



**CRIMINAL**

- **Offence of defilement contrary to S. 8(2) of the Sexual Offence Act.**
- **How to deal with a child offender who is convicted.**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL CASE NO. 252 OF 2009**

**ELIAS KIMATHI**

**STEPHEN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An appeal against the judgment of W.K. Kiarie (SPM) in Criminal Case No. 930 of 2009 Meru delivered on 30<sup>th</sup> November 2009)***

**JUDGMENT**

The appellant was charged before the lower court with the offence of defilement contrary to section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are as follows:-

***“Elias Kimathi Stephen:- On 6/6/2009 at 10.20am within M[...] Location, Meru Central District of the Eastern Province, defiled a child aged 7 years.”***

He pleaded not guilty but after trial was convicted of that offence and was sentenced to life imprisonment. He has by this appeal challenged that conviction and sentence. This is the first appellant

court and I am aware of the duty on this court to reconsider the evidence of the lower court evaluate it and to draw my own conclusion. That duty was well set out in the case **Okeno Vs. Republic** [1972] EA 32 where it was stated:-

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. R. [1957] E.A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala Vs. R., [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”***

The complainant was a 7 year old girl when she testified. The learned trial magistrate quite rightly carried out *voire dire* examination. See the case of **Joseph Karanja Munga Vs. Republic** [2006] eKLR. On being satisfied that the complainant understood her obligation of taking the oath, the lower court proceeded to have the complainant sworn before giving her testimony. The complainant stated that on 6<sup>th</sup> June 2009 she had not attended school. Her mother PW3 left her at home with her younger sister called Y. Her mother had gone to work. Whilst the complainant was at her grand mother’s home, she said that the appellant lifted her up and carried her to his bed in his house. He removed all her clothes and removed his clothes. He then defiled her. The complainant despite her young age well described the position in which the appellant defiled her. She stated:-

***“He then lay on me. He had made me to lie on the bed. I was facing the roof. He lay on me with his stomach. I felt pain. I started crying when I felt pain. Kimathi (appellant) wiped my parts that urinates with my clothes.”***

When she dressed herself, she said that she went home and found her father. She told her father that the appellant had done something to her. She was taken to hospital. She was able to identify the appellant who was known to her in her court. She said that the appellant lived near their home. On being cross examined, she said that the appellant when he lifted her up promised to give her sugar cane, food and tea. PW2 Lucy Kananu Muguna stated that the complainant’s mother ordinarily left the complainant and her younger sister with her when she went to work. She noted on 6<sup>th</sup> June 2009 that the complainant was walking with her legs apart. When she asked the complainant why she was walking in that manner, the complainant said that her genitalia was hurting. The complainant said that the appellant had undressed her. PW2 reported the matter to the assistant chief and to the complainant’s mother when she returned from duty. The mother of the complainant F. K said that when she returned from work she went to PW2 where she normally leaves her children. She was informed by PW2 that the complainant who is her daughter of 7 years had been defiled by the appellant. She checked the complainant’s genitalia where she saw blood and whitish substance. The complainant told her that the appellant had defiled her. PW3 reported the matter to the police. Later she took the complainant to Meru General Hospital. The complainant was treated and they were issued with a P3. PW3 said that she had known the appellant for 8 years. She confirmed that she had no grudge against the appellant. When she was cross-examined, she denied that she had fabricated this offence against the appellant. PW4 A.K is the father of the complainant. When he arrived home, he said he was informed that the appellant had picked the complainant and put her on his bed and had defiled her. Doctor Isack Macharia PW5 examined the complainant on 11<sup>th</sup> June 2009. He said that the complainant was 7 years old. He noted that the complainant’s hymen was broken. He did not see any other injuries. The complainant’s HIV test was negative but she was found to have sexually transmitted infection for which he prescribed antibiotics. On being cross examined, the doctor stated that the complainant was first seen at the hospital on 7<sup>th</sup> June 2009. He further said that the hymen can be broken by sexual intercourse, trauma or sporting

