



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 102 OF 2013**

**NICODEMUS KIPLAGAT KETER.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 2992 of 2012*

*Republic v Nicodemus Kiplagat Keter in the Senior Resident Magistrates' Court at Kapsabet by*

*G. Adhiambo, Senior Resident Magistrate, dated 29<sup>th</sup> May 2013)*

**JUDGMENT**

1. The appellant was convicted for *defilement* contrary to section 8 (1) as read with section 8 (2) of the Sexual Offence Act. The *amended* charge sheet however referred to section 8 (1) (2) of the Act. One of the grounds taken in this appeal is that the charge sheet was *defective*. The appellant was sentenced to *life* imprisonment.
2. The particulars of the amended charge sheet were that on 17<sup>th</sup> December 2012, at [particulars withheld] village within Nandi County, of the Rift Valley Province, he intentionally caused his penis to penetrate the vagina of Q. J. [name withheld] a girl aged five years.
3. The appellant is aggrieved by the conviction and sentence. The original petition of appeal was filed on 11<sup>th</sup> June 2013. On 3<sup>rd</sup> December 2015, the Court granted leave to the appellant under section 350 of the Criminal Procedure Code to amend the grounds of appeal.
4. There are seven *amended grounds*. They can be condensed into five. First, that the amended charge sheet was defective; secondly, that the investigations were shoddy; thirdly, that the trial was irregular; fourthly, that the evidence was inconclusive or unreliable; and, fifthly, that the trial court disregarded the evidence produced by the appellant and his witness. In a nutshell, the appellant's case is that the charge was not proved beyond reasonable doubt.
5. At the hearing of the petition, the appellant relied on his written submissions filed on 30<sup>th</sup> June 2016. He added that he did not follow the proceedings because he was hard of hearing; that the evidence of the complainant and the doctor was inconsistent or unreliable; and, that the charges were trumped up.
6. The appeal is contested by the State. The learned Prosecution Counsel submitted that the charge was proved beyond reasonable doubt. She submitted that the appellant was positively identified by PW1; and, that penetration was proved by credible medical evidence. She submitted that the appellant was at first

charged with an attempt; but the Republic amended the charge on 18<sup>th</sup> March 2012. She said the substitution of the charge was regular. The learned Prosecution Counsel contended that the defence proffered by the appellant was taken into account by the trial court. In a synopsis, the case for the State is that the evidence established the appellant's guilt to the required standard of proof. I was implored to dismiss the appeal.

7. 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, Kariuki Karanja v Republic [1986] KLR 190.

8. On 6<sup>th</sup> February 2013, the trial commenced in the lower court. The court conducted a detailed *voire dire* examination on the complainant. The complainant was a top student at R. School E. [particulars withheld]. She attended church at E. [particulars withheld] but could not identify the Bible in court. The court formed the opinion that she did *not* understand the nature of an oath. The court directed her to make an *unsworn* statement. The true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things: the nature of an oath; and, the need to tell the truth. See Republic v Peter Kiriga Kiune Criminal appeal 77 of 1982 (unreported), Johnson Muiruri v Republic [1983] KLR 445. The Children Act defines a child of tender years to be one of ten years or below. I am satisfied that the court complied fully with the procedure of taking evidence of the minor.

9. The complainant said she knew the appellant as *Kiplagat*. She said that the appellant took her “*near the store....inside a house*”. He removed her pants. She said the appellant “*removed his thing and urinated on her*”. The record shows that she “*pointed to her vagina*”. In cross examination, she said they were alone with the appellant; and, that the appellant was later arrested at the store.

10. PW2 was a brother of the complainant. He was aged *twelve* at the time of the trial. After a detailed *voire dire* examination, the court formed the opinion that he was intelligent and understood the nature of an oath. He testified that on the material day, at about 1:00 p.m., he returned home from K. Centre [particulars withheld]. He was asked about the whereabouts of the complainant. He went to look for her. He then saw the complainant accompanied by the appellant. He said the appellant was wearing a black shirt and jeans. The complainant was limping. He said it was 800 meters away. When he enquired, the complainant told him that “*Kiplagat had done bad manners to her*”. The witness said he took that to mean that the appellant had “*raped*” the complainant. He followed the appellant to his house. He said he planned to lock him up in his house. However, the appellant slapped him. He took off and informed his parents. His father got hold of his cane and went after the appellant. PW2 said he saw the complainant's panties (exhibit 1); and, that they had a whitish liquid. The substance was also visible on the “*front part of her vagina*”.

