



**IN THE COURT OF APPEAL OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL 125 OF 2007**

**JOHN PATRICK KIBET.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal from a Judgment of the High Court of Kenya at Kitale (Ochieng', J) dated 25<sup>th</sup> September, 2007***

**in**

**H.C.CR.A. NO. 138 OF 2005)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

**JOHN PATRICK KIBET**, the appellant herein, was arraigned before the Senior Principal Magistrate's court at Kitale on a charge of defilement of a girl under the age of 16 years contrary to **Section 145(1)** of the Penal Code. The particulars of the offence were that on the 11<sup>th</sup> day of April, 2004 at Trans – Nzoia District within the Rift Valley Province, unlawfully had carnal knowledge of **[M C]**, a girl under the age of 16 years.

The appellant pleaded not guilty to the charge on 20<sup>th</sup> April, 2004 before the Senior Principal Magistrate at Kitale (**H.I. Ongudi**). His trial subsequently commenced on 7<sup>th</sup> July, 2005 before the Principal Magistrate at Kitale (**M.C. Chepseba**), when the complainant **[M.C] (PW1)** and her mother **[M.C.S] (PW2)** testified. Two other prosecution witnesses namely, **Jimmy Peter Simiyu (PW3)** and **P.C. Woman Rael Kiplagat (PW4)** gave evidence on 16<sup>th</sup> August, 2005. The appellant finally gave his evidence in defence on 28<sup>th</sup> October, 2005.

According to the trial Magistrate's record the complainant, then aged nine (9) years old was a student at [S.....] Primary School in Std 3. She re-called the 11<sup>th</sup> April, 2004 at about 6 p.m. whilst playing with her sister at home, she was called by the appellant who was removing his clothes from a washing line. The complainant went together with her sister and the appellant took them to his bed inside the house and locked the door from inside. He demanded a refund of his money a one shilling coin which he had earlier given the complainant to buy a sweet, but she had lost it. The appellant threatened to "do bad manners", to the complainant if she did not produce the coin. He immediately removed his trousers and underwear and ordered the complainant to remove her dress. She refused and the appellant pulled out

her under pant and ordered her to lie down on her back facing upwards. The appellant lay on top of her, and parted her legs and defiled her. She felt a lot of pain and bled. After some time her mother knocked on the door and the appellant opened. She took the complainant and her sister out of the house, and interrogated the complainant who reported that the appellant had defiled her.

The complainant's mother **[M.C.S], (PW2)** confirmed that she was at home on 11<sup>th</sup> April, 2004 at about 7 p.m., making supper for the family. She was aware that her children (the complainant and her sister) were at the appellant's house, because she saw them walk to the house together, as the appellant is their uncle who lives in the same compound. M went to check on the children when supper was ready. At first she noticed that there was no light in the appellant's house. She knocked the door and nobody opened so she left. She returned to the house and again knocked on the door. This time the appellant opened the door and claimed that they had been asleep. The girls came out and she returned home with them. M complained of backache, but on checking, **[M.C.S] (PW2)** saw nothing unusual. The complainant went to school, the following morning, and upon return from school at about 1 p.m. as her mother M was bathing her, she checked her private parts and noticed some "watery substance and discharge", and the private part was swollen. On enquiring from the complainant, she disclosed that the appellant had defiled her. The complainant's father was informed. He also checked her and immediately took her to Kitale District Hospital where she was attended to by **Jimmy Peter Simiyu, (PW3)**, who also completed her P3 form.

**[MC], (PW1)** complained to the clinical officer **Jimmy, (PW3)** of having been defiled by someone known to her, on 11<sup>th</sup> April, 2004 at about 7 p.m. in her parents' home. Jimmy examined her genitalia and found that her "*labia minora*" had bruises. A swab from her showed presence of "Bacteria or S.T.I.". She was given antibiotics. Jimmy formed the opinion that the complainant was "actually defiled." He completed the P3 form which he produced in court as an exhibit.

**P.C. Woman Rael Kiplagat (PW4)** re-arrested the appellant from members of the public who included the complainant's parents. She also examined the complainant and noticed bruises in her private parts. She subsequently charged the appellant with the offence of defilement.

The appellant made an unsworn statement in defence and denied defiling the complainant. He described himself as a hotel proprietor and stated that on the day in question, he proceeded to his hotel business as usual and worked until 8 p.m. when he went to his house to sleep. That the following day at about 6.45 p.m. his brother went to his hotel accompanied by many people, and ordered him to close the business, which he did, and they arrested him and escorted him to Moi's Bridge Police station for an offence he never committed.

The learned trial Magistrate found as follows after listening to both parties:-

***"Having heard both the prosecution and defence case, I am satisfied that the prosecution have proved their case to the required standard of beyond reasonable doubt. The Juvenile offended identified the accused person positively. She knew him as her paternal uncle and she refers to him by his names Patrick Kibet. She knew him well since he lived in the same homestead with her parents where she also lived. No mistake. The second prosecution witness also corroborated this and identified her as her brother in law who lived within the same compound with her family. In his defence the accused admits his brother led to his arrest.***

***Secondly, the girl's testimony was elaborate and detailed as to events leading to her defilement by accused. He asked her to return a shilling he had gifted her earlier as he washed his clothes. When she failed to return the same he threatened to do "bad manners" to her and indeed proceeded to remove her panty and his, threw her on his bed and pushed his penis into her vagina i.e defiled her as a punishment for loosing his 1/=. She appears not to have reported clearly to her mother PWII and it was only after 1 - 3 days she was escorted to the hospital. She had complained of backache that night but PWII did not see anything unusual until she inspected the girl as she washed her the following day at 1.00 pm. That is when she revealed to her. The p3 form is supportive of the alleged sexual assault. She had a bruished (sic) labia minora and or sexually transmitted disease. This court is satisfied since***

***injuries must have occurred during the defilement. No wonder the accused had put off his light and locked the door.***

***All the other prosecution witnesses were credible and corroborated PW1's evidence. Accused's cross-examination did not scuttle their evidence at all and the defence never rebutted the entire prosecution case.***

***In his defence the accused only stated that he is a hotel owner and was at her place of work on the second date after alleged offence when arrested at 6.45 pm. He never referred to issues raised in the prosecution case relating to his offence or defilement of the said minor.***

***I still find the prosecution case proved beyond reasonable doubt and accused is convicted under section 215 of the CPC"***

The magistrate sentenced him to life imprisonment with hard labour.

