



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 170 OF 2016**

**SOLOMON KIPLANG'AT SICHEI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in criminal case number 1299 of 2015 in the Senior Resident Magistrate's Court at Sirisia – K. Mukabi (RM))*

**JUDGMENT**

1. The Appellant **Solomon Kiplang'at Sichei** was charged with the offence of defilement contrary to **section 8(1) (4)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the charge were that on diverse dates between 16<sup>th</sup> and 19<sup>th</sup> days of December, 2015 at Emia location in Cheptais District within Bungoma County he intentionally and unlawfully caused his penis to penetrate the vagina of BCS a child aged 16 years. (Initials substituted to protect the identity of the child).
2. The prosecution called five (5) witnesses. PW1 the Complainant testified in camera that she deserted her parent's home and went to cohabit with the Appellant (her boyfriend) in Kipsigon from 16<sup>th</sup> December, 2015 to 19<sup>th</sup> December, 2015. The Complainant stated that during the period, she actively engaged in sexual intercourse with the Appellant. PW2 David Simotwo searched for her and together with members of the local community policing led by one Albert Kirwas PW3, they traced the Complainant at the Appellant's house on 19<sup>th</sup> December, 2015.
3. Both the Appellant and the Complainant were arrested and escorted to Kipsigon Police Station. The incident was booked, witness statements recorded and the Complainant was issued with a P3 form and referred for medical examination. The Appellant was subsequently charged as read above.
4. In his sworn testimony, the 21 year old Appellant denied having committed the offence and stated that he was away in Transzoia from 4<sup>th</sup> December, 2015 until 18<sup>th</sup> December, 2015 when he returned home. He was arrested on 19<sup>th</sup> December, 2015 at his brother's home in the presence of the Complainant over the subject allegations.
- 5 It is upon this evidence that the trial magistrate convicted the Appellant on the main count and sentenced him to serve 15 years imprisonment. He was disgruntled with the decision and immediately preferred this appeal on grounds that: the prosecution evidence was uncorroborated and was contradictory; the age of the complainant was not proved; he had raised an alibi defence; no voir dire examination was conducted; the Appellant's right of cross examination was denied and the medical evidence was uncorroborated.
6. Learned Counsel Mr. Onyando submitted on behalf of the Appellant and asked the court to allow the appeal since the prosecution failed to prove the offence of defilement against the Appellant to the required standard. He urged that the documents tendered in evidence, and which were the basis of the Appellant's conviction were marred with glaring contradictions.
7. The state conceded the appeal through learned state counsel Mr. Oimbo on the basis that the evidence produced before the trial court was contradictory, and in particular the treatment notes and the P3 forms had varying names and dates. Further that the record was not clear as to whether the Appellant was given a chance to cross-examine since he indicated that he was ill and could not cross-examine on the material day.
8. I evaluated the prosecution's evidence afresh, together with the Appellant's defence and inquired into the entire evidence to establish whether there exists a reasonable doubt in the prosecution's evidence in light of the defence raised by the Appellant. Should there be a reasonable doubt, benefit thereof must be accorded to the Appellant. See – **Ouma vs. Republic [1986] KLR pg. 619**. Upon the fresh analysis of the evidence, I am satisfied that this appeal can be determined on the single question of contradictory evidence, namely on the age and name of the complainant and the medical evidence.

9. There are three critical ingredients needed to prove the offence of defilement namely the age of the Complainant, proof of penetration and positive identification of the assailant as highlighted in the case of **Dominic Kibet Mwareng vs. Republic [2013] eKLR**.

10. Age is a critical component in proving the offence of defilement first because it helps in determining whether the Complainant was a minor at the time of the offence and secondly to determine the sentence to be imposed upon conviction. Commenting on the requirement of proof of age, the Court of Appeal in **Martin Nyongesa Wanyonyi vs. Republic Criminal Appeal No. 661 of 2010** cited and applied the case of **Kaingu Elias Kasomo vs. Republic Criminal Appeal No. 504 of 2010** in which it was observed thus:

**“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.** emphasis mine.

11. In her testimony, the Complainant stated that she was aged eighteen (18) years at the time of giving evidence in court just a month from the time of the said defilement. The charge sheet on the other hand, indicated the age of the Complainant to be 16 years. PW2 David Simotwo, the Complainant’s father, testified that she was aged 16 years and PW5, a clinical officer at Kopsiro Health Centre, stated that he assessed her age to be 16 years by examining her dental formula.

12. No documents were produced to prove the Complainant’s age. The court therefore had only the evidence of PW1, PW2 and PW5 to rely on. Courts have stated that in the absence of any records of birth, medical evidence or evidence of a parent can equally suffice in proving age. I note however that the evidence of the three witnesses was not in agreement and from her age bracket, her apparent age is not evident to the eye. In the absence of documents of birth, clinic or baptism therefore, I find that the age of the Complainant was not proved.

13. On the medical evidence, I note that it had glaring discrepancies. The offence for which the Appellant herein was charged was stated to have occurred on diverse dates between 16<sup>th</sup> December, 2015 and 19<sup>th</sup> December, 2015.

14. In his testimony, PW5, the clinical officer who examined the Complainant, stated that she went to their facility on 19<sup>th</sup> December, 2015 with a history of having been defiled. He stated that he filled the P3 form on 11<sup>th</sup> December, 2015 which is eight (8) days before the Complainant was presented to the facility. The P3 form on the record bears a stamp which shows that it was filled on 4<sup>th</sup> December, 2015.

15. The treatment notes which are ideally used in filling a P3 form show that the Complainant was examined and treated at Kopsiro Health Centre on 2<sup>nd</sup> December, 2015. Further the treatment notes bear a name Sharon which has been crossed out and which differs from that of the Complainant. The medical evidence is therefore wanting and cannot be relied upon to sustain a conviction.

16. In her testimony in examination in chief, the Complainant testified that she was arrested at the Appellant’s house but in cross-examination, she stated that she was arrested at another boy’s house where the Appellant had taken her. The prosecution did not take the Complainant through re-examination to clarify this issue.

17. From the foregoing, it is evident that the evidence tendered was marred with grave contradictions and inconsistencies which went to the root of the case and which the prosecution did not attempt to explain. In **Eric Onyango Ondeng’ vs. Republic [2014] eKLR** the Court of Appeal cited and applied the case of **Twehangane Alfred vs. Uganda Criminal Appeal No. 139 of 2001** in which the Uganda Court of Appeal observed thus:

**“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”**

I note that in the instant case, the contradictions were grave and they affected the main substance of the prosecution’s case but which the prosecution did not attempt to explain before the trial court. Further, I observe from record that the Appellant was not afforded an opportunity to cross-examine the prosecution witnesses. He said he was ill when the witnesses testified and even though he applied for an adjournment, the same was not granted. The record just indicates “Nil” on whether he cross-examined.

For the foregoing reasons, I find that a real doubt exists in the prosecution case whose benefit is granted to the Appellant. The upshot is that this appeal must succeed and is therefore allowed and it is ordered that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

**DATED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF NOVEMBER 2018.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 14<sup>TH</sup> DAY OF DECEMBER 2018.**

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**H. K. CHEMITEI**

**HIGH COURT JUDGE**