11. PW3 was the complainant's mother. She said the complainant was crying as she approached home. She told her that “*Kiplagat had urinated on her*”. When she inspected her, she saw some sperms coming out of her vagina. She put the panties back on the complainant and went towards C. School [particulars withheld]. PW4, a teacher at the school, advised her to take the child to hospital. A visitor to the school gave a lift to the complainant and her mother to Kabiyet District Hospital. PW3 identified the complainant's panties and dress in court. She also produced her birth certificate (exhibit 3). She had known the appellant for three months. She said the appellant was employed as a herdsman by her mother-in-law.

12. The appellant was later arrested by the public. PW5 said the appellant was arrested 300 metres from his place of employment. He was tied up with ropes. He was frog marched to Kabiyet Police Station. PW7, Police Constable Kabaka, accompanied the complainant and her mother to Kabiyet District Hospital. PW7 took down witness statements; and, collected the exhibits.

13. PW6, Wilson Kirwa, is a clinical officer. He examined the complainant on 18<sup>th</sup> December 2012. He found a cut wound on the labia majora; and, a tear on the lower end left of labia minora. There was a discharge. Syphilis and HIV were negative. In his opinion, there was “*partial penetration*”. He filled in

the P3 form [exhibit 4(a)]

14. When he was placed on his defence, the appellant protested his innocence. He commenced his testimony in *Kiswahili*. The record shows that midstream he switched to *Nandi* language. The court provided interpretation. He said that on 17<sup>th</sup> December 2012, he was at the trading centre until 3:00 p.m. There was a power outage. He went to collect milk from his employer. That is when three people alighted from two motor cycles. One of them hit him with a *jembe* handle; the others joined in the assault. He screamed. A crowd surrounded him.

15. One of the three people told the surging crowd that the appellant had defiled a child. He denied it. The crowd would have none of it. They continued to assault him. He said they stole his mobile phone and Kshs 7,500. He was eventually put on a motor cycle and taken to the police station. The police advised that he be taken to the hospital. At the hospital, the mob continued assaulting him. He was rescued by the hospital staff. He said he heard a doctor say: “*this person is seriously injured and even if we examine him there is nothing*”. The appellant contends that the words meant he was innocent.

16. On cross examination, the appellant said his friend, Babu, took him to the police; and, that he was going there to report the theft. The police advised that he be taken to the hospital first. DW2, Diana Cheruto, said she received a call informing her that the appellant had been injured. She waited for him at Kabiyeet Hospital. She said the appellant was bleeding from the head and face. Upon cross examination, the witness said she was not with the appellant at Kaplamai village.

17. A number of matters arise from that evidence. Like I stated earlier, I am satisfied that the court complied fully with the procedure of taking evidence of both minors. The more important question is whether the unsworn testimony of the complainant was consistent and reliable; or, whether there was corroborating evidence. From the evidence, the complainant and appellant were *not* strangers. He was employed by her grandmother as a herdsman. The complainant *identified* the appellant as *Kiplagat*. The only discrepancy is whether the offence took place in a store or in a house. The other issue is whether the complainant gave sufficient details establishing defilement.

18. First, I am alive that a child of the complainant’s age may not describe sexual acts in a *graphic* manner. But in this case, she sufficiently described the act in the following terms: that the appellant “*removed his thing and urinated on her*”. The record shows that she “*pointed to her vagina*”. She said that the appellant took her “*near the store....inside a house*”. The complainant was only *five* years at the time. The distinction between a *house* and a *store* was not material. The complainant was also seen by PW2 in the company of the appellant. She was limping. She said she had been defiled by *Kiplagat*. She told her mother the same thing.

19. It is not lost on me that the complainant disclosed the *name* of her assailant *immediately* after the incident. The identification of the appellant was thus beyond question. That was evidence of recognition; stronger than simple 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.

