



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 77 OF 2018**

**HILLARY CHERUIYOT YEGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT:**

HILLARY CHERUIYOT YEGO, the Appellant herein, was charged in the main Count 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 particulars of this offence are that on the 4<sup>th</sup> of July 2016 in Nandi County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of DKB, a child aged 7 years.

In the alternative, the appellant faced a charge of committing an indecent act with a child, contrary to section 11(1) of the sexual offences act No. 3 of 2006.

The particulars hereof are that on the 4<sup>th</sup> day of July, 2016 in Nandi County, the appellant intentionally and unlawfully caused his penis to come into contact with the anus of DKB, a child aged 7 years.

The prosecution case is that the complainant in this case was born on 5<sup>th</sup> July, 2009. On 4/7/2016 at 5.30p.m, which must have been just a few hours to his 7<sup>th</sup> birthday, he was with his father at home in [Particulars withheld]. The father asked him to go and fetch water from the river. The complainant went to the river and bathed before fetching water and heading towards home. On the way he met the appellant. The appellant was their neighbor and was known to complainants' father for a period of over 10 years. The complainant also knew him very well. He was living in the house of a brother to complainants' father, who was usually away. The appellant lured the complainant to get to the house where he was living. The complainant agreed and went with him to the house. The appellant while therein cheated the complainant to remove his trousers. He did so and the appellant unzipped his. He then requested the complainant to kneel down and when he did so, the appellant defiled him by inserting his penis into his anus. The complainant felt pain and cried out.

The father also decided to go down to the river for a bath. He passed through his brother's house where the appellant was living. While there he called out the complainant's name and he did not respond. He pushed open the door to the house which the complainant was in with the appellant. He saw complainant who had his trouser on the floor and the appellant who was trying to zip his in panic. The father called a neighbor by the name of Jacob, who called the Nyumba Kumi chairman. Neighbours held the appellant as a suspect. The complainant reported that the appellant had defiled him.

They went to Kobujoi Police station and reported the matter. PW-4 booked the report and investigated the case. The following morning, he took the complainant and the appellant to Kaptumo Sub-County Hospital for examination. The complainant was examined and his P3 form filled by PW-5. Urinalysis revealed presence of pus cells. A slight tear on anal region was noted. Other tests were negative. The clinical officer was of the opinion that there was evidence of sodomy. The appellant was taken to a psychiatric for mental assessment while the complainant was treated and counseled. Examination on the appellant did not reveal anything of significance in this matter. The P3 forms were produced as exhibits.

The Trial Magistrate at the closure of the prosecution case found that the appellant had a case to answer and accordingly placed him on his defence.

The appellant gave unsworn evidence and called one witness. His defence is that he was requested by the complainant's father to take care of his brother's house who's an athlete. He did so and was living there in. On 4/7/2016 he did the usual casual jobs. The complainant's father used to get back home late and the appellant had complained about it to his brother (PW-2's brother). The appellant decided to lock the house and go back home. After one week he went back to take his belongings. The complainant's father was not amused and he called neighbours alleging that the appellant had defiled the complainant. Upon his arrest he told the investigating officer what had truly transpired.

The appellant witness indicated that on the material day he parted with the appellant at 4 p.m. The appellant said he was shifting from where he was living as he wished to join his children. The appellant was not living with the complainant's father.

The trial Court evaluated the evidence and found the appellant guilty of the offence in the main count. He was accordingly convicted and sentenced to serve life imprisonment.

The appellant dissatisfied with the said conviction and sentence, appealed to this Court on the grounds that:-

1. Investigations in the matter was Shoddy.
2. The evidence by prosecution witnesses was not credible.
3. The charge was not proved beyond reasonable doubt.
4. Medical evidence availed was not conclusive and the clinical officer was incompetent.
5. He was given the maximum sentence of which is unconstitutional.
6. The charge was founded on a pre-existing grudge and was a frame up.
7. The defence was unfairly disregarded.

The appellant put in written submissions in which he averred that there is discrepancy in the evidence as to the exact time the offence took place. The prosecution case is uncorroborated and contradictory. The clinical officer referred to the complainant as "she" and "her", which suggests she examined a female and not a boy. He challenges his identification of which he alleges was unsafe.

On sentence, relying on the case of *Francis Karioko Muruatetu and Another -Vs\_ Republic (2017) ekr*, Petition No. 15 and 16 of 2015 (consolidated), he alleges that he was given the maximum sentence of life imprisonment of which is unconstitutional. He urged this Court to allow the appeal, quash the conviction and set him at liberty.

The prosecution submitted orally. They opposed the appeal and supported both the conviction and sentence. They averred that the evidence of the complainant who was then ages 7 years was corroborated by the father that the appellant took him to the house where he was living and defiled him. The clinical officer's evidence supports penetration. The appellant was well known to both PW-1 and 2, and the incident took place during the day. There is no question of mistaken identity. The offence caused trauma to the victim who will live with it in his entire life. The sentence meted is deserved given the circumstances.

I have considered the offence the appellant was charged with, evidence adduced by the prosecution witnesses, appellant's defence, the judgment passed and sentence, grounds of appeal and submissions by both sides.

The appellant in his submission raised various minor discrepancies in the prosecution case. However the holding in *Uganda Court of Appeal, Twehangane Alfred -Vs Uganda, Criminal Application No. 139 of 2001 (2003) UGCA* is clear that;

**“with regard to contradiction in the prosecution case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The Court will ignore minor contradictions unless the Court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case”.**

Regarding the above finding, I may wish to observe that rarely evidence by different witnesses in a case fit like a glove. This is so as the capacity to recall is not the same to different persons, as well as registering of details by the mind during occurrence of an incident. Minor discrepancies may even be healthy as they portray independence of evidence by each witness. Just the same way students taught by the same teachers in a class cannot answer an exam question exactly the same way unless there's cheating, the same happens to evidence by various witnesses in a case. Of importance to a Court of law is whether the evidence as a whole Makes its certain that the alleged offence took place and the accused took part in its commission. That's whether the offence against the accused is proved beyond reasonable doubt. If so established, irrespective of the discrepancies, the conviction that may result is safe.

The discrepancies revealed by the appellant in this case are trivial and raises no doubt on truthfulness of the prosecution witnesses. As such they are better ignored or overlooked. The evidence establishes beyond reasonable doubt that the complainant was a boy aged 7 years at the time of the alleged offence. It's the appellant who lured him into the house where he was living and defiled him. PW-3, the father of the complainant, found the appellant in a compromising situation where the boy's trousers was on the floor and the appellant was Zipping back his trousers. The clinical officer's evidence that the complainant anus had tears, shows there was penetration.

The appellant defence does not hold water. The alleged grudge with PW-2 is flimsy. PW-2 was not an employee of his brother and is an adult. His getting home late would have nothing to do with his brother. The appellant was also not imprisoned in the house of which he was staying, and his intention to shift could not have been a cause to fix him with such an offence. The offence is real and not something fabricated. The appellant committed it against the complainant. Conviction was safe and deserved given the evidence on record.

As regard the sentence, the appellant was given the maximum of which is life imprisonment. He is a first offender. Given the finding on the relied-on case by the appellant of Francis Karioko Muruatetu, the Court has discretion to weigh circumstances of the case and mitigating

factors and mete a fitting sentence. Life imprisonment to a first offender is rather harsh as it means he will spend the entire remaining life in prison. In this regard I do vary the sentence. He will serve 25 years imprisonment from 24/9/2018, the day he was sentenced by the lower Court.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF MAY, 2021.**

In the presence of:-

Appellant appearing in person.

Ms. Limo for state

Gladys - Court assistant