



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 59 OF 2016

DENNIS KIPLAGAT YEGON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the judgement of the Resident Magistrate T. Olando

in Eldoret CMCC NO. 164 OF 2015, dated 11th March 2016)

JUDGMENT

DENNIS KIPLAGAT YEGON, Alias Simo, who is the appellant herein, was charged in the lower court with a main cunt of Defilement, contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this offence are that on the 8th day of January 2015 in Eldoret West District, within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of *IN*, a girl aged 8 years.

In the alternative the appellant was charged with the offence of indecent Act with a child, contrary to *Section 11* of the *Sexual Offence Act No 3 of 2006*.

The particulars hereof are that on the 8th day of January 2015 in Eldoret West District, within Uasin-Gishu County, the appellant intentionally and unlawfully allowed his genital organ (penis) to come into contact with genital organ (vagina) of *IN*, a girl aged 8 years.

The prosecution case is that in the year 2015 the appellant was a manfriend to PW-1 who is the mother to the complainant in this case.

By 8/1/2015 the complainant who gave evidence as PW2 was aged 8 years, having been born on 28/8/2006. Her birth notification and Birth certificate were produced as exhibits. She was in class 3 at [particulars withheld] Primary School.

On 8/1/2015 at 9pm PW-1 was with the appellant and the complainant in the house. PW1 was called by her friend in town. She asked the appellant to take her to town and he refused.

She went leaving behind the appellant and the complainant. When she returned she found that the complainant was not in the cloths she had left her in. The following morning the appellant wanted to leave. She told him to wait but he left. When the complainant woke up.

She told the mother that the uncle had removed her cloths and his cloths and defiled her.

The court conducted a voir dire on her and found that “The child can give unsworn statement. She competent to testify”. In her evidence she said the mother had gone. *Simo*, the accused brother (alinifanyia tabia mbaya) defiled her. He remover her clothes and lay on her. He asked her if she will drink tea and made tea. They took tea and he began to kiss her.

He took her to his bed and removed his clothes and lay on her. He took her back to bed and she slept.

PW-1 took her to Moi Teaching and Referral Hospital on 9/1/2015. She was examined by PW3 who filled her P3 form. The General medical history indicates in the survivor’s report that the perpetrator (mother’s boyfriend) has been touching her genitalia with his fingers. On 8/1/2015 at night while the mother had gone to pick luggage from the bus stage he removed her underpant and defiled her; she reported this to the mother in the morning and the mother had found the survivor with her sleeping attire but without underpant on. The Doctor

examined her and found that she had Erythematous hymen and labia minora. Labia minora also had abrasions. There was dry secretions on labia majora. HIV test was negative. Urinalysis revealed no spermatozoa. Pus cells were however seen. VDRL was negative.

The Doctor made no additional remarks on the P3 Forms. She made no opinion on whether the complainant had been penetrated or not. In her evidence in court she as well did not form the said opinion.

The investigating officer received the initial report on 9/1/2015 and issued a P3 form. He later recorded witnesses statements. He alleged the complainant told him that she had been defiled by the accused and the medical report also confirmed the same. However, PW3 on cross-examination indicated that she did not examine the appellant.

PW-4 went to PW-1's house where he found the appellant. He arrested him and charged him with the offences.

The appellant offered a brief sworn testimony in his defence. He alleged that on 29/12/2014 he differed with the mother to the complainant. He was called from work and later charged with an offence he did not commit. He was charged for breaking up with the girl friend.

The trial magistrate evaluated the evidence, found the offence in the main count proved by the prosecution beyond reasonable doubt, convicted the appellant of it and sentenced him to 10 years imprisonment.

The appellant dissatisfied with both the conviction and sentence, appealed to this court on the grounds that:-

1. The offence against him was not proved by the prosecution beyond reasonable doubt.
2. The evidence tendered by the prosecution was flawed.
3. The exhibits produced in court did not support the charges.
4. The particulars of the offence in the charge sheet and the adduced evidence were at variance.
5. The conclusion the court arrived at was not fair.

The Republic filed a notice to enhance sentence on 21/6/2017, from 8 years to life imprisonment pursuant to the provision of *Section 8(2)* of the *Sexual Offences Act No. 3 of 2006*.

Ms Mokuu who appeared for the state opposed the appeal. She alleged the evidence by prosecution witnesses was consistent and corroborative. The age was established by the produced Birth certificate, that the complainant on 8/1/2015 was 8 years old; the evidence by the doctor shows the vagina had bruises and redness.

PW2 the complainant said the appellant removed her clothes and laid her in bed. He defiled her. P3 form shows hymen and labia minora had abrasions which confirmed penetration, the appellant was recognized as a boy friend of the minor's mother. The appellant had visited the woman friend and finding her gone turned on the minor and defiled her. Initially the appellant was sentenced to 8 years imprisonment but *Justice Kimondo* in file No. 38 of 2016 reviewed it to life imprisonment. I was urged to dismiss the appeal.

I have evaluated the entire evidence as recorded by the trial magistrate. I have also weighed the judgment, considered the sentence passed, grounds of appeal and submissions by both sides.

