



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 82 OF 2019**

***(Appeal arising out of conviction and sentence of Hon. M.N. Osoro (Resident Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 38 of 2019 delivered on 5<sup>th</sup> July 2019)***

**JACKSON ERUPE LOMO.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, JACKSON ERUPE LOMO, was charged with the offence of **defilement of a child** contrary to **Section 8 (1)** as read together with **Section 8 (2)** of the **Sexual Offences Act**. The particulars of the offence were that on the 25<sup>th</sup> day of December 2018 within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of JAC, a child aged six (6) years. In the alternative, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars of the offence were that on the 25<sup>th</sup> day of December 2018 within Trans-Nzoia County, the Appellant intentionally caused the contact between his penis and the vagina of JAC, a child aged six (6) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty. After full trial, the Appellant was convicted on the main charge and sentenced to **life imprisonment**.

The Appellant is aggrieved by his conviction and sentence. In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He is convinced that the Prosecution failed to establish the elements necessary to convict him on the charge leveled against him. He contended that the Prosecution's case was marred with discrepancies and contradictions. He faulted the trial magistrate for failing to consider the provisions of **Sections 216 and 329** of the **Criminal Procedure Code**. He cited that the sentence imposed on him was harsh and draconian. In the premises therefore, the Appellant urged this court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, both the Appellant and the Respondent (Prosecution) relied on their written submissions in support of their respective rival positions. The Appellant submitted that the element of penetration was not proved to the required standard as the victim was examined three (3) days after the alleged incident and after she took a bath. He contended that the medical report was full of medical jargon hence incomprehensible on his part; this violated his right to a fair trial. He stated that the age of the complainant was not proved as contradictory documents were presented in court to establish the date of birth. He lamented that crucial witnesses did not come to testify in the proceedings. He impugned the trial magistrate's sentence stating that she did not consider the probation report, his defence, his mitigation and the law. He challenged the court sentence to him to serve a rehabilitative as opposed to deterrent and/or retributive.

On the part of the State, Learned Prosecutor Mr. Omooria submitted that all the ingredients to establish the charge of defilement had been sufficiently proved. He dismissed the Appellant's contention that the evidence that had been adduced was fabricated. He submitted that all crucial witnesses testified. Additionally, he relied on **Section 124** of the **Evidence Act** for the proposition that corroboration is not necessitated in sexual offences. The prosecution had discharged the burden of proof and established the charges beyond any shadow of a doubt. He urged this court to uphold the conviction, affirm the sentence and dismiss the appeal.

The facts established by the Prosecution and giving rise to the charges are as follows; PW2 EKA, the mother of the Complainant testified that she was with PW1 on 25<sup>th</sup> December 2018 at her place. At around 8:00 p.m., she asked her daughter to go to her father's home which was nearby. They do not live together. On her way home, the Complainant JAC, PW1, a baby class pupil at City Light aged six (6) years old at the time of the offence, met the Appellant. He lured her with *mandazi* to go to his house with him. She accompanied the Appellant to his house where they were alone. She indicated that she knew him; he lived with "Moo". She narrated how he told her to remove her trouser and sit on his bed. He then sexually assaulted her.

PW1's father discovered that PW1 did not sleep home. On inquiry, it was discovered that PW1 was in the home of one Celina. Celina informed PW1's parents that she found PW1 at her doorstep on the morning of 26<sup>th</sup> December 2018 at 6:00 a.m. PW2 picked PW1 from Celina's house. She observed that PW1's hair was untidy yet it had just been done the previous day. PW2 interrogated PW1 who revealed that the Appellant, "Lomo", did "*tabia mbaya*" to her at his home. She noticed that her underpants had whitish discharge. She further testified that PW1 informed her that the Appellant slapped her. PW2 knew the Appellant who lived in their village for about fifteen (15)

years.

Due to unavailability of funds, PW2 was unable to take PW1 to hospital on 26<sup>th</sup> December 2018. She took PW1 to Kitale District Hospital on 28<sup>th</sup> December 2018 for treatment. PW3, SUSAN SUTER, a clinical officer examined PW1. On observation, she found that PW1's vulva was hyperemic. The hymen was absent. Her conclusions were that PW1 had been defiled. She administered treatment to PW1 on the same day. She estimated PW1's age at six (6) years old at the time of the offence. She later on filled the P3 form on 4<sup>th</sup> January 2019. She produced the P3 form and treatment notes as **Prosecution Exhibits 1 and 3** respectively.

