



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 98 OF 2013**

**DOMINIC KIPNGETICH LANGAT.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Dominic Kipngetich Langat, the appellant herein, was charged with the offences 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 the charges are that on 23/11/2011. At [Particulars Withheld] Reserve in Narok South District, inserted his genital organ into the genital organ of SC and in the 2<sup>nd</sup> count, the defiled S C. In the alternative, he faced two alternative counts of committing indecent acts contrary to **Section 11(1)** of the **Sexual Offences Act** against the two complainants.

After a full trial, the appellant was found guilty on the main charges and was sentenced to life imprisonment. Being aggrieved by the said conviction and sentence, he filed this appeal citing the following grounds:-

1. **That he as convicted based on a defective charge sheet that offends Section 43 of the Sexual Offences Act and Section 137 of the Criminal Procedure Code;**
2. **That Section 48 of the Evidence Act was not complied with;**
3. **That Section 2(1)(6) and Section 36 of the Sexual Offences Act were not complied with;**
4. **That his defence was dismissed without the court giving reasons.**

The appellant thus prays that the conviction be quashed and sentence set aside.

The appellant filed written submissions. On ground 1, he submitted that the charge sheet was defective because it did not state that the act was unlawful and intentional; that **Section 137(a)** of the **Criminal Procedure Code** requires that there be accurate description of the charge sheet. He urged the court to quash the charge sheet as it could not be a basis for a conviction.

On ground 3, the appellant argued that **Section 2(1)(6)** of the **Sexual Offences Act** requires an accused to be taken for DNA testing for purposes of comparison with specimen and yet this was not done in this case. He further urged that no medical evidence as adduced pursuant to **Section 36** of the **Sexual Offences Act** and urged this court to resolve the omission in his favour.

It is also the appellant's submission that the medical evidence i.e. P3 Form was filled by an incompetent witness in that PW6 was not a Doctor but a Clinical Officer. He submitted that the witness was not a registered Clinical Officer.

It is also the appellant's submission that the ages of the complainants was not ascertained as neither their birth certificates nor clinic cards were produced in evidence; lastly, that his defence which was plausible, was not considered.

The appellant also urged that the prosecution evidence was contradictory, that the evidence of PW7 was contradictory to that of PW1, PW2 and PW4 and he urged the court to resolve the doubts raised in his favour.

The appeal was opposed and Mr. Chirchir, Counsel for the State, submitted that there is sufficient evidence to prove that the complainants were defiled; the complainants knew the appellant as a neighbour and identified him.

This being the first appeal, it behoves this court to re-evaluate and analyse the evidence adduced before the trial court afresh and the court should make its own conclusions and determinations.

S C testified as PW1. She told the court that Dominic, the accused is their neighbour; that there is a time her mother told her and C to guard sheep at Dominic's home. On that particular day, Dominic's brother was absent. Dominic asked them to remove their clothes and sleep on the floor and he came to sleep where they were sleeping. He too removed his clothes and did bad manners to her and C and asked them not to tell anyone. He also promised to give them Kshs.5/- each if they kept quiet. Next day she informed her mother what Dominic did to them, they were taken to hospital and then to police station.

PW2, S C testified that she went to Chemutai's home and they went to sleep in another house. The appellant slept near them. The accused told both her and S to remove their clothes which they did. PW2 said Dominic lay on her and did bad things to both her and PW1. Next day S told her mother and they were taken to hospital then to Police Station and the accused was arrested.

PW3, S C, PW2's cousin to PW1 told the court that PW2 C was visiting S. Because she had a visitor in her house which was one roomed, she asked the appellant's mother to let the girls PW1 and PW2 to sleep in her house. On 23/11/2011, when the girls came back home, S was walking with her legs apart and upon enquiring, she told PW3 that Dominic had done bad things to them after he sent his siblings to go and sleep in his house. The appellant was arrested and taken to Police Station.

PW4, C C is PW1's mother. She also confirmed that PW1 had gone to sleep at Mama J's house with S. The girls used to go to sleep there because she is alone. They returned home next day while limping. The girls told her J was not home and the appellant slept with them. She checked their private parts and saw a discharge. She asked people to arrest the appellant who was a neighbour and they did. PW1 and PW2 were taken to the hospital and then to the Police Station.

PW5, Joseph Kiprotich, learned from PW1's father that the girls had been defiled and went in search for the appellant and arrested him. He saw the girls who were walking with legs apart.

PW6, Zachary Bii is a Clinical Officer at [Particulars Withheld] District Hospital. He examined both complainants on 25/11/2011. SC was found to have inflammation of the vagina, hymen broken, tenderness and pain on examination. Degree of injury was assessed as grievous harm. He formed the opinion that the girl had been defiled. He also examined S C and filled a P3 Form. On examination, her private part emitted a foul smell, hymen was broken, tenderness elicited and pain on examination. He opined that PW2 was also defiled.

PW7, PC Kenneth Kanyoro took over as Investigation Officer from PC Mungai.

In his unsworn defence, the appellant was bathing in the river when the police went there to arrest him for allegedly threatening one Kiplangat with a knife. After arrest and while at Police Station two girls were taken there and he was alleged he defiled them; that the complainant's father asked for Kshs.10,000/- but he did not have the money and ultimately, he was charged.

Whether the charge was defective: Having seen the charge, I do agree with the appellant's contention that it does not state the act complained of was **"unlawful or intentional"**. **Section 43** of the **Sexual Offences Act** defines what intentional and unlawful acts are. Under **Section 43(1)**, an act is intentional and unlawful if it is committed:-

**"(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence."**

Upon analyzing the particulars of the charge, the respondent was duly notified of the charge he was facing and the consequences thereof. I find no prejudice to have been occasioned on him by the omission of the phrase **"unlawful and intentional"**. This is because the complainants were minors who do not even understand what happened to them. Infact **Section 137** of the **Criminal Procedure Code** provides that no charge shall be open to objection in respect of form or contents of its frame in accordance with the Code. The charges generally conformed to the provisions under **Section 137** save for two words. For the above reason, I find and hold that the charge is not fatally defective.

