



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 196 OF 2019**

**PETERSON KARANI KIRIMI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the conviction and sentence of Hon. E. Ndegwa RM**

**made on 25/10/2019 in Githongo SO Case No. 18 of 2018)**

**J U D G M E N T**

1. **PETERSON KARANI KIRIMI (“the appellant”)** was arraigned before the Resident Magistrate’s Court, Githongo on 7/9/2018 with the offence of defilement contrary to **section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006**.

2. It was alleged that on diverse dates between 25/5/2018 and 3/9/2018 at unknown time and place within Meru County, the appellant intentionally caused his penis to penetrate the vagina of SMK (“the complainant”), a child aged 14 years.

3. The appellant also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act**. It was alleged that during the period in question at an unknown place and time, he intentionally touched the breast and vagina of the complainant.

4. The appellant denied the charges but after trial, he was convicted of the offence of defilement and sentenced to 20 years imprisonment. It is against that conviction and sentence that the appellant preferred the present appeal whereby he raised three grounds of appeal as follows: -

***a) That the trial Court erred in convicting the appellant on contradictory and inconsistent evidence.***

***b) That the case against the appellant was not proved beyond any reasonable doubt.***

***c) That the sentence was unconstitutional and excessive in the circumstances of the case.***

5. Both parties filed written submissions. The appellant submitted that the case against him was not proved to the required standard. That the photographs that were produced by **Pw7** were unreliable as the witness did not visit the scene himself. That **Pw1’s** evidence was suspect as it was obtained, after having been assaulted by her mother, **Pw4**. He further submitted that the prosecution evidence was contradictory. That evidence of a broken hymen *per se* is not evidence of defilement. The case of **P.K.W. v. Republic [2012] Eklr**, was relied on in support of that submission.

6. The appellant further submitted that the prosecution failed to bring 3 crucial witnesses, the two girls allegedly **Pw1** to have been defiled by the appellant as well as one **Douglas** who was alleged to be in the compound where the defilement took place. The appellant concluded that the sentence meted on him was harsh, excessive and unconstitutional. He relied on the cases of **Denis Kinyua v. Republic [2017] Eklr** and **Gideon Majau Gitire Alias Kombo v. Republic [2019] Eklr** in support of that submission.

7. On the prosecution’s part, **V. A. Kitoto Snr Prosecution Counsel** submitted that the prosecution had proved its case to the required standard. That the complainant had confirmed that she had been in a relationship with the appellant. The age of the complainant was proved to be 14 years, there had been penetration and that the appellant was the perpetrator. The case of **Joseph Mwangi Kariuki v. Republic [2018] Eklr** was relied on in support of those submissions. It was further submitted that the trial Court had the jurisdiction to hear the case against the appellant.

8. This being a first appeal, this Court is enjoined to review and re-evaluate the evidence afresh with a view to making its own independent findings and conclusions. In so doing, the Court must give regard to the fact that the trial Court had the advantage of seeing the witnesses testify. **See Ekeno v. Republic [1972] EA 32**

9. The prosecution case was that the complainant (**Pw1**) was a form 1 girl in a local school. She had known the appellant since she was in class 3. He was her Sunday school teacher at a local church. From December, 2017, after finishing class 8, she and the appellant were involved in a relationship. The appellant had a butchery in the local market and the complainant would regularly pass by to see him.

10. The complainant knew the appellant's wife and she could often accompany her to her trips where she was singing in various churches. Before meeting the appellant, the complainant was a virgin. After the relationship between the two started, the appellant would take the complainant to some disused house where they would engage in sexual intercourse. She narrated to Court how they engaged in sexual intercourse between the month of May, 2018 and August, 2018 during School holidays as well as half term.

11. She recalled how she once slept over in the appellant's house when the appellant's wife was away in one of her many trips. That night, they had sexual intercourse. They would have unprotected sex whereby the appellant's penis would penetrate her vagina and he would give her emergency pills.

12. When her parents suspected the two, her mother **Pw4** became harsh and on the night of 26/8/2018, she beat the complainant who ran away. **Pw4** called the appellant's wife and informed her that the appellant and the complainant were involved in a sexual relationship. The following morning, both the appellant and his wife came to the complainant's home whereby **Pw4** disclosed the issue to the appellant's wife. The appellant and the wife resulted into a fight. Later that day, the complainant was brought home by **Pw5 and Pw8**.

