



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 169 OF 2014
GEOFFREY KIPKURUI TUM.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

[An appeal from the original conviction in Criminal Case No. 563 of 2013 in the Resident Magistrates' Court at Kapsabet by C. Wattimah, Resident Magistrate, dated 30th October 2014]

JUDGMENT

1. The appellant was convicted for *defilement* contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act. He was sentenced to *fifteen years* imprisonment. Considering that the complainant was aged *sixteen*, the correct penal provision should have been section 8 (4). I will return to that matter.
2. The particulars were that on 21st September 2012 at [K] Tea Estate [*particulars withheld*] in Nandi County, he caused his penis to penetrate the vagina of N. C. [*particulars withheld*] a child aged 16 years.
3. The appellant has preferred an appeal. The *original* petition was filed on 10th November 2014 in person. There are five grounds. The first ground is that the sentence was too harsh. Secondly, that the appellant is the first born in a family of three; that he is a casual worker; and, that the siblings rely on him. Lastly, he claimed *he is a "layman to the law and [it] was [his] first time to be tried in a court of law"*. When I unpack the grounds of appeal, their essence is plea for *clemency*. The petition has never been amended.
4. Learned counsel for the appellant tried to argue some grounds of appeal that had not been pleaded in the petition. No such leave had been obtained. It offended the mandatory provisions of section 350 of the Criminal Procedure Code. However, the last ground of appeal in the petition- that the appellant is a "*layman to the law and [it] was [his] first time to be tried in a court of law* - is wide enough to challenge the *conviction*.
5. Learned counsel submitted that section 200 of the Criminal Procedure code was not complied with. She submitted further that the appellant should have been charged under section 8 (4) of the Act. Lastly, she argued that the appellant believed the complainant was *not* a minor.
6. The appeal is contested by the State. The learned Prosecution Counsel submitted that all the elements of *defilement* were proved beyond reasonable doubt. In particular, she stated that the appellant was known to the complainant. Penetration was established by DNA evidence; and, that a child was conceived out of the illicit union. The age of the appellant was not in doubt; and, the defence set up by the appellant was bogus. In a synopsis, the case for the Republic is that the evidence established the appellant's

culpability. I was implored to dismiss the appeal.

7. I have considered the grounds of appeal, the records of the lower court, the evidence, the precedents and the rival submissions.

8. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been careful because I neither saw nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32.

9. PW1 was the complainant. At the time of the trial, she was *seventeen*; and, was about *seven months* pregnant. She said she was born on 13th March 1996. There is a birth certificate (exhibit 3). She testified that on 21st September 2012, at about 11:00 p.m., she was in her house with her brother. The appellant knocked at the door. She knew him as a neighbour. He said “*today is today*”. He had a knife. He pushed the complainant to the sofa; removed her panties; and, inserted his penis into her vagina. She said he ejaculated. He then left.

10. The complainant did not tell her parents about the incident. When she went back to school, she missed her periods. Her parents were summoned. A pregnancy test proved to be positive. She was taken to hospital. The matter was reported at Nandi Hills Police Station. Upon cross-examination, she admitted she had other boyfriends. She also said that she never raised an alarm when the appellant defiled her.

11. PW2 was the complainant’s mother. She largely confirmed the narrative by the complainant. She said the appellant was her work mate and neighbour.

12. PW3 was the investigating officer. He interviewed the complainant on 21st March 2013. PW3 gave the complainant’s mother a P3 form (exhibit 3). It was filled out at Nandi Hills District Hospital by Kilel (PW4), a clinical officer. The medical examination was conducted on the same date. It confirmed the pregnancy. He produced the treatment notes (exhibit 2).

13. PW5 is a Government Analyst. He conducted DNA sampling. From his original report dated 18th September 2013, he concluded that “*there are 99.99 + % chances that Geoffrey Kipkurui Tum [the appellant] is the biological father to A. J. [particulars withheld] who is [the complainant’s] daughter*”.

14. When the appellant was placed on his defence, he admitted that he had sex with the complainant on 21st September 2013. However, he said it was consensual. He later met the complainant on 25th February 2013. She informed him she was five months pregnant. He said that his parents tried to negotiate a settlement with the complainant’s parents. The matter was not resolved. He was then arrested and charged with the offence.

