



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 116 OF 2013**

**(BEING AN APPEAL FROM THE DECISION OF HON. S K NGETICH (SRM)**

**IN KITALE CRIMINAL CASE NO. 492 OF 2010)**

**JOSEPHAT LUSENO ALIAGANA.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**VERSES**

**JOSEPHAT LUSENO ALIAGANA.....ACCUSED**

**JUDGEMENT**

1. The Appellant was charged with the offence of **defilement of a girl contrary to Sections 8(1) and 8 (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that **on the 11<sup>th</sup> day of February, 2010 at [particulars withheld] farm in Trans-Nzoia East District within Rift Valley province by use of your genital organ namely penis caused penetration into the genital organ namely vagina of SNN a child aged 7 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 11<sup>th</sup> day of February, 2010 at [particulars withheld] farm within Trans-Nzoia East District within Rift valley province unlawfully and intentionally by use of your genital organ namely penis caused a contact with the genital organ namely vagina of SNN a girl aged 7 years.**
3. The Appellant was convicted and sentenced to life imprisonment hence this appeal. The Appellant’s grounds are contained in the petition dated 28 November, 2013 which essentially attacks the trials courts judgement for believing the contradictory evidence as presented by the prosecution. He also argued that the key witness was not called by the Respondent.
4. Before looking at the merits or otherwise of the appeal it is necessary to summarise the evidence as presented during trial.
5. The Complainant PW1 testified in her unsworn evidence that she was a nursery pupil and that on the material day she had been sent by her mother to call her brother from the house of one Kili. His brother who was deaf refused to come and while still there Kili sent her to get a jug at the home of Cheles. She did not get the jug and she came back. On the way she was called by the Appellant whose house was across the fence.
6. She obliged and went to his house where he forcefully laid her down on the bed and removed her panty. He then defiled her and in the process because the door was opened a dog entered the house. One Mama Cheronon followed and though she did not enter the house she spoke to the appellant who told her that he was sleeping.
7. The Appellant then let her go after helping her to dress and gave her a cup of milk to take to her mother. She left for home and her mother noticed that she was not well and asked her what had happened. She explained to her and she poured down the milk and returned to

the Appellant's house where upon confronting him he denied committing the offence. She was taken to the hospital where she was treated and the matter reported to the police.

**8. PW2 RN** the mother to the Complainant testified that she had sent her to call his brother who was in the house of one Gilbert. The brother Kelvin however refused to come and she decided to go and get him herself. She went and was told by, Gilbert's wife that she had sent the Complainant to get a jug from the house of one Rosaline. She went home minus the Complainant who later came home and was looking shy. She told her of what the appellant had done and she examined her private parts which showed some blood stains and sperms.

**9.** She said that she confronted the Appellant who denied. She took the child to her neighbour, one Ruth Chepketer who also saw the child. She then took her to Motosiet Dispensary and was later referred to Kitale District hospital. She had the matter reported at Sibanga police post.

**10 . PW3 FNK** is the father to the complainant. He testified that he was looking after the cows on the material day when she was called by PW2 and informed of the incident. He went to report to the chief despite the Appellants attempt to have him discuss the issue. He reported the matter at Sibanga police post and brought the child to Kitale District hospital.

**11 . PW4 PC. JANE NDIEMA** from Geta police post received the appellant as he was brought by Administrative Police Officer. He was accused of defiling the minor. She issued them with the P3 form which led her take action against the Appellant.

**12 . PW5 DR. KIPROP JONATHAN** a Dentist from Kitale District hospital did dental age assessment on the Complainant and concluded that she was aged 9 years. He produced his report as well.

**13 . PW6 KIRWA LABATT** from Kitale District hospital examined the Complainant and filled the P3 form. He found that her labia minora had injuries and the hymen was broken and freshly looking. He produced the P3 form and other treatment documents.

**14 .** When he was placed on his defence the Appellant gave sworn evidence in which he explained that he was a matatu conductor and he had a pregnant wife whom he took to the hospital. He also said that he went to see his grandmother as well as a midwife. He said that when he came back he was arrested by police officer and taken to the chief's camp at Motosiet. He was later charged which the offence he continues to deny.

#### **ANALYSIS AND DETERMINATION**

**15 .** The court has perused the entire proceedings as well as the lengthy submissions by the Appellant. Apparently there was no submissions on behalf of the Respondent. The courts duty is to evaluate the evidence and come up with an independent finding as was enunciated in the case of **OKENO V. REP. (1973) EA 32.** it was stated 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.”*

**16 .** There are three ingredients of the offence of defilement, namely, the age of the victim, penetration and the identity of the perpetrator.

**17 .** The age of pw1 was clearly proved by the production of the dental age assessment report which was produced by the dentist. It was established that she was 9 years old and this was not contested.

**18 .** On the question of penetration, this court is satisfied with the evidence on record by the Complainant as well as the Clinical Officer. She explained the pain she went through graphically and later her mother corroborated what she saw. In the absence of any other reason the injuries sustained by her were as a result of forceful sexual intercourse.

**19 .** Was the appellant the perpetrator? I find this question was positively proven by the witnesses. The incident occurred around 10 am which clearly was sufficient for the Complainant to identify the perpetrator. This was a person known to her. He was a neighbour despite the Appellant saying that he did not know her. The evidence of the other witnesses was sufficient. In any case during cross examination there is nowhere the appellant stated that he did not know the Complainant.

**20 .** Although he was not found red handed it's clear that from the beginning of the act up to the time the Complainant went home was a such a short span that it would not be possible to lay blame anywhere else other than the Appellant.

**21 .** This court finds the evidence of the minor credible although she was a single witness. She was believable and clearly in line with the provision of Section 124 of the Evidence Act which states;-

*“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”.***

22 . The appeal is not meritorious and the same is therefore disallowed. The defence was not at all convincing as there was evidence that he had a patient on that particular day or at all.

23 . Further and even though the witness one mama Cherono was not called to testify the court is satisfied that the evidence as presented by the other witnesses was sufficient to convict the appellant which it did.

24 . However, on the issue of sentencing, the Supreme Court as well as the Court of Appeal have approached the question of life imprisonment as not the only efficacious punishment. The court stated in the case of **JARED KOITA INJIRI VS.REP (2019) eKLR**, 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 life imprisonment meted against the Appellant is hereby set aside and substituted with an imprisonment for 20 years from 15<sup>th</sup> November, 2013.

26 . Orders accordingly.

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

---

**H. K. CHEMITEI**

**JUDGE**

**30/4/2020**