I also noted that the date in the charge sheet was incomplete in that it did not state the year. However, the evidence on record is clear that the offence occurred in November 2011. The defect is excusable and did not occasion any prejudice. Infact, neither the appellant or trial court noticed it.

It was the appellant's contention that **Section 48** of the **Evidence Act** was not complied with. The said **Section** reads as follows:-

**"48. (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions.**

**(2) Such persons are called experts."**

In my view **Section 48** of the **Evidence Act** does not apply in such cases. Production of medical evidence is covered by **Section 77** of the **Evidence Act**. **Section 77(1)** reads:-

**"In Criminal proceedings any document purporting to be report under the hand of a government analyst, medical practitioner or of any ballistic expert, document examiner or genolgist upon any person, matter or thing submitted to him for examination for analysis may be used in evidence.**

**(2) ...**

**(3) ..."**

A medical report may be produced by a medical practitioner. The said Section does not define who a medical practitioner is. Clinical Officers are the pillars of our hospitals because of shortage of doctors. Clinical Officers have even been known to perform post mortem and the courts have accepted their opinions. See CRA 139/2012, **David Kipkoech Yegon v Rep**, where this court cited the Court of Appeal case in CRA 360/2012, **Daniel Lucas Kimaru** (Embu). In my view, the Clinical Officer is a medical practitioner and competent to examine the complainants, prepare and produce the medical reports in respect thereof.

In respect of the appellant's contention that a DNA test should have been done in compliance with **Sections 2(a)** and **36** of the **Sexual Offences Act**, there is no requirement that a DNA test be done in such a case unless a child was born out of the sexual act, in order to prove paternity. Infact, **Section 124** of the **Evidence Act** did away with the requirement of corroboration in sexual offences involving minors. Corroboration would normally be by way of medical evidence but that is no longer mandatory. The

**Section** reads:-

“S124. ....

**...provided that where in a criminal case involving sexual offences the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

**Section 36** of the **Sexual Offences Act** is not mandatory. The court has a discretion to direct that samples be taken from accused where necessary. The court did not find it necessary to exercise that discretion. As pointed out above, that section is normally exercised where a child is born out of the unlawful sexual act. In this case the court did not see it necessary to invoke the powers of Sections 2 or 6 of the Sexual Offences Act and it is not fatal to the prosecution case.

The appellant's defence was that he was arrested in a river where he had gone to bath for a totally different offence and he only saw the complainants at the Police Station and was charged after he was unable to raise a Kshs.10,000/- to give to the complainant's father or bribe the police. Interestingly, he never asked the witnesses any question relating to the Kshs.10,000/- to the complainant's father of bribe. PW7, the Investigating Officer testified and no such allegation was made. It was an afterthought.

Although during cross examination of the witnesses, the appellant was alleging that there was a land dispute, he did not allude to the existence of any kind of land dispute in his defence. Infact, in his defence, it seemed as if he did not know the complainants which is contradictory to what he had alleged during cross examination. If there was any kind of land dispute in existence, it means the appellant knew the witnesses well. This court prefers the evidence of the prosecution witnesses PW1, PW2, PW3 and PW4 which remained unshaken even during cross examination.

As to whether there are any contradictions in the prosecution evidence; I find none to exist. As regards whether the act of defilement took place, both PW1 and PW2 said that they had gone to sleep at appellant's house. PW3 and PW4 explained that PW2 was visiting PW1 but that PW1 normally used to sleep at the house of the appellant's mother's house because of shortage of space in PW4's house, which was one roomed. PW4 only learnt later that the appellant's mother was away on the night the appellant took advantage of the girls. PW7 on the other hand merely stated what he had been told.

Having considered all the grounds of appeal and having re-evaluated the evidence afresh, I come to the conclusion that it is the appellant who defiled the complainants. He was well known to them. PW1 and PW2 reported to PW3 and PW4 soon after the incident. Medical evidence confirmed that there was penetration of PW1 and PW2 because of the injuries sustained to their private parts. I am satisfied that the trial court arrived at the correctly found that the complainants took part in a sexual act with the appellant.

However, having perused the whole proceedings, except for PW3 stating that the 2<sup>nd</sup> complainant, S was aged 8 years and PW4 stated that S is aged 9 years, there was no attempt by the prosecution to prove the age of the complainants. Under **Section 8(2)** of the **Sexual Offences Act**, proof of age is mandatory because age determines the nature of the sentence to be imposed on an accused in the event of a conviction.

The complainants were not taken for age assessment nor were their birth certificates or clinic cards produced in evidence. The prosecution has the duty to prove all the particulars of the charge beyond any reasonable doubt which they have failed to do. For that reason, I find that the offence of defilement was not proved as charged and the appellant should have been acquitted of the two counts of defilement and I do hereby acquit him accordingly.

However, there being ample evidence that the appellant's genital parts came into contact with the complainants' genitalia. I find him guilty of the alterative charges of indecent act contrary to **Section**

**111(1)** of the **Sexual Offences Act** and he is convicted as charged. He is sentenced to serve 30 years imprisonment on each count and the sentences will run concurrently.

Right of appeal 14 days.

**DATED and DELIVERED this 11<sup>th</sup> day of July, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

The appellant present – in person

Mr. Omari for the State

Kennedy – Court Assistant