



REPUBLIC OF KENYA

High Court at Eldoret

Criminal Appeal 84 of 2007

DAVID KIPRUTO CHEPKWONY APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence contained in the decision of the Senior Resident Magistrate Hon. J. M. NJOROGE delivered on 4th October, 2007 in Kapsabet Criminal Case No. 2968 of 2007)

JUDGMENT

The Appellant David Kipruto Chepkwony was charged with the offence of defilement of a girl contrary to Section 8 (1) as read with Sub-Section 2 of the Sexual Offences Act of 2006.

Particulars of the charge were that on the 27th day of September, 2007 at C in N.N District of the Rift Valley Province, unlawfully and intentionally committed an act which caused penetration into the genital organ of M.J a girl under the age of eighteen (18) years.

After going through the proceedings, I have noted that the accused was convicted on his own plea of guilty, hence the hearing did not go to full trial.

Initially, the Appellant raised seven (7) grounds of appeal as per a Petition of Appeal filed in Court on 8th October, 2007. On 10/5/2012, he was granted leave to amend the grounds of appeal. The amended grounds of appeal were filed in court on 11th April, 2013 which was also the date of the hearing of the appeal. Four grounds of appeal are listed therein, which I duplicate hereunder:-

1. That my lordship, the trial Magistrate erred both law and facts by convicting the Appellant on a defective charge sheet.
2. That my Lordship, the trial Magistrate erred both in law and facts by not putting into account that the P3 form was with errors (omissions) and did not indicate presence of sexual intercourse with the complainant.
3. That my Lordship, the trial Magistrate erred both in law and facts by convicting the appellant without considering that it was his first time to be in court and the time he was given to think about the issue before sentence was too brief.
4. That my Lordship the trial Magistrate erred both in law and fact as he did not order for medical check up of the Appellant who was unwell.

The Appellant opted to rely on written submissions which he filed on 11th April, 2013. The State was represented by prosecuting counsel, Mr. Munene. The latter urged the court to dismiss the appeal in that the Appellant was convicted on his own plea of guilty and that the charge was read to him in the Nandi language which language he properly understood and that the sentence handed to him is that prescribed by the law.

The grounds of appeal raised by the Appellant are pertinent notwithstanding that the conviction was on a plea of guilty. It is therefore important that I consider each one of them.

DEFECTIVE CHARGE SHEET

The Appellant submitted that the charge sheet did not indicate what object penetrated into the complainant's genital organ. He was charged under Section 8 (1) as read with sub-section (2) of the Sexual Offences Act, Act No. 3 of 2006 (which is now revised under 2010 Edition).

Section 8 (1) reads **“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”**

Sub-section 2 prescribes life imprisonment to a person convicted of the charge of defilement.

The operative word under sub-section (1) is '**penetration**'. The word (penetration) is defined under S. 2 of the Act as follows:-

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

And the word **“genital organ”** is defined under the same section as, **“includes the whole or part of male or female genital organs and for purposes of this Act includes the anus.”**

Ultimately therefore for purposes of the Sexual Offences Act, the word penetration connotes insertion of a genital organ of one person into the genital organ of another. In this respect the charge sheet was properly drafted and is not defective in any way.

EVIDENCE OF DEFILEMENT IN THE P.3 FORM

The P3 form was the only exhibit produced by the prosecution. The same was filled and signed on the 29th September, 2007 at Kabiyet Health Centre. The medical opinion as per the form was in the following words; **“slight inflammation on both labia/minor majoras, vagina slightly wider than before”**.

Although the person who filled the P3 form was not called to testify, as in any event, the Appellant pleaded guilty, the wording in the P3 form undoubtedly reveals evidence of sexual assault. I discount the Appellant's assertion that the P3 form did not exhibit that defilement had been committed against the complainant.

TIME GIVEN TO REFLECT ON SENTENCE

The penalty prescribed for the charge upon conviction is in mandatory terms. No window is given to the court to vary the same. The trial Magistrate acted within the law and for certain no lesser sentence would have been preferred.

MEDICAL CHECK UP OF THE APPELLANT

The requirement to subject an accused person to medical check up is provided under S.36 (1) of the Act as follows:-

“Notwithstanding the provisions of section 26 of this Act or any other law, where a person is

charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

The wording of this section is not in mandatory terms. This gives court the leeway to determine under what circumstances an accused person may be subjected to the medical examination. In this case, the Appellant did not make a request for such examination, hence the trial court was not obliged to order for one.

Where an accused is convicted on his own plea of guilty, court must be satisfied that he/she understood the charge and its elements. The charge must disclose an offence and must be read in a language the accused understands. This principle is enunciated in the case of **PAUL MUTUNGU -VS- REPUBLIC (2006) e KLR** where it was held that:-

“an accused person must fully understand the charge and cannot be convicted unless it is certain that he fully understood the charge.”

Proceedings clearly show that the charge was read to the Appellant in the Nandi language which he understood. He pleaded guilty after both the charge and particulars of the charge were read to him. He was given an opportunity to mitigate and he did so. No prejudice was occasioned to him during the taking of plea. He cannot now turn around to say he did not understand what was happening in court. The age of the child was clearly indicated in the P3 form and so the penalty handed to him was within the law and is mandatory.

In the sum, this appeal is dismissed. I uphold both the conviction and the sentence before the trial court.

DATED and DELIVERED at ELDORET this 8th day of May, 2013.

**G. W. NGENYE - MACHARIA
JUDGE**

In the presence of:

Appellant in person

Mr. Mulati for the State