REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 194 OF 2011

KIBET KIPKEU LONGES……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1649 of 2011 Republic vs Kibet Kipkeu Longes in the Chief Magistrate's Court at Eldoret by J. Owiti Resident Magistrate on 30th September2011)

JUDGMENT

1. The appellant was convicted for the offence of defilement of a child aged thirteen years contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to 20 years imprisonment.
2. The particulars of the offence were that the appellant defiled the minor on 13th March 2011 at Kapseret Centre in Wareng District. The appellant has appealed against his conviction and sentence. The petition of appeal was filed in Court on 4th October 2011. It raises seven grounds of appeal. They can be compressed into six. First, that the evidence of one witness (PW2) was obtained through coercion; secondly, that the trial court did not take into account the defence tendered by the appellant; thirdly, that that there was no medical evidence connecting the appellant to the offence; fourthly, that the complainant was suffering from brain palsy and was not a reliable or truthful witness; fifthly, that material witnesses were not called; and lastly, that failure to arrest the appellant immediately was suspicious in the circumstances. At the hearing of this appeal, the appellant contended that his prosecution arose out of a grudge between him and the complainant's mother (PW2). In a nutshell, the appellant's case is that the evidence at the trial was insufficient to found the charge.
3. The appellant sought to rely further on some handwritten amended grounds of appeal. I have however noted from the record that *no* leave was granted by the Court. Accordingly, the amended grounds are incompetent for offending section 350 of the Criminal Procedure Code.
4. The appeal is contested by the State. In a synopsis, the case for the State is that the evidence established the appellant's guilt to the required standard of proof. 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).
5. On 14th June 2011, the appellant's trial in the lower court opened. The record of appeal shows

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

“Court: What is your name" My name is [minor’s name withheld].

Court: When were you born" On 14/10/1997……

Court: Do you go to school" Yes [particulars withheld] Academy in [standard] 6.

Court: what constitutes a nuclear family" Father, mother, children.

Court: Do you go to church" Yes- P.A.G.

Court: Which is the last book in the bible" Revelation……..

Court: Minor understands the meaning of saying the truth and like [sic] minor to give sworn statement.”

6. The minor then proceeded to give sworn 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.
7. There is something else arising from the *voire dire*. It revealed that the child possessed sufficient intelligence. It is thus not true as alleged by the appellant that her cerebral palsy materially affected her testimony. On the contrary, the child (PW1) gave a vivid account of the events of 13th march 2011. She knew the appellant; he used to cut her hair at his barbershop. He found her at her mother’s shop. It was about 1.00 p.m. He asked her to accompany him. They passed by her friend’s (C) house. They then went to the house of the appellant’s friend. The appellant bought her soda and doughnut for lunch. He then locked the door and defiled her for about 20 minutes. He told her not to disclose the incident. It was not the first time the complainant had been defiled; she had been defiled by a different person earlier. She did not state the date.
8. PW1 missed her periods. She confided to her sister on 26th March 2011. The complainant told her mother that the appellant had defiled her. Her mother took her to Langas Police Station and Moi Teaching and Referral Hospital on 26th March 2011. The complainant’s sworn evidence was not shaken by cross-examination.
9. PW2 confirmed her daughter was thirteen and a half years. She produced a birth notification card (exhibit 1). It showed that the complainant was born on 14th October 1997 at Moi Teaching and Referral Hospital. She also produced her post natal records (exhibit 2). The P3 form (exhibit 3) produced by PW3 stated the age of the minor as thirteen years at the time of the offence. The age of the minor was thus not in doubt.
10. Age of the 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 well established by oral and documentary evidence.

11. PW2 testified that the complainant missed her periods on 23rd March 2011. She became suspicious. The complainant then revealed what had happened. She took the minor to hospital. The pregnancy and urinalysis tests were negative. She testified that her daughter was suffering from cerebral palsy. She denied having any grudges with the appellant prior to 13th March 2011. The appellant testified in his defence that there was a grudge arising out of a pair of shoes he had bought from PW2. His version was that when he returned the shoes, PW2 was annoyed. I have looked at the record. The appellant cross-examined PW2 on that aspect. Her answer was as follows-

"I sold a pair of shoes to your child just like any other customer. You paid me Kshs 200 in total. I had no dispute with you when you paid me Kshs 200 even though you paid it in two equal instalments…..[Complainant] said you are the one who defiled her on 13/3/2011".

12. Two things need to be said from that evidence: first, the nature of the dispute over the shoes did not come out clearly. I will revisit the matter shortly when I deal with the appellant's defence. But even if I take the appellant's position to be correct, it would certainly *not* excuse the defilement. In short, the appellant did not show why the complainant or her mother would fix him on a criminal charge. Secondly, the fact that the complainant had cerebral palsy did not take away her rights as a child. As I stated earlier, she came across from the *voire dire* examination and her evidence as a fairly intelligent child.
13. A report of the defilement was made by PW2 to PW5, police constable Lucy Okumu. The appellant was not arrested until 7th May 2011 at his barbershop at Kapseret. There would seem to have been some mediation negotiations between the appellant and PW2. Again I will revisit the matter when dealing with the appellant's defence. PW3, Florence Jaguga, is a clinical officer at Moi Teaching and Referral Hospital where the complainant was taken on 26th March 2011. She filled in the P3 form. She testified as follows-

"She [complainant] had old healed hymeneal tears and whitish vaginal discharge. Specimens were collected. High vaginal swab was done. Numerous epithelial cells were noted but no spermatozoa……pregnancy test was negative, VDRL and HIV test was negative. The patient was defiled though not recent. I filled P3 form. I wish to produce it as exhibit."

