



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 230 OF 2011**

**EKIDAM KITELA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 1039 of 2010 Republic vs Ekidam Kitela in the Senior Resident Magistrates' Court at Eldama Ravine by M. Kasera, Senior Resident Magistrate dated 29<sup>th</sup> October 2011)***

**JUDGMENT**

1. The appellant was convicted for the offence of defilement of a child aged two years eight months contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to life imprisonment.
2. The particulars of the offence were that on 18<sup>th</sup> October 2010, in Rongai District within Nakuru County, the appellant “*caused his penis to penetrate the vagina of [name withheld], a child aged 2 years and 8 months*”.
3. The appellant has appealed against his conviction and sentence. The original petition of appeal was filed on 17<sup>th</sup> November 2011. On 16<sup>th</sup> October 2013, the Court granted the appellant leave under section 350 of the Criminal procedure code to amend the grounds of appeal. The handwritten amended petition of appeal raises six grounds of appeal. They can be condensed into five. First, that the charge sheet was defective; secondly, that the evidence was contradictory, based on mere suspicions and insufficient to found the charge; thirdly, that it was unsafe to convict the appellant on identification evidence of PW2; fourthly, that some material exhibits and witnesses were not presented; and lastly, that the appellant was not given a fair opportunity to defend himself.
4. From the handwritten submissions of the appellant and the address by his learned counsel, the following further arguments were made. The charge sheet is impugned for omitting to have the words *intentionally* or *unlawfully*. On contradictions in the evidence, the appellant points to inconsistencies in the medical evidence. He submitted that the complainant was not examined immediately; that there were discrepancies in the medical records including the P3 form; and, that there was contradictory evidence by witnesses. His case is that there was no clear evidence connecting him with the offence. That is why he contends that he was treated unfairly.
5. The appellant also submitted that consultant doctors from Nakuru Provincial Hospital were not called.

He contended that “incriminating exhibits” were not produced at the trial. He expressed the view that those doctors would have produced exonerating evidence. The appellant submitted that he was framed up. He pleaded that his identification was primarily based on clothes that he left at the complainant’s house. In a synopsis, the appellant’s learned counsel submitted that the charge was not proved beyond reasonable doubt.

6. The appeal is contested by the State. The learned State Counsel submitted that there was clear evidence from witnesses. That evidence was corroborated by medical evidence establishing penetration. The appellant, who was the complainant’s neighbour, was identified by witnesses and placed squarely at the *locus in quo*. The State submitted that the charge sheet was not defective; that the appellant never raised the matter in the lower court; and that at any rate, no prejudice was occasioned to the appellant.

7. Regarding the age of the complainant, the State that it was well established by the clinic records and P3 form. The State denied that the appellant was treated unfairly either in the course of investigations or at his trial. In a nutshell, the case for the State is that on the totality of evidence, the appellant’s guilt was proved beyond reasonable doubt.

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 very careful because I have neither seen nor heard the witnesses. See *Njoroge v Republic* [1987] KLR 99, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190, *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 (unreported), *Paul Ekwan Orenge v Republic* Eldoret High Court Criminal appeal 36 of 2011 (unreported), *David Khisa v Republic* Eldoret High Court Criminal appeal 142 of 2011 (unreported).

9. The appellant contends that the age of the complainant was not established. The age of a complainant is *material* in offences of this nature. See *John Wagner v Republic* [2010] eKLR, *Macharia Kangi 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). The reason is that section 8 of the Sexual Offences Act provides for graduated *minimum* sentences.

10. PW 2, the grandmother of the complainant, testified that the complainant was 2 years old. I have examined the documents produced at the trial. Exhibit 4 was a clinic card from Mogotio Dispensary. It stated that the complainant was born on 20<sup>th</sup> December 2007. On 18<sup>th</sup> October 2010, when the offence took place, the complainant was then about 2 years, 8 months. When the trial opened on 10<sup>th</sup> March 2011, the learned trial Magistrate noted that the complainant was *3 years old*. I agree that the P3 form states the age as 2 years and so does the discharge summary from Nakuru Provincial Hospital and the medical chit from Mogotio Health Centre. The latter puts the age at 24 months. I think all those are minor discrepancies. The child was *over* two years but *below* three years at the material time. The information that goes into such forms is provided by the patient, or in this case by the adults accompanying the patient. Fundamentally, the age bracket of the minor remained well within the provisions of section 8 (1) of the Act. It would have been material if the appellant’s case was that that was not the case. I am satisfied that in this case the age of the minor was clearly established at the trial by both documentary and oral evidence. I am satisfied from the evidence that the minor was born on 20<sup>th</sup> December 2007; that she was about 2 years 8 months at the material time and about 3 years at the time of the trial.

