



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**CRIMINAL APPEAL NO 165 OF 2017**

**RONGINO EZRA KEMBOI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the original sentence of Hon. H.M. Nyaga, SPM, dated 15<sup>th</sup> May 2012**

**in Criminal Case No 835 of 2011 in the Chief Magistrate's Court**

**at Kabarnet, Republic v Rongino Ezra Kemboi**

**JUDGMENT**

1. In his petition to this court, the appellant has appealed against his conviction and sentence of twenty years' imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with 8 (3) of the Sexual Offence Act No 3 of 2006.
2. The appellant has raised five grounds in his petition of appeal. In ground 1 the appellant has faulted the trial court both in law and fact in failing to find that the age of the victim was not proved.
3. The evidence of the victim (Pw 1), JP (initials of her name), was that she was aged 14 years old and was in class 6 in [particulars withheld] Primary school. On 7/7/2011 at 2.pm, she was going back to school and as she passed near a bushy area, the appellant appeared from behind her. The appellant then held and lifted her and carried her on his shoulder to the bush. The appellant told her to be quiet or else he was going to kill her. The appellant then forcefully had sexual intercourse with her. The victim felt pain and could not scream since she had been warned. The victim stood up after he was through with her. She dressed up and went home. As at that time she was bleeding. The appellant told her not to tell anyone.
4. Furthermore, the victim feared to tell anyone; but on the third day she told her aunt (mama A); because the pain got worse. Mama A then told her mother.
5. Thereafter the victim was taken to Kabarnet hospital; where she was examined by Benjamin Kendagor (Pw 4). Pw 4 was a clinical officer. Upon examination Pw 4 found as follows. Her external genitalia were normal. There was a bloody discharge from her vagina. Laboratory test showed several epithelial cells. HIV test was negative.
6. In his opinion, Pw 4 concluded that there was penetration due to the epithelial and pus cells. Epithelial cells are caused by corrosion. Pus cells are a sign of infection. Pw 4 then produced his report which was put in evidence as exhibit 1. According to exhibit 1, the victim was aged approximately 14 years.
7. The respondent's counsel submitted that the age of the victim was proved to be 14 years, citing in support thereof the case of *Waita Munyoki v Republic, Machakos High Court, Criminal Appeal No 242 of 2014*; which in turn cited the Ugandan case of *Francis Omuroni v Uganda No. 2 of 2000*. In that case the court held that in a case of defilement, medical evidence is paramount in determining the age of the victim in the absence of any other evidence. And further, that court held that age may also be proved by the production of the birth certificate by the parents of the victim or guardian. Additionally, it held that it may also be proved by observation and common sense.
8. I have re-assessed the foregoing evidence as a first appeal court in respect of age. I find as credible the unchallenged evidence of the victim that she was 14 years old; which is supported by that of the clinical officer (Pw 4), that she was 14 years old.
9. I therefore find that the age of the victim was proved as required. The submission of the appellant that the age of the victim was not proved

is hereby dismissed for lacking in merit.

10. In ground 2 the appellant has faulted the trial court in failing to find that the offence was not proved beyond reasonable doubt; because the court failed to conduct a *voire dire* examination in respect of the complainant.

11. In this regard, counsel for the respondent cited *Patrick Kathurima v Republic [2015] e-KLR* and submitted that the case was proved beyond reasonable doubt. In that case the Court of Appeal held that the age of 14 years remained a reasonable indication of the age of a child for the purposes of section 19 of the Oaths and Statutory Declarations Act, (Cap 15) Laws of Kenya and that section 2 of the Children's Act defines a child of tender years to be one, who is under 10 years. That court went further and concluded that it had no reason to import the 10 years to the Oaths and Statutory Declarations Act in the absence of express statutory direction given the different contexts of the two statutes.

12. I find that although the trial court did not subject the victim to a *voire dire* examination before taking her evidence, this did not render her evidence inadmissible or worthless. The credibility of the evidence of such a victim must be considered in the light of the other evidence on record. The evidence of mother of the victim namely ECt (Pw 2) was that her sister in law (EY, Pw 3) told her that the appellant had defiled her daughter three days before that date. Upon hearing this Pw 3 went and reported this to the mother of the victim. Pw 3 testified that the appellant is her relative and had no reason to fix him. Pw 3 also testified that the victim is her niece.

