health centre and later to the police station where she was issued with a P3 form.

**N C PW2** and the complainant who the court found too young to take an oath told the court that the appellant whom she referred to as 'mwaliimu' called her to his house with one C. He undressed her and did bad things to her and poured water on her private parts.

**Jane Chepkwony PW3** testified that she too inspected the complainant and found the injuries she had sustained on her private parts. The complainant also revealed to her that she was injured by somebody called *mwaliimu* who lives in the neighbourhood. The appellant was arrested by **PC Joseph Koroch PW4** who also issued the P3 form to the complainant's mother.

**Robinson Kipsut PW4** is the clinical officer based at Olenguruone Health Centre. He testified that he examined the complainant. From the examination he confirmed that the complainant had a discharge from her cervix and swollen labias. Laboratory investigations were done and bacteria infection was traced from the vaginal swab. He concluded that the complainant was defiled two weeks prior to the examination which he conducted on 24<sup>th</sup> October 2003. Bernard Cheruiyot gave evidence of how on the material day he found several children gathered outside the appellant's house and when he went to check he found the appellant having sexual intercourse with the complainant and another girl called C both of them young girls. PW6 entered the house but the appellant kicked and slapped him after which he ran to his home to inform the mother of the complainant. He said that he knew the appellant who is popularly known as Mwalimu in their neighbourhood.

Put on his defence, the appellant denied any involvement with the offence. In deed he put up an alibi that on the 12<sup>th</sup> October 2003 he left his home to another village far away where he stayed until the next morning but when he returned he heard that some girls were raped and his name was being spoilt so he decided to go to the police station to clear his name but he was arrested and charged with the offence.

This appeal raises two issues. Firstly the issue of credibility of witnesses and their evidence of identification of the appellant and the issue of the defence of alibi. The trial court admitted the evidence of the complainant and that of her mother and **B C PW6** who witnessed the appellant defiling the complainant. In dealing with the issue of credibility of a witness this court cannot fault that decision which was based on the trial court's own assessment of the witnesses who testified. The trial court had a greater advantage than this court to determine the credibility of witnesses. This principle was settled in several decisions especially the case of **Republic vs Oyier [1985] KLR page 353;**

***"The first appellate court could not interfere with those findings by the lower court which were based on the credibility of witnesses unless to reasonable tribunal could make such findings or it was shown that there existed errors of law."***

When reevaluating the evidence before the trial court it is significant to note the provisions of **Section 124 of the Evidence Act Cap 80** in regard to the evidence of children in sexual offences. The law provides as follows:

***"provided that wherein a criminal case involving a sexual offence the only evidence is that a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth."***

In this case the complainant although very young was able to tell her mother who defiled her. She also

testified in court and she was able to identify the appellant who was a neighbour and was referred by all other witnesses as mwalimu. Apparently the appellant did not raise any issue with his identification during cross-examination or even in his defence. He did not deny that he was the mwalimu who was being referred to. The evidence by the complainant, her mother and PW6 was also corroborated by the medical evidence which showed that the complainant was defiled. On the issue of the defence of alibi I find that the trial magistrate properly evaluated the evidence by the prosecution which weighed against the defence of alibi the defence did not make sense. The defence of alibi was introduced at the defence and the appellant did not introduce it at an early stage. However it did not dent the prosecution's case which was made up of direct evidence by PW6 who witnessed the incident. The complainant herself whose evidence is admissible and the medical evidence which corroborated what the complainant said.

In view of the above analysis I am satisfied that the trial court was satisfied with the evidence that established that the appellant was guilty beyond all reasonable doubt. I consider that the conviction was just and safe in all the circumstances and the appeal herein is dismissed. The conviction and sentence is upheld.

**Judgment read and signed on 11<sup>th</sup> October, 2007**

**M. KOOME**

**JUDGE**