13. **Shadrack Mwongera (Pw5)** was the area Assistant Chief. He recalled having received a call on 27/8/2018 from the area chief about the complainant who had been assaulted by her parents and was in the chief's home. **Pw5** thereupon called **Henry Mutuma Kiugu, (Pw8)**, the area Nyumba Kumi chairman and they met at the home of **Pw4** the following morning. They found **Pw4**, the appellant's wife and two other persons. They questioned **Pw4** about her assaulting the complainant. She told them that she had only disciplined the complainant for coming home late.

14. Both **Pw5 and Pw8** advised **Pw4** to report to Githongo Police Post which she did. Later that night, the complainant was found and brought home. **Pw5 and Pw8** questioned her and she admitted being involved in a sexual relationship with the appellant. On his part, **Pastor PG** of [particulars withheld] Gospel Church confirmed that the appellant was a Sunday school teacher in that church between 2014 and August, 2018 when he suspended him. He also confirmed that the complainant attended Sunday school classes in his church and would accompany the appellant to visit other churches.

15. **PC Antonio Kioko** was attached to Githongo Police Post when he received a report on 27/8/2018 from **Pw4** that the complainant was missing. The following day, **Pw4** brought the complainant to the post. He accompanied them to Githongo sub-county hospital where **Maurice Maingi Kirimi (Pw6)** examined the complainant and undertook various tests.

16. On examination, there were no blood stains or any tear on the clothes. The hymen was broken and there were no injuries noted on the labia minora and majora. There was Whitish per vaginal discharge and numerous pus cells were noted.

17. **SGT. John Gichuru** investigated the case. On 31/8/2018, he received a report of a missing child from Githongo Police Post. The child resurfaced on 3/9/2018 and was taken to him on 4/9/2018. She told him that she together with two others had run away from home after being defiled by the appellant. The appellant later came to the station with his advocate whereby he arrested and charged him with the charge before Court.

18. Later, the complainant took him to the house where the appellant was defiling her. He took photographs of the same and sent them to the DCI headquarters for processing. They were developed and **Pw3** produced them in evidence. Further, the complainant gave him an exercise book wherein she had narrated her sexual experiences with the appellant. He took specimen handwriting from her which, together with the exercise book, he sent to the document examiner. The report of the document examiner showed that the handwriting in the exercise book was that of the complainant.

19. When placed in his defence, the appellant gave sworn testimony. He admitted to have been a Sunday school teacher for the complainant between 2014 and 2018. He denied having had any sexual relationship with the complainant. Between May, 2018 and September, 2018, he was a butcher at Gakoromone Kithirune butchery which was in a very busy area. That nothing would have happened in that butchery without people seeing.

20. He stated that he had employed a helper who was living with him between 2012 and 2018. That there is no way he would have had sexual intercourse with the complainant at his home where he was living with his wife, children and the subject house help. He stated that **Pw4** had framed him with the case because she was his sexual partner. That he had declined to advance her a loan in 2017 as a result of which she had threatened him with undisclosed consequences.

21. **Purity Kinya (Dw2)** testified that between 2012 and end of 2018, she was living with and taking care of the appellant's children. That during that period, she never saw the complainant at the appellant's home.

22. The first ground was that the trial Court erred in convicting the appellant on contradictory and inconsistent evidence. The appellant contended that **Pw5** testified that the complainant was examined on 30/8/2018 yet **Pw4** had stated that it is on that date that the complainant had gone missing. That the injuries on the complainant's vagina were occasioned by a sharp object and the age of the injuries could not be ascertained. Finally, that the complainant had testified that she knew him in 2012 yet he only joined **Pw2's** church in 2014.

23. From the testimony of **Pw4, Pw6 and Pw7**, it is clear that the complainant was examined on 28/8/2018 and not 30/8/2018. **Pw5** did not state that the examination was on 30/8/2018. Regarding the absence of injuries on the complainant, it was clear that the examination was conducted long after the acts of sexual intercourse had occurred. No injuries could be expected to be noted in such circumstances.

