REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 197 OF 2012

SILVANUS EMOIT SINDANO……..……
……..…APPELLANT

VERSUS

REPUBLIC……..……..……
….RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 794 of 2012 Republic vs Silvanus Emoit Sindano in the Principal Magistrates' Court at Kapsabet by B. N. Mosiria, Principal Magistrate dated 19th December 2012)

JUDGMENT

1. The appellant was convicted for the offence of defilement of a child aged four years 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 6th April 2012, at [particulars withheld] village within Nandi County, the appellant *"unlawfully and intentionally caused his penis to penetrate the vagina of [name withheld], a child aged four years"*.
3. The appellant has appealed against his conviction and sentence. The petition of appeal was filed in Court on 31st December 2012. It raises five grounds of appeal. First, that there was no evidence corroborating the complainant's testimony; secondly, that that there was no medical evidence connecting the appellant to the offence; thirdly, that the evidence was contradictory, was based on mere suspicions and was insufficient to found the charge; fourthly, that material witnesses such as the Assistant Chief or the appellant's employer were not called to testify; and lastly, that the charge was not proved beyond reasonable doubt
4. The appeal is contested by the State. The learned State Counsel submitted that there was clear evidence of penetration. The appellant, who was the complainant's neighbour, was placed squarely at the *locus in quo*. The complainant's evidence was corroborated by her mother (PW2) and the medical evidence of PW3. In a nutshell, the case for the State is that the evidence established the appellant's guilt to the required standard of proof.
5. 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 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 Ekwam Oreng v Republic* Eldoret High Court Criminal appeal 36 of 2011 (unreported), *David Khisa v Republic* Eldoret High Court Criminal appeal 142 of 2011 (unreported).
6. On 20th July 2012, the appellant's trial in the lower court commenced. The record of appeal shows

that a *voire dire* examination was conducted. The questions and answers are on the record. The record states as follows:

> *"Court: What is your name? [minor's name withheld].*
>
> *Court: Do you go to school? Yes.*
>
> *Court: Which class? Baby class.*
>
> *Court: What is the name of your school? [particulars withheld]*
>
> *Court: Do you go to church? Yes.*
>
> *Court: Which [one]? Sunday school.*
>
> *Court: Do you know God's book? No.*
>
> *Court: Do you know meaning of swearing by Bible? No*
>
> *Court: Child is intelligent and can talk but does not understand [the] nature of [an] oath. To give unsworn evidence."*

7. The minor proceeded to give unsworn evidence. 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. In sum the court would be trying to establish whether the child possesses sufficient intelligence to understand the duty of speaking truthfully. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445. If the court proceeds to take unsworn evidence, the accused should not be convicted in the absence of *corroborating* testimony. There is an exception for sexual offences. From the above verbatim record of the court, I am satisfied that the court complied fully with the procedure of taking evidence of a minor. See *Macharia v Republic* [1976-80] 1 KLR 260, *Johnson Muiruri v Republic* [1983] KLR 445. As I will discuss shortly, the evidence of the minor was not the *sole* convicting evidence. I cannot then say that there was non-compliance with section 124 of the Evidence Act.
8. The child (PW1) gave a vivid account of the events of the material day. She knew the appellant. He is her neighbour. She knew him as *Jirani*. She pointed him out in the dock. She testified as follows-

> *I was outside. [appellant] got hold of me. He put his hand there [points to the vagina]; he removed my inner clothes; he removed a stick from his cloth [sic] and put it in my private part…like a needle...I felt pain….I slept on my back… [appellant] slept on me….[appellant] stays in the same line of houses. I told my mother. She took me to the hospital….and police station".*

9. PW2 confirmed that her daughter was born on 18th June 2007. She produced the minor's birth certificate (exhibit 1). The P3 form produced by PW3, Faith Toweet stated the age of the minor as *four* years at the time of the offence. The learned trial magistrate in her judgment stated the complainant's age was three. It was clearly *four* years at the time of the offence. The age of the complainant was thus well established.
10. 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. I am satisfied that in this case the age of the minor was clearly established at the trial by both documentary and oral evidence.

11. PW2 testified that the appellant is her neighbour. Their houses are a row of single rooms. On 6th April 2012, at about 5.00p.m., she was returning to her house. She saw PW1 emerging from the house of the appellant. She beat her up. Appellant was in his house. PW1 told her she had been defiled by the appellant. She examined PW1 and found her private parts were wet; there was a whitish discharge. She summoned a neighbour. She then took PW1 to Nandi Hills Hospital. She recorded a statement with the police. The appellant was arrested two days later by the Assistant Chief and police corporal Juma (PW4). PW2 said she had no previous grudges with the appellant.
12. PW3, Faith Toweet, is a clinical officer at Nandi Hills Hospital where the complainant was taken on 13th April 2012. She filled in the P3 form produced in evidence. She testified as follows-

> *"She [complainant] complained of abdominal pain. The act was done five [days] earlier. The genitalia had mild inflammation….cervix was inflamed; hymen perforated ……..conclusion was penetrative sex, [there was] discharge [that] was clear brown.*

13. 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"*.

14. The complainant's cervix was inflamed. Her hymen was perforated. She had a clear brownish discharge from her vagina. The P3 form recorded that the labia minora and majora were also inflamed. There were pus cells in her urinalysis. The evidence of the complainant was thus corroborated by PW3 and the P3 examination report. When I add the evidence of PW2, I am left in no doubt about the veracity of the complainant's evidence. She came across as a truthful witness. PW2 saw PW1 emerging from the appellant's house on 6th April 2012 at about 5.00 p.m. 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 <u>*Opo v Republic*</u> [1976-80] 1 KLR 1669. The appellant's cross-examination of PW1, PW2 and PW3 did not shake their evidence. The totality of all that evidence points very strongly to the *guilt* of the appellant.
15. I have then considered the defence proffered by the appellant at his trial. He stated as follows:

> *"I used to stay at [particulars withheld] I am a watchman of greenhouse of Kwality Foods Company. I never did that. I heard of this in court and I was surprised.…… Manager came to see if he could pay me since they had never paid me. He told me if its [sic] me I own up. I told them to pay me 15,000 they owed me. The two went. I was told if I don't give [sic] fingerprints I will rot there. The manager wanted me to go to Lessos [on] transfer. I was shocked about the allegation in court. I can't do that. The charges were framed"*

16. 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 or her mother would frame up the appellant on trumped up charges. The dispute with his employer over his wages was *irrelevant* to the *charge* facing the appellant.
17. 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. The appellant's submission before this Court that the prosecution evidence was *inconsistent* or it did not *link* him to the offence is without foundation. All the evidence was wholly consistent with his guilt. It was corroborated by PW2 and PW3. There was solid medical evidence confirming the defilement. PW1 clearly identified the appellant as the person who defiled her. PW1 was seen by her mother emerging from the appellant's house immediately after the defilement. The appellant was inside *that* house. That evidence was sufficient to found the charge. There is no requirement that *all* or a certain *number* of witnesses must 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.

18. 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.
19. 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 complainant was *four* years. This is a grave offence perpetrated against a defenseless child. She is a vulnerable person as defined in section 2 of the Act. She will carry those scars for life. It is thus fitting that the appellant remains behind the bars for life. For all those reasons, the entire appeal is hereby dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 2nd day of December 2013

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr……for the appellant.

Mr…….……..…..…for the State.

Mr. P. Ekitela, Court Clerk.