



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 96 OF 2018**

**(BEING AN APPEAL FROM THE DECISION OF HON. V. WANDERA**

**IN CRIMINAL CASE NO.8 OF 2017)**

**GABRIEL BIKETI WANJOFU.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**VERSES**

**GABRIEL BIKETI WANJOFU.....ACCUSED**

**JUDGMENT**

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1) and 8(2) of the Sexual Offences Act no 3 of 2006**. The particulars of the offence are that **on the 16<sup>th</sup> day of January, 2017 at [Particulars Withheld] village within Trans-Nzoia County intentionally caused your penis to penetrate into the vagina of ANW a child aged 11 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 offence were that **on the 16<sup>th</sup> day of January, 2017 at [Particulars Withheld] village within Trans-Nzoia County intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of ANW a child aged 11yeras.**
3. The appellant was convicted and sentence to life imprisonment hence this appeal. The summary of the evidence as presented during trial is worth a summary before looking at the merits or otherwise of the appeal.
4. **PW1 MN** who is the Complainant's mother testified that she was a casual worker and she had come home around 1pm on the material day and found the Complainant who was in class 2 and she did not have to go back to school in the afternoon. She then gave her a watermelon to eat and went to collect maize cobs.
5. On her way back she heard screams from her neighbours and she rushed to the scene where she found the appellant and the child sitted down. She was told that the Appellant had defiled the minor and upon checking her she found mucus like substance on her thighs and private parts. The Appellant was then arrested and taken to the chief's office.
6. She took the minor to the hospital but did not receive the medication the same day as the doctors had left. The following day she was treated and the P3 form filled. The matter was reported at Kiminini police station and subsequently the Appellant was charged. She also identified the child's panty which she was wearing on the material day as well as the Kshs.5 coin given to her by the Appellant.
7. **PW2 EDDAH NELIMA WAFULA** testified that on the material day at around 1 pm she heard some screaming by a young boy within the neighbourhood and she rushed to the scene. The boy one Evans told her that the appellant was lying on top of the Complainant. He rushed to the scene which was uncompleted house and found the doors locked. Through the windows which had no glass affixed to it he saw

the appellant defiling the minor. He tried to stop him to no avail.

8. The witness went on to state that the Appellant after that opened the door and left towards the river. She took the minor and saw sperms on her private parts. She screamed as she went with her and the Appellant was arrested as he walked to the river. The Chief came and the Appellant was handed over to her and later taken to the police station.

9. **PW3 PHARIS SILALI** from the Kitale County Referral Hospital Dental Department examined the minor and found that she was aged about 11 years.

10. **PW4 KIRWA LABATT** a Clinical Officer also from the County Referral Hospital examined the Complainant and filed the P3 form. He found her vulva swollen and the wall hyperaemic and painful. The hymen was torn and fresh looking. He concluded that there was penetration.

11. **PW 5** the complainant testified that she was in class 3 at [Particulars Withheld] primary school and aged 11 years old. She said that the Appellant was their neighbour and on the material day at around 1.00 pm he called her to his house. She obliged and when she reached there she told her to remove her uniform she was wearing which she did. He then proceeded to defile her and she felt a lot of pain. He told her to keep quiet and not to tell anybody. He gave her Kshs.5 which she identified in court.

12. She left thereafter and the neighbours came and arrested him. She said that she was later taken to the hospital by her mother where she was examined and treated. She also went to the police station with her mother.

13. **PW6 P.C ESTHER NOLARI** from Kitale police station carried out the investigation when the matter was brought to the station. She recorded witness statement and issued the P3 form to the Complainant. In her evidence she produced the minor's panty which she wore on that particular day. She also produced the Kshs.5 coin earlier identified by the witnesses.

14. When placed on his defence the appellant gave sworn evidence denying the charge. He said that he was heading to the river to bath that afternoon vide his nephews incomplete house. When he was about to lock the door he heard some shouts and heading towards his house. He was then arrested and assaulted by many people including the *nyumba kumi* officers. He was told that he had defiled the minor. He was roughed up and taken to Kiminini Patrol Base where they met the Chief. He was booked and later escorted to Kitale police station. He said that he had a family and he could not defile the minor.

#### **ANALYSIS AND DETERMINATION.**

15. The substance of the Appellant's appeal lies on the grounds which are as well contained in his written submissions which inter alia include the contention that there were contradictions in the witness evidence and that the main witness Evans who allegedly saw him defiling the Complainant was not called to testify.

16. The duty of this court at this juncture was well captured in the case of **OKENO V. REP. (1973) E.A32** where it was held that;

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”*

17. The ingredients of the offence of defilement are three generally, namely, the age of the victim, the identity of the perpetrator and whether there was penetration.

18. In the instant case and contrary to the submissions by the appellant the age of the minor was well established by the production of the dental report which clearly indicate her to be 11 years old although her mother had said that she was 9 years.

19. As to whether there was penetration, the evidence of the minor as well as PW2 was corroborated by the production of the p3 form as well as the treatment documents. The Clinical Officer found the injuries fresh and she was still in pain. The hymen was as well fresh and torn. Clearly there was evidence of penetration.

20. Was the Appellant the perpetrator? The evidence of PW2 as well as the minor placed the Appellant at the scene. PW2 in particular saw him on top of the Appellant and later he was seen dressing after the act. This incident took place at 1pm and it cannot be said that there was a case of mistaken identity.

21. Although, Evans was not called to testify, it was his alert that made PW2 rushed to the scene. His evidence although it would have been critical did not water down the fact that the Appellant was the suspect. He has not denied that PW2 was his neighbour as well as the Complainant.

22. The defence by the Appellant did not oust the evidence as presented by the prosecution. Clearly and as found by the trial court the case against the Appellant was proved beyond any shadow of doubt. In fact, the Kshs.5 coin that the Appellant gave the child was still in her custody by the time he was arrested and there was no indication that the child obtained the same elsewhere.

23 . This appeal is not meritorious and the same is hereby dismissed.

24 . On the issue of sentencing however, and following the decision by the Supreme Court in the case of **Muruatetu**, this court is inclined to interfere with the trials court sentencing. This position was found so also by the court of appeal in the case of, **JARED KOITA INJIRI VR REP (2019) eKLR** The said court citing the Muruatetu case said that;

*“In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.*

*The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.*

*Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”*

25 . In the premises, the trials court sentence of life imprisonment is hereby set aside and replaced with imprisonment of the Appellant for 20 years from 20<sup>th</sup> January, 2017.

26 . Orders accordingly.

**Dated, signed and delivered via Zoom at Kitale this 30<sup>th</sup> day of April 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**30/4/2020**