



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 87 OF 2018**

**HILLARY YEGON .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(BEING AN APPEAL FROM THE JUDGEMENT OF HON. R. AMWAYI DATED 8<sup>TH</sup> OCTOBER 2018 IN MOLO CRIMINAL CASE NO. 1322 OF 2016)***

**JUDGEMENT.**

- 1. The appellant was charged with the offence of Defilement contrary to Section 8(1), (2) of the Sexual Offences Act No. 3 of 2006.** The particulars of the charge were that on the 2<sup>nd</sup> day of May 2016 at [Particulars Withheld] Village of Posimoru Location Narok County intentionally caused his penis to penetrate the vagina of DC a child aged 14 years.
- 2. The Alternative charge was Committing an Indecent Act with a child contrary to Section 11 (1) of the Sexual Offences Act No 3 of 2006.** The particulars of the charge were that on the 2<sup>nd</sup> day of May 2016 at [Particulars Withheld] village of Posimoru location Narok county unlawfully and indecently assaulted DC by touching her private parts namely vagina.
3. The appellant after a full trial was convicted and sentence to 20 years' imprisonment hence this appeal. The appellant has raised several grounds of appeal and before looking at them it shall be necessary to summarise the proceedings at the trial court.
- 4. PW1 D C** testified that she was born in the year 2001 and she was a form one student at [Particulars Withheld] secondary school. She said that on the **2<sup>nd</sup> May 2016** at around 4pm she asked her father permission to go and collect her book from her friend called Cherono. As she came back from [Particulars Withheld] place after picking the book she passed through the appellant's compound when she met him. He told her that he wanted to send her and as she went inside his house it started raining.
5. He told her that she should be her girlfriend but she told him that she was not yet 18 years old. As she refused the appellant undressed her and carried her onto his bed and proceeded to defile her. She attempted to scream but nobody heard as it was raining. After he was done she left the house but one R a brother to her father saw her and he called her father by phone explaining that he had seen her coming out of the appellant's house.
6. As she arrived home her father told her that she had information that she was at the appellant's house. She told her that the appellant had defiled her. He called *nyumba kumi* people who went and arrested the appellant. She was taken to Olenguruone hospital in the company of police and her mother. She later recorded statements at the police station where she was also given a P3 form which was filled and she identified in court.
7. She went on to state that she knew the appellant as a neighbour who knew that she was a class 5 student at [Particulars Withheld] primary school. She said that it was her first time to have sexual intercourse with him.
8. In cross examination the complainant said that there were other three houses next to the appellant's house and that she saw his uncle. She said that it was a first time for her to have sexual intercourse.
- 9. PW2 SAMWEL CHERUIYOT MARITIM** testified that he was called by SK at 10pm on the material day to go to his house. He obliged and when he arrived he told him that the appellant had defiled her daughter and that he had reported the matter at the police station. Being a village elder he decided to follow up the matter and they went to his house and arrested him. They took him to the police station. He said that the appellant had been his neighbour for the last three years.
- 10. PW3 RK** the uncle to the complainant testified that he received a phone call from SK at around 5pm on 2<sup>nd</sup> May 2016 who told him that PW1 was missing. He checked but she was missing in his homestead. At around 6pm he saw her pass near his gate and he called the father.

11. At 8pm Samuel called him and requested that he should check at the appellant's house to ascertain whether she was there or not. Upon checking his house, the complainant was not there. At around 10pm Samuel came and told him that the complainant was with the appellant and they went and arrested him and took him to the police station.

12. On cross examination he said that at around 4pm he saw the appellant planting maize in his farm.

13. **PW4 JANET SWAGI** from Olenguruone sub county hospital produced the P3 form in respect to the complainant. She found that there was no tear on external genitalia, no bruises and hymen was missing. There was presence of whitish discharge and epithelial cell were seen. She also produced the post rape form which had similar details.

14. On cross examination she said that the whitish discharge was normal unless it was excess. No spermatozoa were seen. She could not tell when she lost the hymen.

15. **PW5 CPL. RICHARD MAINA** carried out the investigation after the appellant was brought to the station on **3<sup>rd</sup> May 2016**. She took the complainant and the appellant in the company of **PC WAIGANJO** a female officer to the hospital. He later recorded statements from the witnesses. Later age assessment of the complainant was undertaken. She was found to be around 15 years old. He also produced the age assessment as part of the prosecution exhibits.

16. When placed on his defence the appellant gave unsworn evidence denying the charge. He said that on 2<sup>nd</sup> May 2016 he went to his farm to plant maize from 8am to 1pm and went for lunch at 2.30pm. He thereafter went back to the farm till 6pm and went home for the evening. He made his supper and retired to rest but was later arrested.

### **ANALYSIS AND DETERMINATION.**

17. The court ordered that this matter be disposed by way of written submissions which the parties have complied. The appellant through his counsel consolidated his grounds of appeal into three, namely, contradictions in the respondent's evidence, medical evidence and the issue of exhibits as well as witnesses.

18. He submitted that there were glaring contradictions on the part of the complainant as well as PW3. PW1 said that her father called PW3 yet in his evidence there was no such. In fact, there was no evidence that her father asked her where she had gone.

19. On medical evidence the appellant submitted that it was inconceivable that no injury was seen or noticed by the clinical officer when she examined the minor. With the kind of person, she was, namely of tender age she was bound to sustain serious injuries in her private parts as a result of forceful penetration.