13. The evidence of Pw 3 is supported by that of the mother (Pw 2) of the victim; except that the mother added the following. The mother asked her daughter as to why she had kept quiet for some time. The victim told her that the appellant had warned her to be quiet. She was fearful of the appellant, who had warned her to be quiet.

14. After re-assessing the medical evidence and the consistent reporting of the victim to her aunt (Pw 3) and her mother (Pw 2) and her evidence, I find that the offence was proved beyond reasonable doubt.

15. In ground 3 the appellant has faulted the trial court in convicting him on contradictory and uncorroborated evidence of the prosecution. I find that in convicting the appellant, the trial court was mindful that it was convicting him on the uncorroborated evidence of the victim, after explicitly finding her to be a truthful witness in terms of section 124 of the Evidence Act (Cap 80) Laws of Kenya. I have re-assessed the evidence of the victim and I find that she was rightly found to be a truthful witness. Furthermore, I find no contradictions in the evidence of the prosecution witnesses. This ground lacks merit and is hereby dismissed.

16. In ground 4 the appellant has faulted the trial court in failing to find that penetration was not proved. The evidence of the victim is that the appellant forcefully had sexual intercourse with her. This is amply supported by the medical evidence of the clinical officer, who found that there was a bloody discharge from the vagina of the victim and that there were epithelial cells in her vagina; which were indicative of corrosion. In the circumstances, I find that penetration was amply proved. This ground of appeal fails and is hereby for lacking in merit.

17. In ground 5 the appellant has faulted the trial court for rejecting his defence without giving reasons as required by section 169 (1) of the Criminal Procedure Code (Cap 75) Laws of Kenya. In this regard, I find that the trial court gave a reason for convicting the appellant; which is that it found the victim to be a truthful witness. For this reason, this ground of appeal fails and is hereby dismissed for lacking in merit.

18. The appellant has not appealed against his sentence of 20 years' imprisonment. I have on my own initiative (*suo motu*) decided to entertain the issue of sentence for the following reasons. First, the trial court failed to take into account that the appellant was a first offender. Second, the trial court failed to take into account that the appellant had been in pre-trial custody for about five (5) months, which the court was mandatorily required to take into account by section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya. These are errors of law that were committed by the trial court; which now entitles this court to interfere with the sentencing discretion of that court.

19. Furthermore, I find that the appellant has been in prison custody for now over nine years.

20. After taking into account the foregoing matters, I find that the sentence imposed is manifestly excessive and for that reason I hereby reduce it to three years' imprisonment; which will begin to run from the date of this judgement.

21. There is a matter that has caused me concern, which is in respect of proof of a previous conviction. In this appeal the appellant successfully challenged the prosecutor by asserting that he had a previous conviction. Thereafter the appellant asserted that he had been in prison for another offence. The trial court failed to make a finding as to whether the appellant was a first offender or not. It was the duty of the trial court to make such a finding. The court should have called upon the prosecutor to prove whether the accused was a first offender or not. The proof of a previous conviction is primarily proved by the production of a certificate of such conviction from the criminal records office. However, this is not the only method of proving previous convictions.

22. Furthermore, where an appellant has appealed against his conviction and the appeal has not been determined, such a conviction cannot in law qualify to be a previous conviction. Similarly, a probation officer's social enquiry report which indicates that the appellant has been in prison cannot also qualify as proof of a previous conviction; because the appellant may have successfully appealed against his conviction.

23. The importance of a finding that the accused is a first offender or not lies in the fact that if an accused is a first offender, the court may be inclined to impose a lenient sentence. On the other hand, if the accused has a previous conviction, the court may be inclined to impose a harsh sentence. This is more so, if the previous conviction is similar to the conviction in respect of which the appellant has appealed and is recent.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KABARNET THROUGH VIDEO CONFERENCE ON THIS 12TH DAY OF MARCH, 2021.**

**J M BWONWONG'A**

**JUDGE**

**In the presence of:**

Mr. Sitienei and Mr. Kemboi Court Assistants.

Appellant present in person.

Mr. Mong'are for the Respondent.