



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)**

**CRIMINAL APPEAL NO. 93 OF 2015**

**BETWEEN**

**LEONARD KROP.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya*

*at Kitale (J. R. Karanja, J.) dated 13<sup>th</sup> November, 2013*

*in*

***H.C.C.R.A. No. 72 of 2011)***

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**JUDGMENT OF THE COURT**

[1] This is an appeal arising from the judgment of the High court, (J.R. Karanja, J) dismissing the appellant's appeal, against his conviction and sentence by the Principal Magistrate's Court at Kapenguria. The appellant had been tried and convicted by the trial court for the offence of defilement contrary to **section 8 (1)&(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on 19<sup>th</sup> September, 2010 in West Pokot County he caused his penis to penetrate the anus of **CC (name withheld)**, a child aged 6 years.

[2] During the trial, CC, a girl aged 6 years testified and explained how the appellant whom she knew before, took her to the toilet and put his penis inside her vagina. She felt pain and screamed. Her mother **SL (S)**, who had stepped out of the house to go for a short call, heard her screaming and ran back to the house. She saw the appellant jump over the fence and run away. CC was taken to Kapenguria District Hospital where she was examined by **Dr. Njambi Kinuthia** who filled a P3 form, in which she noted that CC's hymen was absent, and concluded that CC was defiled and sodomized. The P3 report was produced in evidence by **Danson Litole** a clinical officer who had worked with Dr. Kinuthia. The matter was reported at Kapenguria police station and **PC Woman Sarah Ndenge** caused the appellant who had been apprehended by members of the public to be charged with the offence.

[3] The appellant in his unsworn statement of defence stated that he used to live in Karas. On the material day he went to buy 16 goats but one goat ran away and he went to look for it. It is at that stage that he was beaten by four people who tied him up with a rope and took him to the police station where he was charged with attempted rape. He denied having done anything.

[4] In its judgment, the trial court found that the age of CC was established from the P3 age assessment form as 6 years; that CC identified the appellant as her assailant; that Selina saw and identified the appellant as he jumped over the fence and tried to escape; that the appellant was arrested immediately thereafter; and that the medical report corroborated the evidence of CC and S that CC was defiled. The trial magistrate therefore found the charge proved beyond reasonable doubt, convicted and sentenced the appellant to imprisonment for life.

[5] Aggrieved by the judgment of the trial court, the appellant filed an appeal in the High court. In dismissing the appeal, the learned judge of the High Court observed that there was no dispute that the complainant was sexually molested on the material date and time; that the main issue was identification of the perpetrator of the offence; that the offence occurred in circumstances which were conducive for a positive identification; that CC identified the appellant as her assailant; that the appellant was not a stranger to CC; that the appellant was also seen and recognized by Selina; and that the appellant's defence was a mere denial.

[6] Dissatisfied with the judgment of the High court, the appellant filed the appeal herein raising several grounds, contending that the two lower courts erred in:

- a) failing to observe that the age of the alleged minor was not proved.
- b) failing to hold that the appellant was not positively identified.
- c) failing to observe that anal penetration was not proved beyond reasonable doubt.
- d) failing to find that the mode of arrest was prejudicial and not in connection with the alleged offence.
- e) failing to hold that the particulars of the charge and the evidence tendered were at variance hence the charge sheet was defective.
- f) failing to observe that crucial witnesses were not brought to court to clear doubts.
- g) failing to observe that the purported medical officer was unprofessional and unqualified.
- h) failing to explain to the appellant of his right to be represented by counsel.
- i) imposing a sentence that was inconsistent with the 2010 constitution.
- j) failing to comply with section 36 of the Sexual Offences Act.
- k) failing to grant the appellant an opportunity to sum up and submit on his case.
- l) Failing to find that the appellant was underage during conviction; and that
- m) the learned Judge was unfit to handle the appeal.

[7] When the matter came up for hearing, the appellant was in person while **Mr. Mulati**, Senior Public Prosecution Counsel appeared for the respondent. The appellant submitted that the person who arrested him was not called as a witness and that his appeal was heard by one judge instead of two judges; that the learned Judge was an Environment and Land Court judge, and therefore his judgment should be declared unlawful and unconstitutional.

[8] Further, the appellant submitted that the age of CC was not properly proved and reliance on the P3 form was wrong; that no identification parade was conducted; that CC testified as to being penetrated in the vagina while the charge sheet stated penetration of the anus; that the charge sheet was not amended to reflect or corroborate the evidence of CC and the said particulars of the charge sheet were misleading as to which private part of CC was penetrated; that the defect in the charge sheet was prejudicial and cannot be cured under **section 382** of the **Criminal Procedure Code**; that the appellant was not informed of his right to be represented by counsel; that the clinical officer failed to indicate his area of specialization and was therefore not qualified to testify as an expert; and that **Article 50 (2)(p)** of the **Constitution** prohibits inhumane sentences like life imprisonment.