20. The appellant submitted that key witnesses were not called especially the minors father and her friend C. These were key important components in the whole case.

21. The appellant submitted that the trial court failed to take into accounts his defence especially on the question of timings which according to him demonstrated that he was not at the scene.

22. The learned state counsel on her part supported the findings by the trial court. She submitted that all the ingredients of the offence were met and indeed the appellant had defiled the complainant. She said that the age of the complainant was proved by the production of the age assessment report and that there was prove of penetration as evidenced by the P3 form and that of the minor.

23. By dint of **Section 24 of the Evidence Act**, it was her submission that the minor was truthful and that she managed to establish that the appellant was the perpetrator.

24. On the submissions by the appellant's counsel that the key witnesses were not called, she said that that was not at all the case since there is no requirement for a certain number of witnesses to be called so that an offence can be proved. She relied on **Section 143 of the Evidence Act**.

25. The courts duty is to re-evaluate the evidence afresh and come up with a fresh and an independent finding. See **OKENO V. REP. (1973) E.A. 32**.

26. The three common ingredients of the offence are now clear namely the age of the victim, penetration and the identity of the perpetrator. In this case there is no doubt that she was 15 years old or thereabouts and as per the dental age assessment report on record. (Exhibit 4).

27. On the issue of penetration, it was her evidence that she was defiled by the appellant while in his house after undressing and carrying her to the bed. She said that efforts to scream were thwarted by the rains. She said that this was her first time to have sexual intercourse and for that matter with the appellant.

28. The evidence of the clinical officer who examined her and filled the post rape form as well as the P3 form did not find any injury on the minor's private parts. There were no tears, no stains and no bruises except some whitish discharge which she opined were not abnormal. The hymen was however missing. There was no probable age of the injuries.

29. That brings me to the issue which I consider pertinent raised by the appellant's counsel. The examination was done within 12 hours after the incident and if this is so, and taking into account her age and the fact that this was her first time to engage in sexual activity, was it too

remote not to expect her sustain some injuries whether tears or bruises.?

30. How come there were no stains in her clothes especially her panty which she alleged she gave the police? Of course it is not necessarily true that when defilement occurs there must be injuries. However, in a case of a minor and more specifically the case at hand, it does not take rocket science not to expect at least some injury. The clinical officer should have at least seen some iota of injury.

31. Beside this grey area, this court finds the evidence of the minor clearly contradictory as submitted by the appellant. For example she said concerning one Robert that;

***“When he was done I dressed up and left. When I was leaving Robert who is my father’s younger brother saw me coming from Hillary’s house and he called my father on phone and told him...”***

32. On the other hand, PW3 said that he was called by the complainant’s father concerning the whereabouts of the minor.

33. On the same note the minor stated that she requested for permission to go to pick her book from her friend C which permission was allowed by her father. Pw3 on the other hand testified that it was SK who was inquiring about the whereabouts of her daughter. According to him she had disappeared.

34. If indeed she had asked for permission from her father why would he be worried that he had disappeared?

35. All the above issues go into my findings that she was not truthful. I do not find any reason to grant the complainant the benefit of **Section 124 of the Evidence Act** as submitted by the respondent. These are not minor contradictions as the charge facing the appellant are grave and would lock him in jail for the next 20 years.

36. More importantly there is no evidence at least from the medical conclusions that she was defiled. It is not enough to say that she slept with me and forcefully penetrated me. The same ought to be corroborated or if not the victim must be believed as required under **Section 124 of the Evidence Act**. The same for record states that;

***“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act , where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***

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

37. On the other hand, the submissions by the appellant’s counsel concerning the absence of key witnesses namely the complainant’s father and her friend C in my view was critical. The complainant’s father was the genesis of the whole issue. He was the one who allegedly called PW2 and 3 concerning the incident. Without his efforts perhaps the incident would not have come into fore.

38. Why then would he fail to turn up and testify on behalf of his daughter. At the same time if indeed the complainant went to get the book from C and was accosted by the appellant on her way home, then she was a vital link to the whole episode. There was no reason why they were not called by the respondent. The court agrees of course with the respondent’s submissions that **Section 143 of the Evidence Act** does not envisage specific number of witnesses to prove a case.

39. In this case however the court finds the missed evidence of the father and the friend to the complainant very vital as it would have tied what she told the court. It must be remembered that there were no eye witnesses to the incident and the more reason why other collaborating evidence was necessary.

40. This court does not find the minor truthful. Her evidence was not adding up especially on the events leading to her purported defilement. There is nothing much to say about the identity of the perpetrator. The minor and the appellant are people known to each other as they live 20 meters from each other.

41. For the foregoing reasons the court finds that the appellant ought to have been granted the benefit of doubt. The case left many doubts especially on the conduct and character of the minor. More importantly him father and her friend C ought to have been called to buttress the fact that she actually asked her for permission to go and get her book from C and the said C would have corroborated this.

42. Further, there was no evidence by PW3 that she saw the complainant leave the appellant’s house. The evidence of PW3 concerning the tracing of the minor at the appellant’s house at 10 pm was not consistent with that of the complainant. The complainant did not mention anywhere that she was with the appellant at 10pm. As a matter of fact, when the appellant was arrested while asleep the complainant was not there.

43. In the premises, the appeal is hereby allowed, the appellant set free unless lawfully held.

**Dated signed and delivered via video link at Nakuru this 29<sup>th</sup> day of April 2021.**

**H. K. CHEMITEI**

**JUDGE.**