



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CRIMINAL APPEAL NO.29 OF 2019**

**ENOCK KIRUI KIPRONO.....APPELLANT**

**- V E R S U S -**

**REPUBLIC .....RESPONDENT**

***(Being an Appeal from the conviction and life sentence imposed by HON. B. R. KIPYEGON (SRM) in Kericho CM Criminal Case (S.O.) No.11 of 2015 delivered on 30/8/2019)***

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

1. The Appellant was sentenced to life imprisonment for offence of Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No.3 of 2006 in Criminal Case No.11 of 2015.
2. The particulars of the charge were that on 19/2/2015 in Kericho District within Kericho County, the Appellant intentionally and unlawfully caused his Penis to penetrate the Vagina of JCM a child aged 5 years old.
3. The Appellant was faced with an alternative charge of committing an indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006 in that on the same material particulars as in Count 1 above the Appellant intentionally and unlawfully caused his Penis to come in contract with the Vagina of JCM a child aged 5 years old.
4. The Prosecution evidence in summary was that the Appellant called the victim into house he was staying belonging to one Isaiah and removed her clothes then defiled her on the seat.
5. The Complainant was with her sister aged 13 years old who said she saw the Appellant leading the Complainant into the house and when the Complainant returned she was unhappy and she did not say anything.
6. PW.3, the mother of the Complainant said she came home and found the Complainant not playing with the other children. When she interrogate her, she told her that the Appellant had defiled her. She took the Complainant to Central Hospital and the Complainant pointed out the Appellant at Isaiah's house and he was arrested. She produced the Complainant's Birth Certificate showing DOB.26/6/2010.
7. PW.4 a Clinical Officer who examined the Complainant indicated in the P.3 that the Complainant had a torn hymen, bruised vaginal wall and smelly vaginal discharge. The P.3 was produced by PW.4 on behalf of his colleague Misoi Isaiah who examined the Complainant on 21/2/2015. He also said lab tests at Unilever showed pus cells.
8. The Appellant said in his defence that on that day he was living at Central Hospital with his Uncle Isaiah but he was away at Rocky Driving School and when he returned home Isaiah was in the house sleeping. He cooked supper and they were joined by a Doctor called Charles. They ate supper and his Uncle went to work and left Charles behind. He said they slept and the following day he was arrested.
9. The Court found the Appellant guilty on the charge of Defilement Contrary to Section 8 (1) as read with Section 8(2) and sentenced him to life imprisonment.
10. The Appellant has now appealed to this Court on the following grounds:-

(i) **THAT the charge sheet was defective.**

(ii) **THAT the Trial Court did not consider his defence, mitigation and alibi and shifted the burden to the Appellant.**

(iii) ***THAT the sentence imposed upon the Appellant is manifestly excessive and unconstitutional.***

(iv) ***THAT the Appellant was not positively identified.***

(v) ***THAT the witnesses gave conflicting statements and the Medical Experts' Report were conflicting.***

11. The parties filed written submissions which I have duly considered. The Appellant submitted that the alibi defence was not considered and the same was not rebutted.

12. The Appellant further submitted that the Prosecution evidence and Medical Reports were conflicting yet the Trial Courts convicted him.

13. The Respondent opposed the appeal and submitted that the Trial Court properly evaluated the evidence and further that the Prosecution evidence was cogent, corroborated and consistent.

14. The Respondent submitted that the Appellant was properly identified and the age of the Complainant proved by production of the Birth Certificate which shows that she was born on 26/6/2010 and therefore at the time of the incident on 19/2/2015 she was 4 years old and 4 months.

15. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses.

16. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

**“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”**

17. The issues for determination in this appeal are as follows:-

(i) ***Whether the charge sheet was defective.***

(ii) ***Whether Appellant was positively identified.***

(iii) ***Whether the Complainant was defiled.***

(iv) ***Whether the age of the Complainant was proved.***

(v) ***Whether the Appellant’s alibi defence was considered.***

(vi) ***Whether the sentence imposed upon the Appellant was manifestly excessive.***

18. On the issue of the charge sheet being defective, I find that the Appellant has not shown in what aspects the charge is defective. I also find that the said issue was not raised during the Trial.

19. On the issue of identification of the Appellant, the Complainant knew the Appellant well and she pointed him out. PW.2 the Complainant’s sister corroborated the Complainant’s testimony. She saw the Appellant leading the Complainant to Isaiah’s house.

20. On the issue of penetration, I find that the testimony of the Complainant was corroborated by the Medical Expert who filled the P.3. The Medical Report confirmed penetration and a smelly discharge. There were bruises on the vaginal wall. An earlier Report showed hymen pus cells and Epithelial Cells.

21. On the issue of whether i.e. age of the Complainant was proved, I find that the Complainant’s mother produced the Birth Certificate which shows that the Complainant was born on 26/6/2010 and therefore on the material day on 19/2/2015 she was 4 years old and some months.

22. On the issue as to whether the Appellant’s alibi defence was considered, I find that the Trial Court dwelt on it at length and therefore the same was weighed against the prosecution evidence as required.

23. In the case of **JUSTUS KIRUTHU MWANGI VS REPUBLIC NYERI CRIMINAL APPEAL NO. 70 OF 2015**, the court stated as follows:

**“The role of the court when it comes to the determination as to the admissibility or otherwise of an alibi defence is to weigh such**

*a defence(s) against the totality of the prosecution's evidence to determine whether it is dislodged or not.”*

24. I find that the alibi by the Appellate was raised too late in the trial but the same was weighed by the Trial court and it did not dislodge the prosecution evidence.

25. In the case of *Wangombe v Republic [1980] KLR 149*, the Court of Appeal held as follows;

*“When an accused raises an alibi as an answer to a charge made against him he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution (or police) ought to test the alibi wherever possible; but different considerations may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution.”*

26. Finally, I find that the sentence meted upon the Appellant is lawful as the same is determined by the age of the Complainant.

27. I find that the Appeal lacks in merit and the same is dismissed and both the conviction and the sentence herein are upheld.

**Delivered, Dated and Signed at Kericho this 2<sup>nd</sup> Day of October, 2020**

**A.N. ONGERI**

**JUDGE**