



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CRIMINAL SEXUAL OFFENCE APPEAL NO.10 OF 2018**

**GEOFFREY KIBET KIRUI.....APPELLANT**

**- V E R S U S -**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the conviction and sentence in KERICHO*

*CMCC NO.39 OF 2017 delivered by B. R. KIPYEGON (SRM) on 22/1/2018)*

**J U D G M E N T**

1. The Appellant was convicted with the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No.3 of 2006 and he was sentence to serve Life Imprisonment in KERICHO CMCC NO.39 OF 2017 delivered on 22/1/2018.
2. The particulars of the charge were that on 21/7/2017 at [particulars withheld] SUB-LOCATION in **KERICHO WEST** within **KERICHO COUNTY**, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of **S. C.** a child aged 5 years old.
3. The Appellant was charged with an alternative charge of committing an indecent act with a child in that on the same material particulars as in Count 1 (above the Appellant unlawfully and intentionally caused his penis to come into contact with the vagina of **S.C.**, a girl aged 5 years old.
4. The Appellant pleaded not guilty to the charge. The prosecution called six witnesses. The minor aged 5 years old told the court that the Appellant whom she knew as **Shua** called her when she was going home from school and told her to go with him so that he could do "**kitu tamu**"(something sweet) to her.
5. The Complainant said when she declined, he pulled her by the hand into a tea plantation where he removed her panty and put his thing on her private part.
6. The Complainant said she went home and told her mother who took her to Hospital. The Accused who is also known as **Shua** was arrested the same night and charged with this offence.
7. The Clinical Officer who testified as PW.4 said upon examining the complainant, he found vaginal wall hyperemic but the hymen was intact. He concluded that there was partial penetration.
8. The parents of the Complainant said they knew the Appellant who lived their neighbourhood and was also known as "Shua".
9. The Appellant said in his defence that he had cohabited with the mother of the Complainant for 4 months and that brought issues between him and his wife and that he had reconciled with his wife and she was about to return when the Complainant falsely accused him in order to fix him.
10. The trial court found the Appellant guilty as charged and convicted him and sentenced him to life imprisonment.
11. The Appellant is aggrieved with both the conviction and sentence and he has appealed to this court on the following grounds:-

(i) **THAT** the trial court did not apply *voire dire* Examination on the Complainant a girl aged 5 years.

(ii) **THAT** the trial court relied on the testimony of the child aged 5 years old alone.

(iii) **THAT** the language used by the Appellant is not indicated on record.

(iv) **THAT** the sentence imposed upon the Appellant is harsh and Excessive.

12. The parties filed written submissions dated 11/3/2020 and 23/7/2020 which I have duly considered.

13. The first duty of the Appellate court is to weigh the evidence adduced before the trial court and to arrive at its own conclusion. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

**“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. 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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424.”**

14. There are three elements to be proved for the Appellant to be convicted with the offence of defilement. The first is whether there was penetration of the complainant’s genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

15. In the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** it was stated that:

**“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”**

16. In the current case, I find that all the three elements for the offence of Defilement were proved. I find that there is evidence that the Complainant was defiled and that it was the Appellant who did it. The age of the complainant was also proved.

17. I find that although the trial court relied on the evidence of a single witness, the Evidence Act Section 124 allows the court to rely on the testimony of a single witness in such instances. The said Section states as follows:

**124. “Notwithstanding the provisions of [section 19](#) of the Oaths and Statutory Declarations Act ([Cap. 15](#)), 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”.** (Emphasis added)

18. The court clearly recorded the testimony of the Complainant which the trial magistrate captured as follows:-

**”He pulled my clothing this far (touching her knees) then put that thing of his in me. He removed his trousers. I had lied facing down. He removed the thing from here (touches her groin area) and placed it in me here (touches the same area). I am not sure if he urinated on me. I felt pain....I found my mum at home and I told her Shua had urinated on me.....”**

19. I find that the testimony of the Complainant was Explicit and the Court had a reason to rely on it. The Complainant’s evidence was corroborated by the Clinical Officer (PW.4) who said there was partial penetration.

20. The trial court conducted *voire dire* and the record is clear and therefore it is not true that no *voire dire* was conducted.

21. I find that the Complainant knew the Appellant as **Shua**. When she told her mother what **Shua** had done, her mother was able to identify the Appellant and he was arrested the same day. The trial court also noted that the Appellant did not ask the Complainant and her parent any questions during cross examination.

22. I also find that the birth certificate of the minor was produced and her age was proved. She was born on 1/10/2011 and on 21/7/2017 she was 6 years old.

23. The defence by the Appellant that she had cohabited with the mother of the Complainant was dismissed by the trial court as a lie since the Appellant did not put any questions to the Complainant’s parents during cross examination.

24. I find that the conviction herein is safe and the sentence lawful.

25. The Appeal herein lacks in merit and the same is dismissed and both the conviction and sentence upheld.

**Dated, Delivered and Signed at Kericho this 18th day of September, 2020**

**A.N. ONGERI**

**JUDGE**