



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NUMBER 269 OF 2015**

**PAUL NJOROGE JAMES.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against Conviction of Sentence in Molo Chief Magistrate's*

*Adult Criminal Case Number 1864 of 2008 by Hon.Soita (Principal Magistrate).*

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

The appellant Paul Njoroge James was charged with **Indecent Act with a child Contrary to Section 11(1) of the Sexual Offences Act.**

It was alleged that on 26<sup>th</sup> October 2008 at Keringet Camp in Molo District of the Rift Valley, he did an indecent act with a child namely TW aged thirteen (13) years.

Plea was taken on 3<sup>rd</sup> November 2008.

On 29<sup>th</sup> April, 2010, the prosecution substituted the charge where the offence of '**Defilement Contrary to Section 8(1) (3)**' was added, and the initial charge became an alternative charge.

It was alleged that on 26<sup>th</sup> October 2008 at 2.00 p.m. at Keringet IDP Camp in Keringet Division of Kuresoi District of the Rift Valley Province, he intentionally and unlawfully caused his penis to penetrate the vagina of TWN a girl aged thirteen (13) years in violation of the said Act. In the alternative that he intentionally and unlawfully caused his penis to come into contact with the vagina of TWN a girl aged 13 years in violation of the said Act.

On the same date TWN testified that she was 14 years and in class eight (8). That on the material date she was sent by her mother to go borrow a comb from Kamau the appellant's cousin, a neighbor whose tent was about ten (10) metres from that of the complainant. Kamau was not in the tent. The complainant who knew where Kamau kept the comb, entered the tent to take it. As she bent down to pick it, she felt herself being gagged with clothes. She was then dragged onto a bed, her face covered with the cloth, her petticoat, biker and pants removed. Then her legs were tied apart with the rope. She struggled but in vain. He caressed her breasts, in the struggle her biker got torn. Then "*he took his penis and entered [her] private parts*". He blocked her mouth. She bled.

She testified that when he finished is when she identified him as Njoroge.

She also testified that she went home and found her mother who was now cross with her for the delay in bringing a comb, and had now found another comb. She was unable to tell her mother.

That the following day the "*cousin of Njoroge*" told her mother about the incident. Her mother beat her up and took her to Keringet Hospital. Then to Molo Police Station.

The complainant further testified that Njoroge ran away after the incident, and while in she and her mother were Molo town, they saw him and followed him. They then called her uncle, and Njoroge was arrested.

On cross examination she said that when she entered the tent she did not know that he was inside the tent. That when he was raping her, she heard Kamau's voice. That there was a Police Post at the camp but she did not report to the police, that she was afraid of her mother. That it

was her uncle who stopped him while they were following him, that her uncle questioned her before arresting him, that she did not know that her uncle had demanded money from him. That when she was being raped she was not seeing because her face was covered.

PW2 GW was the complainant's mother.

On 26<sup>th</sup> October 2008, she was not feeling well and was just at home. She needed to do her youngest child's hair but did not have a comb. She sent TWN for a comb, but she overstayed so she asked one Alice, the neighbor in the next tent to give her one.

TWN came back later with her sweater tied at the waist. When asked why she responded that her skirt got torn when she was washing clothes.

On 27<sup>th</sup> October 2008 the complainant went to school but came back home at lunch time saying she was unwell.

On 28<sup>th</sup> October 2008 one Mary told her that her daughter had been raped by Njoroge. When TWN came home GW beat her up demanding to know why she had not reported the alleged rape. An unnamed Administration Police Officer found her beating the child and urged her to take her to hospital.

She took her to hospital and made a report to the police. She testified that while at the police post; *"I saw the accused going towards the camp. We went after him but found that he had gone to Molo... While near the post office I saw the accused ahead... I called my brother... Joined us and he was arrested by my brothers and members of the public... Njoroge was questioned. We then took him to Molo Police Station. My daughter's biker was torn."*

On cross examination she said she had not sent her daughter to any specific place for the comb. That she was informed by one Mary, who was Njoroge's relative that Njoroge had defiled TWN. That the police were slow in responding and the arrest was by her two brothers and members of the public.

PW3 Peter Kamau Mwangi said he was brother to PW2, and that on 29<sup>th</sup> October 2008 he was on his way to work when he met her at 8.00 a.m. She told him that her daughter had been raped and she had trailed the culprit to Molo Town. She pointed the person out at a distance. He called some friends, he stopped the culprit and questioned him. GW joined him together with TWN. He spoke to the complainant and they took the culprit to the police station.

On cross examination he said he did not know when the offence was committed.

