**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 1 OF 2011**

**ABRAHAM KIBET CHERUIYOT ..... APPELLANT**

**VERSUS**

**REPUBLIC …..... RESPONDENT**

***(Being an Appeal from the Original Conviction and sentence by Hon. B. Mosiria (Resident Magistrate) in the Eldoret Chief Magistrate's Court in Criminal Case No. 645 of 2009 dated 28th December, 2010)***

**JUDGMENT**

The Appellant, **ABRAHAM KIBET CHERUIYOT** was charged with defilement of a girl contrary to Section 8 (4) of the Sexual Offences Act No. 3 of 2006. The allegation being that on the 14th December, 2008 at around 8.00 p.m. in Marakwet District of the Rift Valley Province intentionally and unlawfully caused penetration of his genital organ (penis) into the genital organ, vagina, of L K a girl aged sixteen (16) years.

In the alternative, he was charged with the offence of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2008.

Particulars of the offence were that on the 14th December, 2008 at around 8.00 p.m. in Marakwet District of the Rift Valley Province, did act of indecent assault with L K a girl child aged sixteen (16) years by touching her private parts namely vagina.

The Appellant was convicted in the main charge and was sentenced to serve fifteen (15) years imprisonment. He appealed against both the conviction and the sentence.

Mr. Angu, learned counsel for the Appellant submitted on three main issues;

Firstly, that the prosecution did not prove that the Appellant did actualy defile the complainant notwithstanding that he had an opportunity to. He submitted that although the offence is alleged to have been committed on 14th December, 2008, it was not until the complainant became pregnant and was about to give birth that her brother lodged the complaint. He submitted that a child was born from the pregnancy, yet no DNA test was conducted to link the Appellant as the father of the child.

Secondly, Mr. angu submitted that the age of the complainant was not proved. He stated that, although a birth certificate No. xxxxx was produced in court the same was registered on 6th July, 2009, only a month before its issuance to the complainant's brother. He submitted that the issuance of the birth certificate too

late for purposes of the case was suspect.

Thirdly, he submitted that the complaint was lodged with the police too late in the day which was prejudicial to the Appellant.

Learned State Counsel, Mr. Munene opposed the appeal. He submitted that the prosecution proved its case beyond all doubts. He said that the age of the complainat was proved by the medical examination produced as P. Exhibit 3.

He submitted that the evidence of PW2 and PW3 was corroborative and left no doubt that the Appellant was with the complainant on the material date.

He submitted that the Appellant's defence was contradicted by that of DW3, his wife. According to the Appellant, he was at his home on the material date. His wife unfortunately testified that he had gone on a long journey and returned home at mid night.

He submitted that the law gave no limitation on when a complaint relating to a criminal offence should be made.

Further, Mr. Munene submitted that there was no need for conducting a DNA test because the medical examination had proved the act of penetration. He also submitted that the trial court correctly invoked Section 124 of the Evidence in arriving at a finding that the Appellant was guilty.

In rejoinder, Mr. Angu submitted that the P3 form and Birth Certificate were obtained one year after the alleged defilement. He said that only a DNA test would rule out the participation of a third party in the defilement. He urged the court to quash the conviction.

This being the first appelant court, its duty is to evaluate the evidence on record and come up with its own finding but bear in mind that it has not heard or seen the witnesses and give allowance for that.

In total five prosecution witnesses testified. PW1 was the complainant whose evidence was that the Appellant had accompanied her to church on the material date. While they were coming back at about 8.00 p.m., the Appellant pulled her into a thicket and had sex with her for about 30 minutes. The Appellant told her not to tell anyone what had happened. This happened on 14th December, 2008. In January, 2009, the complainant missed her menstrual cycle and suspected she was pregnant on experiencing symptoms relating to pregnancy. She informed the Appellant who promised to facilitate an abortion. When she realized that abortion was not forthcoming and she was about to join form one, she fled to stay with a lady called Salinah where she worked as a househelp. In July, 2009 the pregnancy was too big and she could not work properly. So she went to live with her sister one P. Her two brothers namely J and A found her at her sister's place. When they realized that she was pregnant they reported the matter to Kapsowar Police Station.