15. A number of issues arise from that evidence. I will deal first with the *age* of the complainant. I am satisfied from her evidence and that of PW2 (her mother) that she was born on 13th March 1996. She was thus *sixteen years* at the time of the offence. Doubt is removed completely by the birth certificate (exhibit 3). The appellant was thus properly charged for defilement of the minor. However, I agree with his learned counsel that he should have been charged under section 8 (4) of the Act and not section 8 (3). The charge sheet properly cited the provision creating the *offence* in section 8 (1) of the Act. The infraction in citing the wrong provision for *sentencing* is not material. Furthermore, it is *curable* under section 382 of the Criminal Procedure Code. See *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Court of Appeal, Criminal Appeal 661 of 2010 (unreported).

16. I will now turn to *identification* of the appellant. The complainant and appellant were *not* strangers. The appellant was a neighbour. She *knew* him. The appellant admitted the fact; and, that he had *consensual* sex with the complainant on the material date. That is evidence of *recognition*; stronger evidence than that of identification. See *Wamunga v Republic* [1989] KLR 424, *Republic v Turnbull & others* [1976] 3 All ER 549, *Obwana & Others v Uganda* [2009] 2 EA 333.

17. The next key question is whether the appellant *penetrated* the complainant. There is no doubt about the matter. The complainant was emphatic that the appellant penetrated her. The appellant did *not* deny it. There was also a smoking gun: a baby girl was delivered. PW5, the Government Analyst, testified that DNA profiles established that “*there are 99.99 + % chances that Geoffrey Kipkurui Tum [the appellant] is the biological father to A. J. [particulars withheld] who is [the complainant’s] daughter*”. I find that the prosecution proved beyond reasonable doubt that the appellant defiled the complainant on the *material date*. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332.

18. The fact that the complainant had other boyfriends does not aid the appellant’s case. It may show the complainant had poor morals; or, she could not be completely trusted. For example, I did not believe that the complainant was forced to have sex. From the evidence of the appellant, it was *consensual*. The complainant did not raise an alarm during the incident. But the fact that the sex was *consensual* is *not* a defence to the offence of *defilement*. The offence of *defilement*, unlike that of *rape*, takes place even when intercourse is consensual, so long as the complainant is a *minor*.

19. The appellant submitted that he *believed* the complainant was not a minor. Section 8 (5) (a) of the Sexual Offences Act avails him that defence. But it requires the accused to show the *steps* he took to *ascertain* the *age* of the complainant. The appellant did not lead such evidence. The defence accordingly falls flat on its face. It is a red herring.

20. I will now deal with the question of compliance with section 200 of the Criminal Procedure Code. The section requires the succeeding magistrate to explain to the accused, on the record, of the right to recall any witnesses. Section 200 (3) is couched in mandatory terms: the succeeding magistrate *shall inform* the accused person of that right. Where the accused is convicted on evidence not wholly taken by the convicting magistrate, the High Court can overturn the conviction if there is a material prejudice. In that event, a new trial may be ordered.

21. I have carefully examined the original record. The evidence of all the five prosecution witnesses was recorded by *B. Limo*, Resident Magistrate. He found the appellant had a case to answer. On 26th May 2014, the trial was taken over by *C. M. Wattimah*, Resident Magistrate. At page 27 of the record, the prosecutor prayed for directions in the matter. The accused told the court: “*the case to proceed from where it had reached*”. The learned trial magistrate ordered the matter to proceed from that point. The appellant proceeded to give a sworn statement. The appellant *elected* to proceed from where the matter had reached. It *cannot* now fall from his lips that section 200 (3) of the Criminal Procedure Code was *not* complied. It would be a misnomer to say that the appellant was prejudiced by his own election.

22. In the end I have reached the firm conclusion that the prosecution *proved* all the elements of the offence beyond reasonable doubt. It follows as a corollary that the conviction was *safe*.

23. The appellant was sentenced to fifteen years imprisonment. Under section 8 (4) of the Sexual Offences Act, the *minimum* sentence is *fifteen* years. I am unable to disturb the sentence handed down to the appellant. That said, the legislature must revisit the Act; and, return the *discretion* on sentencing to the court. Here is a case where the appellant, a young man of *twenty*, admitted to consensual sex; and, was willing to take up the responsibility of a *father*. The girl was *sixteen*; a minor under the Act. Regretably, my hands are completely tied by the legislature.

24. The upshot is that the entire appeal is devoid of merit. It is hereby *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 24th day of January 2017.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant.

Mr. Birech for the appellant.

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.