11. On 10<sup>th</sup> March 2011, the complainant appeared in court. The learned trial Magistrate observed the following-

*“Complainant aged 3 years. She is brought to court by her grandmother. She is not able to talk although she can ask for water or food which she does not pronounce well. Due to her age, her evidence is not taken”.*

12. One of the points taken in the appeal is that the minor did not testify. I agree with the learned Magistrate that considering the age of the minor, and for the reasons she placed on the record, it was not practical for her to testify or to be examined by the appellant. She nevertheless remained the complainant

through her guardian, PW2. The complainant thus spoke through the adult witnesses and from her medical records. That part of the appeal has no merit.

13. I will now turn to the identification of the appellant. PW2 is the grandmother of the complainant. She was living with the complainant and a twin sister of the complainant. She testified that on 18<sup>th</sup> October 2010, she left the twins in the house to go to the shop about 100 meters away. On her way back, she stopped to speak to a neighbor when she saw the appellant leaving her house. She knew the appellant who was a neighbour. She said she was 5 meters away. When she entered the house, she found the children crying; the complainant's private parts were bleeding, and there was a whitish discharge. She said appellant had left his navy blue jacket (exhibit 7) and a cap (exhibit 8) in the kitchen. She called a neighbor PW3. In the meantime her husband PW4 came. She narrated to them about the incident. PW3 and PW4 went for the appellant. When confronted, the appellant said nothing. PW2's evidence was confirmed by PW3 and PW4. Upon cross examination, PW2 said the appellant had a missing tooth and that he ran away from her house after defiling the complainant. When she entered her house, the complainant was lying on her back and crying.

14. From that evidence, I have reached the conclusion that this was a case of recognition. Evidence of recognition is generally more reliable than identification of a stranger, but mistakes may sometimes be made by witnesses *Wamunga v Republic* [1989] KLR 424. PW2 knew the appellant as a neighbor who lived a short distance away. She said his home was about 150 metres away. She saw the appellant from about 5 metres away leaving her house. It was daytime. The appellant left his clothes in PW2's house. PW2 said there were no grievances between her and the appellant.

15. The appellant was the last person seen leaving the house where complainant was defiled. PW2 found the complainant bleeding from her private parts. The appellant never contested that the clothes were not his. The situation is thus *not* the way the appellant frames it: that he was identified by the clothes. On the contrary, the appellant was *recognized* by PW2 as the person who left the house immediately after the complainant was defiled. The clothes he left behind only fortified the identification. I have reached the conclusion that the appellant was positively identified by PW2.

16. PW2 took the complainant to Mogotio Dispensary. They were referred to Nakuru Hospital. They went there the same night and were admitted. There is some discrepancy there. PW2 said they were admitted for 3 days; PW3 said it was for a week. It is not a material discrepancy in my view. In any event, the discharge summary (exhibit 3) clearly shows the complainant was discharged on 22<sup>nd</sup> October 2010. The appellant was arrested and detained at Mogotio Police Station. PW5 testified that he went to Mogotio Dispensary where he found the complainant. As her condition was serious, she was referred to Nakuru Hospital. PW5 claimed that the appellant had confessed to the crime. In the absence of compliance with section 25A of the Evidence Act, that confession is inadmissible in evidence. PW5 issued PW2 with the P3 form.

17. PW6, Roseline Nyagol, is a clinical officer at Mogotio Health Centre. The complainant was taken there at about 6.00 pm on the material day. She examined the complainant. The complainant had problems walking and in pain. She had a vaginal tear; her hymen was torn and bleeding. She discovered some epithelial cells. The degree of injury was harm. She filled in the P3 form produced in evidence. She referred the complainant to Nakuru Hospital.