24. On the inconsistency of the date when the complainant knew the appellant, whether 2012 or 2014, that is a minor inconsistency that is not material. In **Eric Onyango Ondeng' v. Republic [2014] Eklr.**, the Court of Appeal held that it is not every contradiction that warrants the rejection of the prosecution case. In this regard, the alleged contradictions and/or inconsistencies were not material enough to affect the prosecution case.

25. The second ground was that the prosecution case was not proved beyond any reasonable doubt. That the evidence of the prosecution witnesses was inadequate and that 3 potential witnesses were not called. That **Pw7** did not visit the alleged house where the act occurred. That the investigation officer had indicated that no report of any defilement had been made and that **Pw5** lied that he was the chief of the appellant.

26. The original record shows that **Pw5** was the Assistant Chief of Kioru sub-location and not the accused's chief. It was not necessary for **Pw7** to visit the scene. His role was to receive the complainant on the 28/8/2018 and took her and **Pw4** to hospital. Of the 3 alleged witnesses who were not called, none was crucial. It was not the prosecution case that they had witnessed the offence being committed.

27. In defilement cases, the prosecution must prove beyond any reasonable doubt; the age of the complainant, the act of penetration and that the perpetrator was none other than the accused.

28. In the present case, the prosecution produced the birth certificate of the complainant. It was Birth Certificate No. [.....] dated 8/3/2017. It showed that the complainant was born on 16/7/2004. It meant that by May, 2018, the complainant was 14 years and some months. Clearly, the age of the complainant was proved to the required standard.

29. As regards penetration, the complainant was a Form 1 student when she testified before the trial Court. The trial Court made a finding that she knew what sexual intercourse was. She told the Court how she had been in a relationship with the appellant since December, 2017.

30. The complainant gave consistent and firm testimony how she had sexual intercourse with the appellant on several occasions. She took the investigations officer to the subject house where sex took place. She stated that the penis of the appellant used to penetrate her vagina and as a result, the appellant used to give her 'emergency pills' to prevent pregnancy. She also told the Court how they once had sex in the appellants house when his wife was away.

31. To buttress her story, she narrated in 13 pages of an A4 exercise book her relationship with the appellant. The said narration was voluntary. Before she had sexual intercourse with the appellant, she was a virgin. Her evidence was corroborated with the medical evidence of **Pw6**.

32. I agree with the appellant that the absence of hymen is *per se* not proof of penetration as was held in the **Eric Onyango Ondeng' case (supra)**. In the present case however, there was evidence to corroborate the act of penetration. The evidence of the complainant was firm and consistent on how the appellant had sex with her. I am satisfied that the trial Court cannot be faulted for finding that there was penetration.

33. The final ingredient is identity of the perpetrator. The appellant was well known to both the complainant as well as her family. He was her Sunday school teacher. They had known each other for well over 4 years. The sexual intercourse took place not once or twice, but several times. There was no room mistake.

34. The appellant's defence was a mere denial. He alleged that he had been framed by **Pw4** whom he alleged was his sexual partner. That allegation had not been put to either **Pw4** when she testified or any of the prosecution witnesses. It was but an afterthought. It could not displace the prosecution evidence. The trial Court was right in rejecting the same.

35. The last ground was that the sentence was unconstitutional and excessive in the circumstances of the case. Under **section 8(3) of the Sexual Offences Act**, the sentence set out for defiling a minor of between 12 and 15 years is imprisonment for a period of not less than 20 years.

36. In the present case, the Court considered that the minor was 14 years. That the appellant was the minor's Sunday school teacher and therefore a person in authority over her. That he took advantage of the minor. Further, the trial Court considered the appellant's mitigation and sentenced him to 20 years.

37. In my view, first, the sentence is not unconstitutional. Secondly, in the circumstances of this case, where the appellant took advantage of the minor whom he was supposed to be teaching positive values but ended nearly destroying her life, the sentence of 20 years is reasonable. Indeed, because of what he had introduced the minor to, she would not only run away from her home, but she also became disrespectful to her parents and nearly ruined her studies. He was a married man with children. However, I will reduce the sentence to 10 years imprisonment.

38. In view of the forgoing, I find the appeal on conviction to be without merit and I dismiss the same. The sentence is reduced to 10 years.

**DATED and DELIVERED at Meru this 20<sup>th</sup> day of May, 2020.**

**A. MABEYA**

JUDGE