The matter was then reported at Kitale Police Station where PC MELVIN PURITY NABWIRE No. 101038 PW4 commenced investigations. She recorded witness statements and pieced the evidence together. She visited the Appellant's home who was away. The witness testified that the Appellant had been previously arrested to face a charge of robbery with violence in Endebess. She issued an order to arrest him as he was a fugitive. He was traced and found in the court's cells on 12<sup>th</sup> February 2019. He was arraigned in court on 13<sup>th</sup> February 2019 where he was charged. She produced a copy of the Complainant's immunization card No. 39061 as **Prosecution Exhibit 2**.

The Appellant was placed on his defence. His sworn testimony was that on 25<sup>th</sup> December 2018, he was at work as a cart pusher. He then proceeded to his home at [Particulars Withheld] village where he had refreshments. Later that night, he visited JE's home where he had dinner and retreated there till midnight. He was arrested on 25<sup>th</sup> January 2019 on a charge of robbery with violence. When he was in court for mention of his case on 12<sup>th</sup> February 2019, PW4 arrested him and took him to Kitale Police Station. He took plea on 13<sup>th</sup> February 2019. He denied committing the offence.

This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate's so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (**See Njoroge –Vs- Republic [1986] KLR 19**). In the present appeal, the issue for determination by this court is whether the Prosecution established to the required standards of proof that the Appellant committed the offence that he was charged with.

For the Prosecution to sustain the charge of defilement, it must establish that the following three ingredients to the required standard of proof:

1. Age of the Complainant
2. Penetration
3. Identification of the perpetrator

On the Complainant's age, PW1, the Complainant, testified that she was six (6) years old at the time of the offence. Her evidence was corroborated by that of her mother (PW2). Furthermore, the Complainant's immunization card No. xxxx produced in evidence established that she was born on 18<sup>th</sup> July 2012. This court thus finds that the age of the minor was established by the Prosecution. The Appellant's claim that contrasting documents were presented before the trial court is dismissed. The Prosecution relied on the immunization card to establish her date of birth which was in consonance with the evidence of prosecution witnesses in regard to complainant's age.

The next ingredient is penetration. Section 2 (1) of the Sexual Offences Act defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

PW1's testimony was that the Appellant took her to his house. He asked her to remove her trouser. He then defiled her. PW2 was also informed by the complainant that the Appellant had defiled her. She observed that her trouser had a whitish discharge. Upon examination in hospital, PW3 confirmed that PW1's vulva was hyperemic. The hymen was absent. Her conclusions were that PW1 had been defiled. In other words, penetration was proved to the required standard of proof. This finding is reached notwithstanding the Appellant's lamentation that PW1 was not examined immediately after the incident. Being a child of six (6) years, it was not expected that such a child would have had previous sexual experience.

On the element of the identification of the perpetrator, PW1 testified that she knew the Appellant who lived with a person called "Moo". PW2 testified that she had known the Appellant as their neighbour for the last fifteen (15) years prior to the offence. The complainant was the sole eye witness. She testified that the Appellant defiled her in his home where she left the following morning. The complainant was emphatic that it was the Appellant (identified as "Lomo") that defiled her. He was thus positively identified as the perpetrator. This court sees no reasons to interfere with this finding by the trial court.

The Appellant raised several grounds in this Appeal. On the claim that he did not comprehend the contents of **Prosecution Exhibit 1**, this court dismisses the same as an afterthought. It was not raised at trial. On whether crucial witnesses were called, **Section 124** of the **Evidence Act** was invoked. It is clear from her testimony that the complainant was telling the truth. She was subjected to a *voire dire*. She was cross examined by the Appellant. Her evidence was credible and cogent.

This court finds that the Prosecution established all the ingredients of offence of defilement to the required standard of proof beyond reasonable doubt. The Appellant's appeal against the conviction lacks merit. It therefore fails and is hereby dismissed.

The Appellant was under **the Sexual Offences Act** sentenced to **life imprisonment** by dint of the provisions of **Section 8 (2)**. The trial court meted the mandatory sentence imposed. The court considered his mitigation and the probation report. In his mitigation, the Appellant stated that he had spent considerable amount of time in custody. He sought a fair sentence. He urged this court on appeal to consider a rehabilitative approach rather than a retributive one. He presented before this court several certificates awarded to him, including one on theology. He however did not show any remorse at trial and on this appeal. The sentence imposed on the Appellant was lawful. Consequently, this court

will not interfere with the sentence imposed by the trial court. The Appeal against the sentence is hereby dismissed. The conviction and sentence of the trial court is hereby upheld.

It is so ordered.

**DATED AT KITALE THIS 23RD DAY OF FEBRUARY 2022.**

**L KIMARU**

**JUDGE**