PW4 No. 61268 PC Leah Chesang testified on 2<sup>nd</sup> September 2010 that she had taken over the investigations from one Sgt. Njenga and simply perused the file, read the complainant's statement, took over a torn biker which she produced in court. She told the court she did not know the accused person as *"he was on bond when I took over."*

PW5 Julius Kibagendi Osiemo a Clinical Officer at Elburgon Nyayo Wards at the material time testified on 15<sup>th</sup> August 2011. At the time of filling the P3 the age of injury was four (4) months. He produced the P3 which was filled and signed on 11<sup>th</sup> March 2009.

The appellant was placed on his defence on 13<sup>th</sup> January 2012. He gave an unsworn statement and denied committing the offence. He said on the day he was arrested he met the brothers of the mother of the complainant at Molo Post Office who told him that PW2 was looking for him. He accompanied them to Keep Left where she was and was shocked when she alleged he had defiled her daughter.

He decided to go to the police station but was still charged on 3<sup>rd</sup> November 2008.

In a judgment delivered on 22<sup>nd</sup> March 2012 the trial magistrate found him guilty of defilement, convicted and sentenced him to serve twenty (20) years imprisonment.

Aggrieved he filed this appeal in 2015. The grounds were that;

1. *THAT the trial magistrate erred both in law and fact by convicting and sentencing him notwithstanding that the only eye witness never availed one's self before court therefore, it is inconclusive evidence that was given before court.*
2. *THAT the learned trial magistrate erred in law and fact by convicting and sentencing me despite the fact that even the complainant denied having seen the accused (locus).*
3. *THAT the learned trial magistrate erred in law and fact by convicting me on flimsy evidence.*
4. *THAT the learned trial magistrate erred in law and fact by convicting me the appellant notwithstanding my cogent defense.*
5. *THAT due to the fact that I can't recollect all that was adduced in terms of evidence off head I pray for a certified copy of proceedings.*
6. *THAT I pray to be made available before court upon the fateful hearing of my appeal.*

These he amended the grounds in 2020 thus;

1. *THAT the learned trial magistrate erred in law and fact by convicting me on unproved age of complainant.*
2. *THAT the learned trial magistrate erred in law and fact by ordering that I be issued with statements at my own cost.*
3. *THAT the learned trial magistrate erred in law and fact by not considering that crucial witnesses and evidences were not availed in court.*
4. *THAT the learned trial magistrate erred in law and fact in relying on contradictory and uncollaborated evidences.*
5. *THAT the learned trial magistrate erred in law and fact in failing to note that voire dire examination was not done and investigations were shoddy.*
6. *THAT the learned trial magistrate erred in law and fact in failure to note that penetration was not proved to standards.*
7. *THAT the learned trial magistrate erred in law and fact by not giving reasonable consideration to my defence and convicting and sentencing me on a charge that I was not charged with hence defective charge sheet.*

He filed the latter grounds together with his written submissions.

At the hearing of the appeal the appellant relying wholly on his submissions highlighted his submissions.

- The allegation of defilement by TWN on 26<sup>th</sup> October 2008, and the medical evidence gathered four (4) months later by PW5.
- That the charge was Indecent Act, *kupapasa*, yet he was convicted of defilement.
- he pointed out that the particulars of the offence of defilement were not proved, i.e. age, penetration and the identity of the offender, the complainant's face was covered by the defiler and no evidence of identification
- the inconclusive medical evidence,
- The failure by the prosecution to call the only eye witness and the witness who reported the "rape" to PW2.
- The contradictory evidence of PW1 and PW2.
- The lack of investigations by PW4.
- The missing charge sheet, leading to unfair trial,
- the failure by prosecution to provide witness statements.
- The failure by the court to conduct voire dire examination.
- The failure by trial court to consider his defence.

In response the state opposed the appeal through Miss Wambui prosecuting counsel.

- On proof age the prosecution cited **MW vs Republic [2020] eKLR** against the appellant's **Hillary Nyongesa vs Republic Criminal Appeal Number 123 of 2009 at Eldoret** and **Moses Mwarimo vs Republic KIL 2012** and **Dennis Murunga Mulati vs Republic [2014] eKLR** on the effect of failure by prosecution to prove age of victim.
- On the issue of witness statements and **Article 50(2) (j)**, counsel argued that the law was silent on who was to pay for the witness statements. That appellant never spoke up to say he could not afford the statements, and there was a presumption that he already had them.
- On issue of uncalled witnesses, that the court was satisfied with the evidence given by the prosecution.
- On issue of contradictory evidence, that the evidence of TWW was unshaken, and the contradiction between PW1 and PW2 on who reported the rape was not grave to create doubt that the offence was committed.
- On *voire dire* the state relied on **Maritep Loolkomok vs Republic [2016] eKLR**, that child of tender years, fourteen (14) years and below, as per **Kibageny arap Korir (1959) EACA 52** and that complainant was fourteen (14) on the day she testified. That her evidence was believable, and lack of *voire dire* was NOT prejudicial to appellant.
- On medical evidence that the medical examination revealed injuries on the complainant's private parts.
- That charge was amended to include defilement.
- That manner in which offence was committed deserved the sentence.

