



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.124 OF 2016**

**LEONARD KIPYEGO MOHAMMED.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(An appeal arising from the original conviction and sentence on 10/05/2016 by C.MENYA, SRM in Kimilili Criminal Case No. 8 of 2014)

**JUDGMENT**

The Appellant LEONARD KIPYEGO MOHAMMED was charged with the offence of defilement contrary to section 8(1) (4) of the sexual offences act No. 3 of 2006.

The particulars of the charge were that between 17<sup>th</sup> August 2014 and 21<sup>st</sup> August 2014 as [particulars withheld] village in Cheptais District within Bungoma county, intentionally caused his penis to penetrate the vagina of S C a child aged 16 years.

He also faced an alternative charge of committing indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of that charge were that between 17<sup>th</sup> August 2014 and 21<sup>st</sup> August 2014 at [particulars withheld] village in Cheptais District within Bungoma county,

Intentionally inserted his penis to the vagina of S C a child aged 16 years.

The evidence before the trial court was that PW1 is S C a student at [particulars withheld] primary 17 years old. She testified that she is born in 1998 and knows appellant as a boy friend from March to August. She stated that they had sexual intercourse in May and recalls on 17/8/2014 appellant told her they go to his house after church and they went all the way to [particulars withheld].

She recalls that on the 17/08/2014 appellant removed their clothes and they had sexual intercourse on Sunday and Monday on Wednesday morning complainant came for her and took her to the chief and they were later on arrested by police and taken to Kapsowkony Police Station recorded a statement and she went to Kapsowkony hospital. On cross examination by the appellant stated that he knows appellant as her boyfriend.

Pw2 is IC a farmer at [particulars withheld] and mother to complainant. She recalls that on 17/8/2014 complainant told her she wanted to go to church and she allowed her to go but she did not come back until the following day and pw2 opted to report to the chief and the girl was brought home on 20/8/2014 and she further stated the complainant was born 1/1/1999.

PW3 is J N a farmer from [particulars withheld] area and father to complainant he states that on 17/8/2014 at around 2pm he was told that complainant had escaped with appellant to Kamasielo and could not be found and on 19/8/2014 he reported to the chief and on 20/8/2014 to the children's officer and he got referred to report to the police. He testified that on 21/8/2014 he went to Leonard's home in Cheptais and found complainant at chief's office and on inquiry complainant said appellant had promised to marry her. He stated appellant was arrested and they took complainant to hospital on 22/8/2014. Pw3 stated he does not know appellant and he had not allowed complainant to get married.

Pw4 is E S a farmer and pastor from Chebaibai. He testified that on 17/8/2014 he received a phone call from T N who claimed to have seen the complainant with the accused and he was accompanied by DC brother to pw2 and managed to trace complainant at chief's office.

Pw5 is Dr.Edward Wafula Simiyu of Mt.Elgon sub county hospital he testified that complainant who is 16 years old was brought to the facility on the 22/8/2014 on allegation of defilement and she had no injuries, had broken hymen, there was no STI and she was not pregnant and produced P3 form as exhibit.

Pw6 is investigating officer Mary Side of Kapsokwony police station. She recalls that on 21/8/2014 at around 6.30pm she received a call

from the incharge to rush to the office and she found appellant and a girl brought by AP and it was alleged that the appellant escaped with the girl for 5 days and she took both for them to the hospital and doctor concluded the two had sexual intercourse and doctor filled p3 form and pw6 charged the appellant with the offence.

In his defense the appellant gave sworn testimony and stated that on the 19/8/2014 he was in Kapland working and he travelled home on 20/8/2014 and on 21/8/2014 he was called by the chief to his office in Sasuri and on his way back home he was stopped by 2 policemen and who informed him that he had assaulted a police officer and arrested him and took him to police station until 24/8/2014 and he was brought to court on the 25/8/2014 and he does not understand the charges and denied knowing complainant.

It is upon this evidence that the trial court convicted and sentenced the appellant to 15 years imprisonment. Having been dissatisfied with that decision the appellant preferred this appeal on grounds that:

**the appellant pleaded not guilty and that he did not intentionally and unlawfully commit an act which caused penetration; that trial magistrate erred in law and fact by convicting appellant on evidence that is contradictory.**

The appellant also filed hand written submissions in court which he briefly submitted that his constitutional right had been violated since no witness statement were supplied to him and that no evidence of baptism card was produced in court to prove age of victim. He also submitted that essential witnesses were never called during trial and finally that his alibi defence was rejected by the court.

The state counsel Ms. Akello opposed that appeal. Counsel submitted on violation of constitutional right that appellant was supplied with statements and that appellant did not ask for more time to prepare for more time and trial commenced 19.4.2016 that is one and half years later. He submitted that on proof of age the prosecution produced baptism card and that proof of age is not limited to birth certificate and he submitted if appellant wanted an essential witness to testify he could have made request for him to be called. He also submitted that his alibi defence was rejected with proper explanation and she prayed for dismissal of the appeal.

This being the first appellate court I'm tasked with the duty of reevaluating the entire evidence and coming up with my own independent findings bearing in mind I did not have the privilege of examining the witnesses I will thus give that allowance. See **Okeno vs R 1972 EA**

The issue this court will determine is whether the three ingredients forming the offence of defilement that is age, penetration and whether the penetration was by the appellant were proved beyond reasonable doubt as to find the appellant guilty.

**The age of the complainant.** It was the evidence of pw1 during examination in chief that she was born on in 1998 January

A baptismal card was also produced of African Inland showing that she was born on 1/1/1998 There is nothing on record to suggest that the baptismal card was issued for purposes of the trial in this case. Was this sufficient proof of age?" Rule 4 of the Sexual Offences Rules stipulates that:

**"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."**

Thereof a baptism card was produced as exhibit MF1 which indicate complainant was 16 years old.

**With regard to penetration** it is important to note that penetration can be complete or partial. The complainant testified that the appellant diverted her to his house and defiled her. The medical evidence show that complainant had broken hymen and concluded that there was penetration. Penetration was thereof proved. Penetration can be proved by evidence of the complaint and/or witnesses and can be confirmed by medical examination. The complainant in the evidence testified appellant penetrated her on 17.8.2014 by inserting his penis into her vagina and does the same on Sunday and Monday before she was rescued on Wednesday. I am satisfied that penetration was proved.

The third issue is with regard as to whether the appellant was the alleged perpetrator. It is the evidence of the complainant that they had sexual intercourse in May and recalls on 17/8/2014 appellant told her they go to his house after church and they went all the way ,She recalls that on the 17/08/2014 appellant removed their clothes and they had sexual intercourse on Sunday and Monday. The appellant was thus effectively placed at the scene of crime. The duration that the appellant was with the complainant was sufficient opportunity to positively identify the appellant as the one who defiled her.

**On the question of fair trial,** an integral component of a fair trial is that an accused person ought to be furnished with all the details and evidence against him at the earliest opportunity to enable him/her prepare his defence. From the record, I note that on the first date of hearing on the 28/7/2015, the appellant stated that he was ready for the hearing and as a result trial commenced and he never requested for more time to prepare the appellant cannot his constitutional rights were violated, on the ground that he was not prepared for the hearing and defence.

For the above reasons, I am satisfied the prosecution discharged its duty to the required standards. The appellant guilt was proved beyond reasonable doubt and conviction was proper. The sentence of 15 years imprisonment imposed was legal as the complainant was aged 16 years old.

In the premises the appeal herein is without merit and is hereby dismissed.

**Dated and Signed at Bungoma this 13<sup>th</sup> day of February, 2019**

**S.N. RIECHI**

**JUDGE**