The issues for determination in this appeal are:-

1. Whether the age of the victim was established by the prosecution beyond reasonable doubt.
2. Whether penetration of the victims genital organ (vagina) by the appellant's genital organ (penis) was proved by the prosecution beyond reasonable doubt.
3. Whether the Appellant was positively identified and or recognized as the perpetrator.

On the first issue of age, though it looks strange that PW-1 and PW-2 in their evidence did not state categorically that she was 8 years old, the Birth notification and Birth certificate produced, of which authenticity is not in doubt, put the issue to rest that PW-2 at the time of the alleged offence was aged 8 years.

The offence of defilement is defined under *Section 8(1)* of the *Sexual Offences Act*. It is where a person commits an act which causes penetration with a child. Where there is no dispute that the victim was a child as is in this case, of paramount importance in the offence is the word "*penetration*". This word penetration under *Section 2(1)(d)* of *Sexual Offences Act*, means the partial or complete insertion of the genital organs of a person into the genital organs of another person. This does not make it very clear in absence of proper understanding of what "*genital Organs*" are. Under *Section 2(1)* of the *Sexual Offence Act*, they include the whole or part of male or female genital organs and for purpose of the Act also anus. The use of the words "*genital Organs*" in the definition of the very same words "*genital organs*", does not help much in understanding of the other organs referred to, save for anus of which is specifically disclosed.

Oxford Concise Dictionary define "*genital*" as relating to human and animal reproductive organs. To make it clear, they can be internal or

external and I am certain the sexual Offences Act refers to only the external genital organs of which are a male penis and a female vagina. In an offence of defilement, it follows that the prosecution must establish beyond reasonable doubt that a male penis partially or fully penetrated the victim's vagina and or anus.

The only eye witness to what exactly took place in this case is PW2, the alleged victim. Her evidence is very brief and I will quote it as recorded.

"I know Simo. He is the accused in court (alinifanyia tabia mbaya) defiled me. He removed my cloths. My mother had left and I do not know where she had gone.

Simo removed my clothes and he lay on me. Simo asked me if I shall drink tea and he made tea and we took tea and he began to kiss me.

He took me to his bed and removed his cloths and lay on me and he took me back on bed and I slept and later my mother came the following morning my mother took me to hospital. That is all."

The foregoing evidence only suggest there was a sexual activity which took place between the complainant and the appellant. However, it's not clear that the appellant used his penis to penetrate her vagina. The phrase "Alinifanyia tabia mbaya" of which in English can be interpreted to mean "he did to me bad manners", are words not carried anywhere in the Sexual Offences Act.

"Bad manners" as this court expressed in the case of Langat Dinyo Domokonyang (Appellant) versus Republic, Criminal Appeal No. 6 of 2017, is an English phrase which refers to discourteous manners that ignores acceptable social usage. Rudeness, disrespect, insolence, impertinence, bluntness, imprudence, coarseness, discourtesy, abruptness, boorishness', incivility, brusqueness, churlishness, curtness, indelicacy and impoliteness all fit in the phrase "bad manners". Explanation that followed "Defiled me" does not help much as defilement is a technical word of which when used by a lay person needs explanation as to what they exactly mean or took place.

The evidence of the mother (PW-1) and of the doctor (PW-3) does not vividly show that the appellant using his penis penetrated the complainant's vagina. The general medical history allegedly given to the doctor by PW-2 shows that the perpetrator has been touching PW-2'S genitalia with his fingers and on 8/1/2015 at night while the mother (PW-1) had gone to pick a luggage from the bus stage, he removed her underpant and defiled her; she reported this to her mother in the morning and the mother had found the survivor (PW-2) with her sleeping attire but without an under pant on.

The foregoing report draws us to a possibility, where if penetration is well established, and by this I am not saying it's well established, that she could have been penetrated with another body organ, save to a penis, like a finger or fingers. If this is what happened the offence committed is different and is termed, "Sexual Assault"

Under Section 5(1) of the Sexual Offences Act.

This offence is committed by any person who unlawfully: -

- (a) Penetrates the genital organs of another person with: -
 - (i) Any part of the body of another or that person; or
 - (ii) An object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purpose.
- (b) Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ with or by any part of the other person's body.

What the doctor noticed on examination does not establish beyond reasonable doubt that there was penetration. She noted of Erythematous hymen and labia minora. Abrasions on labia minora. There was dry secretion on labia majora. The doctor made no opinion out of the said observation. There is no evidence that what she noted could only result from penetration. There is also no evidence that a penis was involved in whatever happened. Spermatozoa were not noted and the appellant was not examined. The noted dry secretion on labia majora was not expounded on.

The prosecution must make it certain to the court of the offence which was committed and by who. The court should not be left to assume. This is what prove beyond reasonable doubt is all about.

The available evidence does not make it certain of which offence was committed between defilement and Sexual Assault.

It therefore follows that the offence of defilement, contrary to Section 8(2) of the Sexual Offences Act number 3 of 2006 is not proved by the prosecution, against the accused, beyond reasonable doubt.

I therefore do allow the appeal; conviction and sentence are quashed, and the appellant should be released forthwith unless otherwise lawfully held.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 1st day of November, 2018

In the presence of:

Appellant

Ms Oduor for state

Mr. Mwelem – court assistant