18. The P3 form stated that the age of injuries was six hours. The examination revealed the following-

*“Swollen inflamed labia majora. Vaginal tear; torn hymen. Inflamed labia minora with active PV bleeding”*

19. The appellant was not medically examined. However, the injuries to the minor's private parts were *consistent* with penetration. Penetration is defined in section 2 of the Sexual Offences Act as follows-

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

20. The evidence of PW2 was thus corroborated by PW6 and the P3 examination report. The minor's undergarments were produced in evidence. They had bloodstains. There are also the Ministry of Health clinical notes accompanying the P3 form titled *MOH 363* (exhibit 1) confirming the injuries. It recorded the following- "*there is a freshly broken hymen with perineal tear and inflamed labia minora and....bleeding actively*".

21. I am left in no doubt about the veracity of PW2's evidence. She came across as a consistent witness. PW2 saw the appellant emerging from her house immediately after the complainant was defiled. The appellant was inside *that* house. The appellant was thus placed squarely at the *locus in quo*. From the time lines in that evidence, he had a clear *opportunity* to defile the complainant. In the circumstances of this case, it would also amount to further corroboration. See *Opo v Republic* [1976-80] 1 KLR 1669. The appellant's cross-examination of PW2, PW3, PW5 and PW6 did not shake their evidence. The totality of all that evidence points very strongly to the *guilt* of the appellant.

22. I have then considered the defence proffered by the appellant at his trial. He stated as follows:

*"I woke up in the morning. I did not go anywhere. I went to harvest maize until 1.00pm. I went for lunch. I came to take the maize home till (sic) 4.00 pm. I went to sleep as I listen (sic) to radio till 8.00pm. I was brought supper while (sic) late. At 9.30pm I heard someone knock at the door.."*

23. The appellant said in his defence that after the knock, four persons came in. They were policemen. He said they knocked out his tooth, beat him up and took his salary. He said the police brought with them the jacket and cap (exhibits 6 and 8). He was then taken to the police station. He denied perpetrating the offence.

24. The burden of proof, subject to section 111 of the Evidence Act, rested entirely with the prosecution. There were no previous grudges between the appellant and PW2. I am at a loss why the complainant, a child of barely three years or her grandmother, would frame up the appellant. I agree with the learned trial Magistrate that the defence put forward was feeble. When juxtaposed against the prosecution evidence, the defence was completely unbelievable. I cannot also say in the circumstances that the appellant was treated unfairly by the police or the court.

25. The appellant's submission before this Court that the prosecution evidence was *inconsistent* or that it did not *link* him to the offence is without foundation. All the evidence was *consistent* with his guilt. There was solid medical evidence confirming the defilement. PW2 clearly identified the appellant as the person who defiled the complainant. The appellant was seen by PW2 emerging from her house immediately after the defilement. The appellant was inside *that* house. That evidence was sufficient to found the charge.

26. The charge was not defective either. The victim of this offence was a child of 2 years 8 months. She was *incapable* of giving any *consent* to sexual intercourse. Unlike the offence of rape, there was no requirement for the words *intentionally* or *unlawfully* in the charge to qualify the act of defilement. That aspect of the appeal is again without any merit.

27. There is no condition in a criminal trial that *all* or a certain *number* of witnesses be proffered to prove the charge. See section 143 of the Evidence Act, *Bernard Kiprotich Kamama v Republic*, High Court, Eldoret, Criminal Appeal 123 of 2010 [2013] eKLR.

28. From the totality of the evidence, I find that all the *ingredients* of the offence of defilement were proved beyond reasonable doubt. I have reached the same conclusion as the trial Court that the evidence of defilement was clear-cut and pointed *only* to the accused. The evidence at the trial was *inconsistent* with the *innocence* of the appellant.

29. In the end, I uphold the conviction by the learned trial Magistrate. 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 *two years eight months*. This is a grave offence perpetrated against a toddler. She is a vulnerable person as defined in section 2 of the Act. She will carry the scars for life. I am

unable to disturb the conviction and sentence. For all those reasons, the entire appeal is hereby dismissed.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 15<sup>th</sup> day of July 2014

**GEORGE KANYI KIMONDO**

**JUDGE**

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

Mr. D. Mwinamu for the appellant.

Ms. G. Ruto for the State.

Mr. Kemboi, Court Clerk.