PW1 stated that she gave birth on 5th September, 2009 and by the date she testified, the child was five (5) months old. She identified in court both the medical examination report (P3 form) and her birth certificate as MFI-1 and MFI-2 respectively.

**PW2**, J C was a minor aged 14 years and a sister to the complainant. She testified that on the material date, the Appellant accompanied her and PW1 to church but on their way from the church as they walked home, she was left behind. She said she arived home at 5.00 p.m. and after sometime, PW1 also arrived. She stated that PW1 had a child at home whose father was the Appellant.

**PW3**, Doctor Wilfred Kimosop testified that he examined PW1 on 8th August, 2009. She was pregnant and about three weeks to giving birth. The vagina, cervix, labia majora and minora were normal. The hymen was absent as a sign of penetration. There were remnants of the hymen. There was no evidence of recent injury or infection. An ultra sound was done which showed that the foetus was 36 weeks old.

PW3 filled the medical examination report (P3 form) and produced it as P. Exhibit 1.

**PW4**, APC Paul Tunai of Kimnai Administration police post testifed that he arrested the Appellant following a complaint by the complainant's brothers namely A and J K that the Appellant had been impregnated by the Appellant.

**PW5**, Police Constable Woman Flora Kanari from Kapsowar Police Station investigated the case. She said that on 3rd August, 2009 the Appellant and the complainant were taken to her office by administration police officers in the company of the complainant's brothers. She said that the complainant was pregnant and that she was a friend of the Appellant. She stated that the complainant was below 18 years. She ran away from home upon realizing that she was pregnant. Her brothers looked for her only to find her pregnant after which they reported the matter to the police.

The Appellant gave a sworn statement of defence and called two (2) witnesses. He testified as **DW1**. He stated that on 5th August, 2009, he had travelled from a journey and arrived home at mid night. While he was asleep at about 5.00 a.m., police officers went to his house and arrested him. He was informed by the police officers that he had defiled the complainant on 14th December, 2008. He stated that on this date, he was at home and never defiled anyone.

In cross-examination he said that the charges were framed against him because of a debt of Ksh. 600/= he owed to the complainant's brother.

**DW2**, J K a neighbour to the Appellant testified that he was informed of the incident by the Appellant's wife after the arrest of the Appellant. He then went to Kimnai Police Post where he learnt that the Appellant was required to give a bribe to secure his release. But since he did not have anything to give as a bribe, he was taken to Kapsowar Police Station and charged.

**DW3**, G J, the wife of the Appellant stated that the Appellant was arrested after returning home from a long journey. She stated that she was surprised to hear the allegation that he had defiled somebody. According to her, the Appellant was charged because he failed to give a bribe to the police officers at Kimnai.

Having evaluated the evidence by the prosecution, it is my view that I consider all the issues raised simultaneously. The evidence of PW1 was that she was defiled by the Appellant while both were returning home from the church. According to PW1, she did not state that she was accompanied by PW2 on her way to the church. In sharp departure from the testimony of PW1, PW2 stated that she too accompanied PW1 and the Appellant to the church and only parted ways while they were returning from the church. Apparently, this is the time PW1 was allegedly defiled.

One intriguing issue that casts aspersions on PW2's evidence is why the victim herself failed to remember that she was in the company of her own sister (PW2) when she was going to the church. It may be true that PW1 was in the company of the Appellant at the material time, but clearly her omission of the mention of PW2 in her evidence is a clear demonstration that PW2's evidence may have been concocted with a view to fixing the Appellant.

Moreover, it is obvious that the incident was reported to the police after PW1's brothers named as J and A knew that PW1 was pregnant. Upon interrogating PW1, she revealed that the pregnancy was as a result of sex she had had with the Appellant. This then led to the arrest of the Appellant.