This being the first appeal the appellant is entitled to a fresh relook and assessment of the evidence placed before the trial court **Okeno vs Republic**.

I have carefully considered the evidence on record, the submissions and authorities cited. The issues for determination is whether the appellant was convicted on a charge he was not charged with, and globally whether the prosecution proved the charge against him beyond a reasonable doubt to warrant the conviction and sentence.

The offence of defilement is made of four ingredients, age, penetration, identity of the perpetrator and the circumstances of the offence as per

### Section 33 of the Sexual Offences Act.

On the charge sheet the record shows that the charge as presented on 3<sup>rd</sup> November 2008 was substituted on 29<sup>th</sup> April 2010. However, the trial magistrate did not cancel the original charge sheet and indicate on it that it had been substituted. The substituted charge was not placed where charge sheets ought to be in proceedings, at the beginning of the file. It was placed within the written proceedings. Hence until one gets to the proceedings of 29<sup>th</sup> April, 2010, there is no indication that the charge as placed at the start of the proceedings was no longer valid.

This is a simple “housekeeping” act that makes it clear that the charge that is being dealt with in the proceedings had changed. The trial court ought to have cancelled the first charge and indicated on it that it had been substituted with another, indicating the date on it. And to replace the substituted charge sheet with the new charge sheet at the same place, with an indication as to when it was substituted, admitted, and a new plea taken.

Any other court reading the proceedings will know from the onset that the charge facing the offender was amended or substituted, at the earliest.

The seriousness of this omission is seen reflected by the fact that the wrong committal warrant was made out with regard to appellant’s imprisonment. “*The warrant of commitment for a sentence of imprisonment or fine*” made out on 22<sup>nd</sup> March 2012 states that the appellant was sentenced to twenty (20) years imprisonment for the offence of **Indecent Act with a child Contrary to Section 11(1) of the Sexual Offences Act**, yet the Judgment states he was convicted and sentenced for the offence of defilement.

The appellant’s committal was for the wrong offence and was contrary to the judgment read on 22<sup>nd</sup> March 2012. Hence it was not his fault that he submitted that he was serving an illegal sentence. He was committed to prison for the wrong offence, why? Because the original charge sheet, bearing this offence is the one sitting pretty at the beginning of the proceedings and whoever signed the warrant did not notice the same.

On *voire dire* the record shows that no *voire dire* was conducted. The trial court went directly to the complainant’s testimony. She said she was fourteen (14) years old. However, no evidence was produced as to when she was born. No date of birth was mentioned either by the complainant or even the mother. PW2 did not mention the age of the complainant nor did she testify as to when the complainant was born.

The P3 filled on 11<sup>th</sup> March 2008 did not have any estimated age by the examining doctor, the age indicated on the 1<sup>st</sup> page of the P3 appears to have been entered by the police officer at Molo Police Station. The source of that age was not indicated by the doctor or the investigating officer, no evidence of mother, or documentary provided by the police, clearly the age of the complainant was not proved as required by the law, and no effort was made to do so.

On penetration the complainant said she was tied with ropes, and her face was covered when she was “raped”. However, there is no evidence as to how she was able to know that the person “raping” her had “raped” her with a penis. Neither is it clear how she identified the ‘rapist’ after he finished. In her testimony there is no time she says that her face was uncovered, for her to see who it was or what she was penetrated with.

In addition, the medical evidence was just not supportive, the PW2 said the complainant was taken to Keringet hospital on 27<sup>th</sup> October 2008, but no evidence at all was produced to prove that.

The evidence of the P3 was collected four (4) months later, the P3 states, on state of clothing “*no blood stains, no tears*”.

Clearly the doctor did not see the torn biker. Neither did he see any blood stained clothes despite the complainant saying she bled. Regarding history of the alleged offence, the doctor said;

“*No history of relevant offence*”

On examination on 11<sup>th</sup> March 2009 the complainant had painful abdomen, painful left arm, no laceration on labia or vulva but presence of vaginal discharge and presence of semen.

PW5 did not attempt to explain how on 11<sup>th</sup> March 2009, four (4) months after the alleged offence, the complainant had vaginal discharge and presence of semen. Whose semen was still present in complainant’s genital organs? The complainant testified that she bled, but no such evidence was presented before the doctor or the police.