14. 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".

15. The complainant's hymen had "*old healed tears*". She had a *discharge* from her private parts. She had moderate 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. The totality of that evidence points strongly to the guilt of the appellant. True, the complainant had earlier been defiled by a different person on an unspecified date. But there is *no* doubt on the dates of the present and material defilement: it was on 13th March 2011. Regrettably, the complainant was not examined until 13

days later. Granted her condition and that the appellant told her not to reveal her ordeal, it may be understandable. It would have been preferable to examine the complainant immediately. The appellant could also have undergone examination. But too long a period had passed and it is doubtful that it would have added significant value. However, the available medical evidence on the complainant established *penetration*. The complainant clearly *identified* her assailant as the appellant.

16. I have then considered the defence proffered by the appellant at his trial. He stated as follows:

"On 13/3/2011…….I reached home at 12.50 p.m. My wife prepared lunch. She told me there was no bathing basin and shoes for the child. I went to Wairimo's [PW2's] shop. She had sold me a pair of shoes for my child. The pair of shoes were not fitting. I was infuriated. She picked a stick and pricked me with it. She insulted me until I left. She told me to keep the shoes until she gets another [sic] stock. Her children came to the scene. [complainant] also came to the scene…..I left the scene. On 7/5/2011 I was arrested. I was incarcerated until 9/3/2011 when I was arraigned in Court. I denied the charges. I deny the charge to date"

17. The appellant called two witnesses. DW2, his wife, confirmed he made lunch for him at 12.00 p.m on 13th March 2011. There is a discrepancy there as the appellant said he got home at 12.50 p.m. DW2 then sent her husband to return the shoes to PW2. She said she heard PW2 complain to the appellant that the appellant "*had a love affair with [the complainant]".* DW3 also witnessed the argument between the appellant and the complainant's mother on 13th March 2011. The appellant was seeking a refund. He did not hear "*any complaint of defilement uttered by M [PW2] or K [appellant] at the scene".* He heard that a mediation meeting was held between M and K.
18. The learned trial Magistrate found that "*the defence of DW1 [appellant] was tailor made to fortify his innocence hence rejected [sic] by the court".* The learned trial Magistrate found the demeanor of DW3 suspicious and meant to conceal *"what was being arbitrated between PW2 and DW1 before DW1 was arraigned in court".* The trial court also found various discrepancies between the evidence of DW1 and DW2. The court stated-

"*DW1 stated further that he went to buy the pair of shoes from PW2 on 13/3/2011 but never paid for them yet DW1 stated he bought the shoes on 11/3/2011 and paid Kshs 200 for the same. DW2 was at the scene. She stated that she heard PW2 accusing DW1 of defiling PW1 herein, a fact which DW1 denied".*

19. I agree with those findings. The appellant was placed squarely at the *locus in quo*. He was positively identified by PW1 as the person who defiled her on 13th March 2011. From the time lines in the evidence, he had a clear opportunity to defile the complainant. The defilement took place for twenty minutes only. I have stated that the medical evidence corroborated the complainant's evidence.
20. I have not seen anything to suggest the complainant was an unreliable or untruthful witness. Although she had cerebral palsy, her evidence was clear and consistent. There may have been a dispute between the appellant and PW2 over the shoes. But such a dispute would not justify the offence of defilement. Fundamentally, there is no persuasive evidence that the complainant and her mother trumped up the charges. The appellant did not explain to the trial court how, as he now alleges, the evidence of PW2 was procured by coercion. I agree that the appellant was arrested long after the offence. He was held in custody for two days. Under the present Constitution, the true remedy for such delay or breach of constitutional rights is not an acquittal on the criminal charge. It does not vitiate the trial in the lower court. An action for damages may lie for unlawful confinement. See *Lovone v Republic*, Eldoret, High court Criminal appeal 127 of 2010 (unreported). That ground lacks merit.

21. From the passages of the judgment of the lower court I have set out, the appellant's defence was considered but rejected. The burden of proof, subject to section 111 of the Evidence Act, rested entirely with the prosecution. But from the totality of the evidence tendered at the trial, it pointed *strongly* to the appellant's guilt. The complainant's evidence was *corroborated*. All the *ingredients* of the offence of defilement, for the offence that took place on 13th March 2011, were thus proved beyond reasonable doubt. I have reached the same conclusion as the trial court that the evidence of defilement was clear-cut and pointed to the accused. That evidence was *inconsistent* with the *innocence* of the appellant.
22. Under section 8(3) of the Sexual Offences Act, defilement of a child of between twelve and fifteen years attracts a *minimum* sentence of *twenty* years imprisonment. I have said that the *age* of the complainant was well established at the trial. She was thirteen years and a half. She had cerebral palsy. This is a grave offence perpetrated against a defenceless child. She is a vulnerable person as defined in section 2 of the Act. She will carry the scars for life. The sentence handed down to the appellant was the minimum provided by the law. I will not disturb it.
23. In the end, I uphold the conviction and sentence. The entire appeal is accordingly dismissed. It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 29th day of November 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.