The child was born by the time PW1 testified. The most prudent thing the police should have done was to conduct a DNA test so as to ascertain whether the child was indeed sired by the Appellant. The silence by the police in this line of investigations was unexplained giving rise to a big gap in the prosecution's case that would not be filled by any other evidence.

Besides, the doctor's evidence could not relate the pregnancy (and by extension the child) with a sexual act done on the 14th December, 2008. That again meant that the court cannot ascertain that even if there

was sex between PW1 and the Appellant, that act gave rise to the pregnancy, which prompted the complaint that was subject of the charges facing the Appellant.

In this respect, I then agree with the Appellant's counsel that although the Appellant had an opportunity to have sex with PW1, there is no prove that he had it and if he did, that it is the sexual intercourse which gave rise to the child. Again, the mere fact that the Appellant was seen with PW1, does not automatically mean that he is the person who sired PW1's child. And as I had noted earlier in this judgment, it is only a DNA test that would have cleared any doubts that no third party except the Appellant was involved sexually with PW1. The omission to do the DNA test certainly rendered a fatal blow to the prosecution's case.

It is factual that the medical examination report concluded that PW1 had had unprotected penetration that led to the pregnancy. But questions abound as to whether the penetration was occasioned by the Appellant.

As regards the age of PW1, I have seen the birth certificate produced as P. Exhibit 2. It shows that PW1 was born on 6th October, 1993, placing her age at about 15 years as at the date of the alleged defilement. While consent to sex is not a defence in a charge of defilement, I need not over emphasize that the prosecution did not prove that it is the Appellant who sired the child.

Besides, and with respect, it is suspect why the birth certificate (registered on 6th July, 2009) was obtained too late in the day, specifically with a view to adducing adverse evidence against the Appellant. Save that other evidence discredits the prosecution's case, on account of the late birth registration, I would have found that the complainant's age was not satisfactorily proved.

I was referred to two authorities by counsel for the Appellant namely:-

1. Eldoret High Court Criminal Appeal No. 78 of 2010 – Richard Kiprotich Chesire -Vs- Republic

2. Criminal Appeal No. 69 of 2011 - (Court of Appeal sitting at Eldoret)

   Masai Biketi Chemuku -Vs- Republic

While the case in **MASAI BIKETI CHEMUKU -VS- REPUBLIC** (Supra) was not exhibited, I have found the facts of the appeal in Richard Kiprotich Chesire -Vs- Republic not similar to those of the instant case and so not relevant to this case.

May I however state that criminal liability has no limitation of time. However, when so much time lapses before a matter is reported to the police, a lot of evidence is lost or destroyed and the evidence which may finally be tendered may fail to provide a water tight case against an accused.

On the whole, it is clear that the trial court failed to appreciate very pertinent weaknesses in the prosecution's case. Although section 124 of the Evidence Act allows the Court to uphold the evidence of a complainant notwithstanding corroboration, in the instant case, the complainant's case, coupled with other incosistencies ought to have found an acquittal for the accused.

On sentence, under Section 8 (4) of the Sexual Offences Act, any person who commits the offence of defilement with a child between the age of sixteen (16) and eighteen (18) years is liable upon conviction to imprisonment for a term not less than fifteen (15) years. Thus, if I were to find that the conviction was sound, then the sentence meted against the Appellant would be the appropriate one.

However, having evaluated all the evidence on record, I find that the prosecution did not tender sufficient evidence to warrant a conviction. The conviction by the trial court was unsafe in the circumstances. I accordingly quash the same, set aside the sentence and order that the Appellant be forthwith set free unless he is otherwise lawfully held.

**DATED** and **DELIVERED** at **ELDORET** this 15th day of July, 2014.

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:**

Mr. Birir holding brief for Angu for the Appellant

Miss Mwaniki for the State