[9] In opposing the appeal, Mr. Mulati, submitted that the appellant was taken to the police station by three people including CC; that though the members of public who arrested him did not testify, there was other evidence pointing to the appellant as having been the offender; that CC knew the appellant and also narrated what he had done to her; that the clinical officer corroborated the evidence of CC and Selina; that the trial court made an order for the appellant to be supplied with the record and that before the hearing he indicated to court that he was ready to proceed.

[10] This being a second appeal, **section 361(1)** of the **Criminal Procedure Code** obliges us to consider only questions of law. In ***Karani vs. R [2010] 1 KLR 73*** this Court explained its duty as follows:-

***“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”***

[11] We have carefully considered the record of appeal, the submissions by the appellant and counsel for the respondent, the authorities cited and the law. **Section 8(1)** of the **Sexual Offences Act No. 3 of 2006** defines the offence of defilement as;

**“A person who causes penetration with a child is guilty of an offence termed defilement.”**

[12] From the above definition the main elements of the offence of defilement are that:

- (i) the victim is a ‘child’ and a ‘child’ is defined under the Children Act as ‘a person under the age of 18 years.’

(ii) there is penetration of the genital organ of the child by the genital organ of the perpetrator, and such penetration need not be complete or absolute as partial penetration will suffice.

(iii) the identity of the perpetrator is established.

[13] It is trite law that the onus to prove the charge lies on the prosecution throughout the trial and the standard of proof is that of beyond reasonable doubt. The High court in addressing itself on the elements of the charge, did not address itself on the issue of age and penetration but stated that:

**“There was no dispute that the complainant was sexually molested on the material date and time. The dispute centered on the identification of the appellant as the offender.”**

[14] This was a mis-direction as the High Court had the duty as a first appellate court to reconsider and reevaluate all the evidence and come to its own conclusion regarding the establishment of all the elements of the charge. As concerns the age of CC, total reliance was placed on the estimated age that was indicated on the P3 form as 6 years. This taken together with the fact that CC was subjected to a *voire dire* examination, an indication that the court formed the opinion that she was a child of tender years, who is defined under the Children Act as a child under 10 years, was sufficient to establish that CC was a child as defined under the Children Act.

[15] As regards penetration, the evidence was rather contradictory. While the particulars of the charge stated that the appellant caused his penis to penetrate the anus of CC, in her evidence CC said the appellant penetrated her vagina. It is also noteworthy that in the P3 form Dr. Njambi did not notice any bruises on the vaginal area or the anal area of CC. Although the Dr. Njambi noted that the hymen was ‘absent,’ it was not clear what that implied. In other words, whether it was absent because it was broken or absent for other cause. Moreover, although the Dr. Njambi’s conclusion on the P3 form was that CC was sodomized it was not clear what was the medical basis for that conclusion. In the circumstances, a critical element of the offence of defilement which is penetration was not established. In addition, there was further contradiction in the evidence of CC and her mother regarding how the offence was committed. CC explained that the appellant took her to the toilet and sexually assaulted her. Selina’s evidence was not clear but implied that she found CC in the house.

[16] In addition, **Section 134** of the **Criminal Procedure Code** provides that:

**“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”**

[17] The charge sheet in this case indicated that the appellant had been charged with **“defilement contrary to section 8(1)&(2) of the Sexual Offences Act No. 3 of 2006.”** The particulars as already noted were that the appellant **“... did cause his penis to penetrate the anus of CC, a child aged 6 years.”** It is clear that the evidence adduced was not consistent with the particulars as CC talked of penetration in her vagina and the medical evidence did not support penetration in the anus. This was a crucial factor that resulted in doubt as to whether there was penetration at all. Penetration being a crucial element of the charge, the disparity between the evidence adduced and the particulars of the charge cannot be lightly treated nor is it curable under **section 382** of the **Criminal Procedure Code**. For these reasons, we find that the appellant’s conviction cannot be sustained. We do not find any substance in the other grounds of appeal as judge J. R. Karanja is a judge of the High Court and not a judge in the Environment and Land Court as alleged by the appellant. Nor is there any substance in the contention that the appellant’s appeal ought to have been heard by two judges.

[18] The upshot of the above is that this appeal is allowed, the appellant’s conviction quashed and his sentence set aside. The appellant shall be set free unless otherwise lawfully held.

Those shall be the orders of the Court.

**Dated and delivered at Eldoret this 28<sup>th</sup> day of June, 2019.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true  
copy of the original.*

**DEPUTY REGISTRAR**