Regarding the perpetrator, the record will show that the complainant testified that it was after the defile was done that she knew who it was. There is no evidence as to how this happened, did he uncover her face? Did she uncover herself? How did she know who her defiler was yet her face was covered? This evidence was crucial.

The one eye witness Kamau was never called, it is alleged by the complainant that she heard his voice when the defilement was on going, this person allegedly saw the defiler in the Act but the prosecution did not call him, why?

In addition, one “Mary” reported to PW2 that the appellant had “raped” the complainant, but the prosecution did not make any effort to demonstrate who this Mary was and how she knew about the alleged defilement. How come she was not interrogated by the investigating officer? So was it Mary or Kamau who witnessed the defilement? Mary told her that Njoroge raped her child, but the beating of TWW by her mother only revealed that she had been “raped” but no one was identified. It is on the strength of what Mary told her that appellant was

arrested.

The record does not tell how the appellant was identified as the person who committed the defilement. Pursuant to Section **33 of the Sexual Offences Act**, the circumstances critically appraised do not give up much evidence as to how the appellant was identified as the defiler.

If only Kamau and Mary were called as witnesses to support the PW2's testimony, without these witnesses what they are alleged to have said remains uncollaborated hearsay and we have no evidence as to how the appellant was identified as the defiler.

Was defilement proved? The complainant gave her evidence, but the rest of the case for prosecution did not support the same. No clinical or treatment notes of the first hospital attendance were produced

The circumstances of the offence do not create a certainty of the identity of the alleged defiler.

The arrest of the appellant also creates doubt. A report had been made to police in Molo, but on sighting the accused, PW2 did not call the police but called her brother, why? It would also appear that on being charged the prosecution did not have evidence to support the allegations, hence the charge of indecent act with a child. The charge sheet was substituted in 2010 yet offence was allegedly committed in 2008. This speaks to the authenticity of the charges.

On investigations, it is clear that none was conducted. The PW4 took over from Sgt. Njenga and perused the file, she made no attempt to familiarize herself with the case, she had no idea who the accused was, she did not state whether she knew when the offence was committed or what happened to the three uncalled witnesses, the kind Administration Police Officer, Kamau the cousin to Njoroge and Mary, the person who reported the issue to the complainant's mother. As the investigating officer, she did not add any value to the case, despite taking over investigations. These omissions left obvious dents in the case for the prosecution. One would expect that upon taking over a matter a new investigating officer would at least read the file and see whether before he or she gives her evidence in court he or she has anything of value to add to the case.

Regarding the supply of witness statements and prosecution evidence to an accused person to prepare for his defence, there is no doubt in my mind that the law is NOT silent as upon whom the burden lies, it lies on the prosecution to supply their evidence to the accused person, the moment the prosecution makes the decision to charge they have the duty to avail to the accused, who is innocent until proven guilty, all evidence they have against him. No burden can be laid on a person presumed to be innocent, to obtain the evidence being brought against him, that would amount to contradiction the state chooses the charges, determines the evidence, compiles the same. It cannot hide behind an alleged ambiguity to supply the said evidence to the accused.

I have said elsewhere that the duty of the trial court is to uphold the rights of the accused person and to ensure the duty bearers complied with the law. The trial court ought to ensure that before the trial starts, the accused person, especially here unrepresented has been supplied with the evidence against him and has had time to prepare for the trial.

Was there contradiction in the evidence of PW1 and PW2? The same was conceded by the state. The only argument being that it was not grave to affect the prosecution case. However, the record will show that the complainant testified she was sent specifically to Kamau, the cousin to Njoroge, yet the mother said she never send her to any specific person. This was crucial as it placed the complainant specifically at the place where the offence is alleged to have been committed. With the contradiction and without the evidence of Kamau, it is not certain where the alleged defilement took place.

The appellant described his arrest by the uncle of the complainant on the pretext that PW2 was looking for him only for them to accuse him of defilement. This fact was confirmed by PW3 that it is them who arrested him. PW2's explanation that the Police were slow in responding is not credible because first, though there was a Police Post at the Camo, no report was made there, then there was the Administration Police Officer who could have arrested the accused at the camp, and further, while in Molo they had just reported to the police. No evidence that the police were informed and failed to act.

What is clear from the totality of the case for the prosecution is that the conviction was unsafe. The same is quashed, the sentence is set aside and the appellant be set at liberty unless otherwise legally held.

**Delivered and Signed at Nakuru this 2<sup>nd</sup> September, 2020.**

**In the presence of: VIA ZOOM**

Court Assistants Edna

For state Ms Kibiriu

Appellant present

**Mumbua T. Matheka**

**Judge**

**2<sup>nd</sup> September, 2020.**