The appellant was aggrieved by the trial magistrate's conviction and sentence, and he appealed to the superior court, (Ochieng, J), who said in part:-

***"In the event, having re-evaluated all the evidence on record, I do agree with the learned State Counsel that the prosecution had proved the offence beyond any reasonable doubt"***

The learned Judge however reduced the sentence which had been metered out to the appellant by the trial magistrate when he said:

***"As regards sentence, the state did not support the same. I note that the appellant was a first offender, but he was given the maximum sentence prescribed by law.***

***Ordinarily, first offenders are not given the maximum sentence unless the court forms the considered opinion that the circumstances prevailing called for the same.***

***There is no doubt that the offence committed by the appellant was serious by any standards. The victim was a very young girl aged either 7 or 8 years at the time of the incident.***

***Both PW1 and PW2 said that the complainant was 9 years old, as at July, 2005, when the two witnesses gave evidence in court. That would imply that as at April, 2004 the complainant was about 8 years old.***

***But whether she was 7 or 8 is not really material, as the fact remains that the complainant was a very young girl. Therefore, there would be no doubt that the girl would be traumatized for life, as observed by the learned trial magistrate. In the circumstances, a deterrent sentence was definitely called for. However, I believe that a life sentence was excessive, notwithstanding the gravity of the offence. In the event, I find that the trial court exercised its discretion wrongfully. Accordingly, the appeal as against sentence is allowed. The sentence of life imprisonment with hard labour is set aside, and the same is replaced with imprisonment for 25 years with hard labour. The said sentence shall run from 22<sup>nd</sup> December, 2005 when the appellant was convicted and sentenced.***

***It is so ordered."***

The appellant was again dissatisfied with the judgment of the superior court, and he preferred this second appeal citing eleven "Grounds of Appeal". Arguing his appeal on his own before us, the appellant submitted that he was not tested after having been arrested; that the complainant was found to have syphilis, and there was no evidence to show that he was the one who infected her. He submitted further that the prosecution should have been penalized for not producing all the exhibits in court, such as the underpant of the complainant to show that she was defiled. The appellant did not urge all his grounds of appeal before us, but he raised the issue of the complainant's sister not having been called, and in ground

5 he complained about the failure by the two courts below in considering the fact that the “vaginal swab (specimen)”, did not show the presence of spermatozoa to confirm intercourse. However, the trial magistrate believed the prosecution evidence in toto, despite the assertions by the appellant.

The learned Judge of the superior court on the other hand noted that the witness the appellant complained was not called was the complainant’s sister [P. C] who was said to have been in the appellant’s house as the complainant was being defiled. The Judge said:-

***“In the circumstances, it would appear that the said [P.C ] could have been an essential witness. But when the totality of the evidence is considered, it will be noted that when the incident of defilement itself was taking place, P C was fast asleep.***

***That being the testimony of PW1, it would imply that her sister would not have been an eye witness to the actual defilement. At best, she may have only confirmed to the court that she and her sister were called into the appellant’s house and ordered into bed.***

***In so far as PW2 did corroborate the fact that PW1 was inside the appellant’s house, in the company of her sister, I hold the considered view that the failure to call [P.C] was not material to the prosecution case”.***

On the vaginal swab not showing the presence of spermatozoa, the trial magistrate’s record shows that the complainant was examined 5 days after the offence. This we think might have interfered with the presence of spermatozoa, though the injuries in her “genitalia and her “labia minora”, was evident plus the presence of “Bacteria or T.S.I.”

The learned Senior Principal State Counsel *Mr. Omutelema* opposed the appeal on both the conviction and sentence of the appellant, and submitted that he was convicted of defilement on sound evidence. That the complainant’s evidence was supported by that of her mother who found her daughter locked in the house with the appellant. That the offence of defilement was corroborated by the evidence of the clinical officer who examined the complainant.

*Mr. Omutelema* noted that the appellant dwelt on the incident after the offence, as such, there was no evidence to contradict the evidence of the complainant. He urged the Court to dismiss both the conviction and sentence.

We have considered the findings of the two courts below and are of the view that they arrived at the correct conclusion. We, however, wish to point out that though the complainant’s sister who was with her in the appellant’s house at the time of the alleged offence did not give evidence, the trial magistrate was entitled to rely on the evidence of the complainant child, if she was satisfied that the child was telling the truth. See the proviso to **Section 125** of the Evidence Act brought in by Act 5 of 2003, which was in force then. It provided:-

***“Provided that where in criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth”***

In line with the above proviso, the learned magistrate observed in her judgment that, “the girl’s testimony was elaborate and detailed as to events leading to the defilement by the accused”.

We find no merit in this appeal and proceed to dismiss it.

**DATED and DELIVERED at ELDORET this 27<sup>th</sup> day of FEBRUARY, 2009.**

***P.K. TUNOI***

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***JUDGE OF APPEAL***

***D.K.S. AGANYANYA***

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***JUDGE OF APPEAL***

***J. ALUOCH***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**