activities. PW6 was the investigating officer. When the matter was reported to her at the police station, she noted that the complainant had bruises at her genitalia. The clothes that the complainant was wearing when she was defiled were not taken to the police station and she also learnt that the underpants which the complainant was wearing when she was defiled was washed by her mother. At the end of the prosecution's case, the appellant in his defence stated under oath that he had been framed with the offence he faced. He confirmed that on 6<sup>th</sup> June 2009 he was at his home. He gave the reason for the fabrication of the charge to be that E.M, who did not testify before court but was said to be a brother of the complainant's father, wanted to take away his mother's land. He said that the said E wished to have him incarcerated to ensure that he is able to take away their family land. The appellant on being cross examined confirmed that there was no grudge between him and PW2, 3 and 4. He further confirmed that he had known the complainant since she was a baby. In his testimony, the appellant did not state that on that day when the offence occurred he was in the company of his mother. However, when his mother, Jane Gauku, DW2, gave evidence, she said that on the day in question she was with the appellant at home the whole day. She too stated that E.M had threatened her saying:-

***“That he is (sic) to show me.”***

She did not elaborate why the threat was made. In other words, she did not support the testimony of the appellant that there was a threat by the brother of PW4 to take away their land. She however confirmed under cross examination that there was no grudge between her and the complainant and her parents. The appellant in his grounds of appeal faulted the learned trial magistrate for not finding that vital witnesses were not called by the prosecution. He also faulted the trial magistrate in imposing a life imprisonment on him. He stated in his grounds that the learned trial magistrate failed to consider his defence. When this appeal was argued by the learned counsel for the appellant, through written submissions, the learned counsel did not allude to the vital witnesses who had not been called by the prosecution. The courts have often held that the prosecution is not under any obligation to call any number of witnesses to establish a fact. This was stated in the case **Paratoti Ole Tema vs. Republic** CRA No. 142 of 2005 where the Court of Appeal had this to say:-

***“The prosecution is not bound to call more witnesses than are necessary to establish a particular fact. The principle of law is that the court may only draw an adverse inference that had the uncalled witnesses testified their testimony would have been adverse to the prosecution case where the evidence adduced is barely sufficient to support the charge [Bukanya Vs. Uganda [1972] E.A. 549.”***

There is no basis in the first ground of appeal. In my view the witnesses called by the prosecution sufficed to establish the commission of the offence with which the appellant was charged before the lower court. On the third ground of appeal, I beg to defer the submissions of the appellant. The trial magistrate considered the appellant's defence when he stated:-

***“The accused (appellant) contention that he was framed up due to land dispute is untenable and not supported by any evidence on record except by that of his mother. This contention is clearly an afterthought for the girl's parents and Lucy Kananu Muguna (PW2) were not cross examined on the same.”***

Having re-evaluated the entire evidence of the lower court, I too I am satisfied that the prosecution met the required standard of proof in criminal cases. I wholly support the finding of the trial court where it was stated:-

***“I am satisfied that the victim was able to identify her assailant for he is their neighbor and to all who inquired from her what transpired she did not weaver or contradict herself.”***

Indeed the complainant on being asked by PW2 she stated that she was defiled by the appellant. The appellant confirmed that he knew the complainant from the time when she was a baby. The evidence before court was that the family of the appellant and that of the complainant are very close neighbours. It should therefore follow that the complainant also knew the appellant very well. When the complainant was taken to the police station, PW6 a police officer on checking her genitalia area found that she had bruises. PW6 was an independent witness who in my view would have no reason to fabricate the evidence against the appellant. It is immaterial that the complainant's clothes were not produced before court. I take judicial notice that most members of the public have not been trained or sensitized on how to preserve evidence in defilement cases. In that regard, it is not surprising to have the victim of defilement bathed before being taken to the police station and to the hospital. In that bathing, material evidence is destroyed. As in this case, it was stated that the complainant's mother washed the complainant's underpants. That notwithstanding, I am satisfied that the evidence adduced at the trial sufficiently disclosed that the appellant had defiled the complainant. I have deliberately left the second ground of appeal to be considered last. This is because in my view it needs special consideration in this judgment. It was submitted by the learned counsel for the appellant Mr. J.M. Isaboke that the appellant is a minor and should not have been imprisoned for life but rather he should have been treated as provided under sections 190 and 191 of the Children's Act. It should be noted that the issue of the appellant being a minor was not raised before the lower court even though the appellant was all along represented by counsel. The issue of the appellant's age was the subject of much controversy as I considered this appeal. The appellant made an application in this appeal seeking to be released on bail pending appeal. He filed a Chamber Summons in that regard dated 17<sup>th</sup> February 2010. In his affidavit in support of that application, he deponed as follows:-

