



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 95 OF 2019**

**HILLARY KIPROP.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction in Criminal Case No. 1889 of*

*2012 delivered on 23<sup>rd</sup> day May 2019 in the Senior Principal Magistrate's Court*

*at Kapsabet by Hon. P. W. Wasike (Senior Resident Magistrate)*

**JUDGMENT**

1. The appellant Hillary Kiprop was tried and convicted in the Senior Principal Magistrate's Court at Kapsabet for defilement, contrary to Section 8(1) as read with subsection 8(3) of the Sexual Offences Act No 3 of 2006 (SOA). The offence was alleged to have been committed between January 2012 and August 2012 within Nandi County. It was alleged that the appellant intentionally and unlawfully did cause his penis to penetrate the vagina of **MJ** (name withheld), a child aged 14 years. In the alternative the appellant had been charged with committing an indecent act with the child contrary to section 11(1) of the SOA.

2. In sum, the prosecution's case was that the complainant was a 14 years old minor, when a man took her from a hotel at [particulars withheld] on the evening of 9<sup>th</sup> August 2012 and locked her up in his house nearby. He remained with her for three days, during which period he defiled her repeatedly. When the man released her, she went away and met her brother and the police who were looking for her. She led them back to the man's house whereupon he was arrested and subsequently charged as set out above. She identified that man as the appellant in this case.

3. When placed on his defence the appellant testified without oath and denied the offence. He stated that the entire case against him was a fabricated pack of lies. He called one witness in support of this case.

4. On the evidence that had been tendered before the trial court, the appellant was found guilty and was convicted on the main charge. He was sentenced to serve 20 years in prison.

5. The appellant felt disgruntled with the conviction and sentence and moved the superior court by way of this appeal filed against both conviction and sentence. He urged that the evidence before the trial court was not properly evaluated and that the 20 years imprisonment is the maximum rather than mandatory sentence.

6. In his grounds of appeal the appellant contended that; he was not given a fair trial; that the age of the complainant was not proved and that the medical evidence was not authentic. In his written submissions the appellant also complained that the charge sheet was defective and that his defence was not considered.

7. Learned state counsel Mr Rop opposed the appeal on behalf of the state. Counsel argued that the age of the minor was proved by her birth certificate which was produced in evidence. Secondly that the minor's evidence on the act of defilement was supported by the medical evidence of pw3 and pw5 and lastly that the charges were properly laid.

8. This being the first appellate court I have the duty to analyse and consider the evidence afresh to draw my own conclusions. I however bear in mind that I neither saw nor heard the witnesses testify and give due allowance.

9. On the contention that the charge sheet was defective I note that the charge sheet indicated the offence the appellant was charged with. The date, time and place where the offence was said to have taken place and the particulars of the offence were indicated sufficiently to enable the appellant understand the charge and mount his defence. Indeed it is important that the charge sheet must carry the definition of an offence

as provided in the law in which it reposes and for that reason, both the prosecution and the trial court in this matter are adjured to ensure compliance in future. This ground must however fail because failure to indicate the word 'unlawful' in the particulars without more did not render the charge against the appellant incurably defective.

10. Secondly, it was not clear how the appellant's right to fair trial was infringed. The charges were read to him, to which he pleaded not guilty. The witnesses testified in a language he understood and he cross examined them. At the close of the prosecution case the appellant was placed on his defence and he gave his testimony and called one witness in support of his case. Nowhere in the record did he raise issue with the manner in which the trial was conducted. This ground too is therefore, found to have no basis and must fail.

11. The main issue is whether the learned trial magistrate evaluated the evidence produced before the court properly, to arrive at the conclusion that he did. The main issues for determination in a case of defilement were, in my view, set out properly by the learned trial magistrate as proof of:

- a) the age of the complainant,
- b) penetration and
- c) identification of the perpetrator.

12. There was no dispute on the age of the minor. Her birth certificate was produced in evidence and it showed that she was born on 28<sup>th</sup> December 1998 and was therefore, four months shy of her fourteenth birthday when she was violated in August of 2012. The identity of the appellant as the perpetrator was determined by the court to be sound and I am in agreement, for reasons that the man who took her from the hotel did not pounce on her suddenly. There was evidence that he first to persuade her to go with him before he led her away by the hand.

13. The evidence also indicated that the appellant thereafter, lived with the minor for three days in his house and would lock her up in the house whenever he left to go anywhere. On the last day he escorted her back to the road. This in my view provided more than ample opportunity for the minor to see and recognise the appellant and to be able to identify him later. In any case the arrest of the appellant followed immediately thereafter and it was the minor who led the police and her brothers to the appellant's home and identified him for purposes of arrest. The identification was therefore solid and safe.

14. The minor went on to testify that after the initial arrest the appellant and his aunt spirited her away to a place called Kurkur. The appellant lived with her in hiding for three weeks and continued to defile her repeatedly.

15. On the last issue as to whether there was penetration, the minor herself narrated the chronology of events. She testified that the appellant took her to his house, locked the door, removed her clothes, made her lie on the bed, removed her pants and lay on top of her. In her own words she stated that:

***'He had sex with me without any protection that night. We had sex three times until morning'***

She testified further that he had sexual intercourse with her every night for the three nights that she remained in his custody.

16. The evidence of pw3. Mr Patrick Kemei, the clinical officer confirmed that the minor presented before him with a history of being defiled by a person well known to her. A quick examination revealed that while her external genitalia was normal, she however showed signs of infection internally as evinced by a foul smelling whitish discharge. Her hymen was also missing.

He treated her and filled and signed the p3 form which he produced in evidence. He also gave her a pill to prevent pregnancy.

17. PW5 Mr Richard Kimutai Langat, a government analyst, confirmed that on 22<sup>nd</sup> October 2014 he compared DNA profiles from the complainant, the appellant and baby BC. He concluded that there was 99.99% possibility that the appellant was the father of the baby BC. The baby was said to have been born to the complainant as a result of the defilement.

18. Without shifting the burden of proof to the Appellant, his defence that the prosecution case against him was all lies cannot debunk the cogent evidence tendered by the prosecution witnesses.

There was no basis to conclude that the family of the complainant or the police had any reason to frame him. I also find that the sentence of 20 years imprisonment is the minimum provided under Section 8(3), and was properly imposed.

19. Having assessed the evidence as a whole. I am satisfied that the prosecution proved their case against the appellant beyond reasonable doubt and that he was properly convicted. Consequently the appeal fails and is hereby dismissed.

**DATED, SIGNED and DELIVERED at ELDORET this 8<sup>th</sup> day of SEPT. 2020**

**L. A. ACHODE**

**JUDGE**