20. The next key question is whether the appellant penetrated the complainant. From the evidence of the complainant, the appellant used his *thing* to urinate into her *vagina*. PW2 saw a whitish substance on her panties. The complainant’s mother saw sperms flowing from the complainant’s vagina. This was corroborated by the clinical officer, PW6. The examination revealed *a cut wound on the labia majora and a tear on the lower end left of labia minora*. There was a discharge. Syphilis and HIV were negative. The clinical officer said there was “*partial penetration*”. I have thus reached the inescapable conclusion that penetration was proved beyond any reasonable doubt. Section 2 of the Act defines *penetration* as follows-

“*Penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person*”.

21. The age of a complainant is *material* in offences of this nature. See *John Wagner v Republic* [2010] eKLR, *Macharia Kanji v Republic* Nyeri, Court of Appeal, Criminal Appeal 346 of 2006 (unreported),

Kaingu Kasomo v Republic, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported), Felix Kanda v Republic Eldoret, High Court Criminal Appeal 177 of 2011(unreported). From the evidence of the complainant's mother, the birth certificate (exhibit 3), and the P3 form (exhibit 1) I am satisfied that the complainant was born on 8<sup>th</sup> February 2007. She was thus aged *five* years at the time of the offence.

22. The appellant submitted in this appeal that the investigations were shoddy. I agree that the investigating officer could have been a little more thorough. But I am alive that in any trial there are bound to be discrepancies. See Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993. I am satisfied that the evidence tendered by PW1, PW2, PW3 and PW6 was *sufficient*; and, established the *culpability* of the appellant.

23. The appellant submitted that the amended charge sheet was defective. First, the *amended* charge sheet referred to section 8 (1) (2) of the Act. The correct provision would have been 8 (1) *as read with* 8 (2) of the Act. I do not find the error to be material or prejudicial to the appellant. The offence was properly framed; and, the particulars were clear. I find that the error was a minor infraction; and, 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).

24. Secondly, I am satisfied that the trial court followed the correct procedure in admitting the fresh charge. The appellant pleaded *afresh* to the new charge. I have carefully studied the record. There was no infringement of section 214 of the Criminal Procedure Code. The section provides that an accused person *may* request the court to recall witnesses for examination. The prosecutor offered to *recall* the witnesses; but the appellant *protested* that it would *delay* his trial. The prosecutor then told the court he would proceed from where the trial had reached prior to substitution of the charge. Granted those circumstances, it cannot now fall from the lips of the appellant that there was an infringement of the procedural rule.

25. I am not persuaded that the appellant did *not* follow the proceedings. Although he claims he was hard of hearing, he never brought the matter to the attention of the trial court. The record shows he actively took part in the trial; and, he cross examined the witnesses at length. The appellant testified in his defence; and, called a witness. I am satisfied that the appellant was afforded a fair trial.

26. The defence mounted by the appellant was hollow and unbelievable. The lower court dismissed it as a red herring. The appellant was placed at the *locus in quo* by the complainant. He was seen by PW2 in the company of the complainant immediately after the incident. The complainant identified him by name. The appellant's witness (DW2) conceded she was *not* in the company of the appellant at Kaplamai village at the *material* time.

27. The legal burden of proof lay throughout with the prosecution. See Woolmington v DPP [1935] AC 462, Bhatt v Republic [1957] E.A. 332, Abdalla Bin Wendo and another v Republic (1953) EACA 166. From my *analysis* and *re-evaluation* of all the evidence, the charge and all its elements were *proved* beyond reasonable doubt. I cannot say that the burden of proof was shifted to the appellant at any point. It follows as a corollary that the conviction was *safe*.

28. Under section 8 (2) of the Sexual Offences Act, defilement of a child of eleven years or *below* attracts imprisonment for *life*. The sentence is *mandatory*. The complainant was *five* years at the time of the offence. I am thus unable to disturb the sentence.

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

**DATED, SIGNED and DELIVERED** at **ELDORET** this 13<sup>th</sup> day of September 2016.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

Appellant (in person).

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.