***“I am young man (sic) but married to a housewife and I have two young children who heavily depend on me on their survivor (sic).”***

In a ruling that I delivered in this appeal dated 8<sup>th</sup> October 2010 I stated:-

***“That deposition cannot be attributed to a minor who is 17 years old. For that reason I order the appellant, Elias Kimathi Stephen to be produced before court on 14<sup>th</sup> October 2010.”***

On 14<sup>th</sup> October 2010, I requested the appellant to be taken for age assessment. The age assessment was carried out by the dentist in charge in the dental clinic Meru District Hospital. The report that was made to the court by the said dentist was that:-

***“The approximate dental age would be 17 years old.”***

I was not satisfied with that report and I therefore requested for another one to be made by the Nyeri general Hospital. The Nyeri General Hospital by its report dated 29<sup>th</sup> November 2010 stated:-

***“Radiographic age assessed in between 18 ½ and 19 1/2 years.”***

The offence was committed on 16<sup>th</sup> June 2009. It therefore says that the appellant was a minor as at the date of the offence. That fact was also accepted by the learned state counsel Mr. Kimathi. That being so, the Children's Act sections 190 and 191 would be applicable in considering the correct sentence of the appellant. Section 190 provides as follows:-

***“190. (1) No child shall be ordered to imprisonment or to be placed in a detention camp.***

***(2) No child shall be sentenced to death.***

***(3) No child under the age of ten years shall be ordered by a Children's Court to be sent to a rehabilitation school.”***

Section 191 provides as follows:-

***191 (1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways-***

***(a) by discharging the offender under section 35 (1) of the Penal Code;***

***(b) by discharging the offender on his entering into a recognizance, with or without sureties.***

***(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act;***

***(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;***

***(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;***

***(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;***

***(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for establishment and regulation of borstal institutions;***

***(h) by placing the offender under the care of a qualified counselor;***

***(i) by ordering him to be placed in an educational institution or a vocational training programme;***

***(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;***

***(k) by making a community service order; or***

***(l) in any other lawful manner.***

***(2) No child offender shall be subjected to corporal punishment.”***

I should state that I find that there is no merit in the appeal by the appellant against conviction. The appellant was correctly convicted of defilement of the complainant. The sentence provided under section 8 (2) of the Sexual Offences Act is that on conviction of the defilement of a child aged 11 years and less, a person shall be sentenced to imprisonment for life. Such a sentence is forbidden by section 190 of the Children’s Act. It is for that reason that I set aside the lower court sentence. I should however say that the offence committed by the appellant against a young innocent child who probably trusted him as a neighbor is a serious one. It was stated in the lower court that the appellant was arrested by members of public who were probably angered by that offence. For the appellant to be released to return to the same neighbourhood where the complainant is living, where the complainant may not yet have emotionally recovered from the defilement may probably adversely affect her emotional growth. If the appellant was an adult and did the act of defilement as charged that he did he well deserved life imprisonment. However, as stated, that is forbidden by the Children’s Act. In order to assist me to make a decision on the sentence of the appellant, I request the probation officer to carry out a well detailed report and thereby suggest best suited treatment of the appellant in the light of the sentiments I have expressed in this judgment. I have in mind that the appellant should be placed in a probation hostel as provided under section 191 (f) of the Children’s Act if such a hostel does exist. I order that until the date that the probation report will be provided to this court, that the appellant be detained at the G.K. Prison Meru. This matter will be mentioned on 9<sup>th</sup> March 2011 when the court will receive the probation officer’s report.

***Dated, signed and delivered at Meru this day of 3<sup>rd</sup> March 2011.***

**MARY KASANGO**  
**JUDGE**