



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 85 OF 2019**

**(Being an appeal from the judgement of Hon. C. Kesse dated 26th July 2019 in Criminal case No. 162 of 2018)**

**FELIX KEMEI TEREM.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

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 were that **on the 15<sup>th</sup> day of September 2018 in Trans-Nzoia County intentionally caused his penis to penetrate the vagina of AI a child aged 6 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 15<sup>th</sup> day of September 2018 within Trans-Nzoia County intentionally touched the vagina of AI a child aged 6 years.**
3. The Appellant denied the charge and after a full trial he was convicted and sentenced to 8 years' imprisonment hence this appeal. The facts and evidence as presented during trial in summary was as hereunder.
4. **PW1 LN** the mother to the Complainant testified that she was a 6-year-old child and on 15<sup>th</sup> September, 2018 she sent her to fetch milk from a neighbour at around 7.30 am. She on the other hand went to work and she arrived home at 4.00 pm and proceeded to wash and clean the children including the Complainant.
5. She went on to state that while cooking supper the Complainant asked her whether she knew the Appellant who was also known as Rodgers. She then told her of how he had stopped her in the morning when she went to get milk and defiled her. She told her that he inserted his finger in her vagina and went ahead also to insert his penis.
6. In the morning took her to the hospital at Saboti and later Kitale County hospital. The matter was reported at the police station as well.
7. When cross examined she said that the Appellant defiled and even ejaculated on her. She said the hymen was broken and smelling discharge oozed from her vagina.
8. **PW2** the Complainant testified that she was a class one pupil at [particulars withheld] primary school. She said that she could not recall the date but while she went to fetch milk from Makori's place she met the appellant who was walking behind her. He called her and he put his finger through her trouser and thereafter inserted her penis. He promised to buy her *kangumu*. He threatened her not to tell anyone.
9. She however told PW1 in the evening and she was taken to the hospital as well as the police station. She said that the Appellant laid on her while she faced up.
10. **PW3 LINUS LIGARE** from Kitale County Referral hospital examined the minor and produced the examination summary as well as the P3 form. He found the hymen torn and thus was sexually assaulted. He also produced the Age Assessment Report by Dr Kegode which indicated that she was 6 years old.
11. **PW4 PC MICHAEL MACHAGE** from Saboti Patrol Base carried out the investigations. He said that he issued the Complainant with the P3 Form which was later produced. The minor mentioned the name of the Appellant who were from the same village. He recorded statements from the witnesses and preferred charges against the appellant.

12. When placed on his defence, the appellant gave sworn evidence saying that on the 24<sup>th</sup> September 2018 he went to his aunt at Kapkoi to cut maize. He was later called and told that his house had been broken into by Moses and LN. He called the village elder as well as the area Chief who denied that he had heard about it.

13. On 24<sup>th</sup> September 2018 he was in court after being accused of Robbery with violence but at the gate of the court he was arrested by a police officer and taken to the police station. He said that the police officer did not find the case to match that which he had been accused of.

14. At 4.00 pm three people came to the police station and a child accompanying them was told to identify the Appellant. The minor could not but through the insistence of her mother she zeroed on the Appellant. He was later brought to court and charged.

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

15. The court ordered the parties to dispose this appeal by way of written submissions which they have complied. The learned state counsel has submitted that the findings by the trial court should not be disturbed as all the ingredients of the offence were met. He said that there was evidence of penetration, the age of the minor as well as the identity of the perpetrator who was the appellant.

16. The Appellant on the other hand denied that he was the perpetrator of the offence and that the witnesses lied to the court especially her mother.

17. The grounds raised by the Appellant in his appeal generally touched on the veracity of the evidence as presented at the trial court. He said that the same was not weighty and were contradictory in nature and that had the trial court carried out serious examination it would have set him free.

18. This court at this juncture is bound by the directions given by the court of appeal in the case of **OKENO V. REP. (1973) E. A. 32** where it states 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.”*

19. The three ingredients of the offence were well captured by the learned state counsel in his submissions. These are, the age of the Complainant, the identity of the assailant and penetration.

20. As indicated above the age of the complainant was proved to be 6 years old which issue was not disputed.

21. In terms of identification, PW 1 told the court that **‘my daughter asked me if I knew Rodgers and she told me that Rodgers stopped her and removed her trouser’.**

22. That was how the conversation began and later the discovery that she had been defiled. Obviously the Appellant was a person the Complainant and her mother may have known. What is intriguing though is how the Appellant was arrested. The arresting officer was not called. In fact, the Appellant said that he was not at the scene that time as he had gone to Kapkoi to cut maize.

23. Is it possible that there was a mistaken identity by the minor? This probability is high considering what the Respondent said in his defence, namely, that the minor identified him at the police station. There was no evidence that any identification parade was conducted. Being a minor of such tender age her evidence ought to have been corroborated even by calling one Mama Nelly whom the minor said was with the Appellant talking on the road.

24. What I find intriguing and interesting though is the style of evidence by the mother PW1 and the minor on how she was defiled. This when juxtaposed with that of the Clinical officer has some very variance. It must be noted that **Section 124 of the Evidence Act** is instructive on how the evidence of victims of sexual offences ought to be considered. First of all, it must be corroborated and even then the court must believe the victim. It 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.”*

25. In this case PW1 stated that the minor told her that;

***“Accused inserted his fingers into minor’s vagina and proceeded to defile her. He then laid her and removed his penis and inserted it into the minor’s vagina and after he was done, the accused let the complainant go. And shortly the complainant left, after she had walked some metres away the accused again recalled the complainant and put his fingers into her vagina after removing the complainant’s trouser. “***

26. On cross examination she went on to state, ***“after you defiled the minor she proceeded to go for milk, the minor did not bleed, but you defiled her and even ejaculated on her.”*** She went on to state that the Appellant used his middle finger and penis.

27. The minor on her part said that;

***“When he reached where i was, he then put his finger into my trouser (pointing on the front part between the legs). He then put his finger inside my panty and touched my susu, the one I use to urinate. He then proceeded to insert his penis into my vagina”.***

28. She went on to state that;

***“The accused defiled me while I was lying on the ground facing up. He was lying on top of me facing me. ...”***

29. PW3 the Clinical Officer on his part said that the minor told her that he inserted his finger into her vagina. This he emphasised even on cross examination.

30. Exhibit P2, the notes made by the doctor indicates that the minor said that the Appellant took her into a maize plantation and defiled her.

31. What I find baffling and interesting is the evidence of both the minor and the mother. The minor graphically describes to the court how the Appellant laid her on the ground and proceeded to defile her using his penis. This does not come out from the evidence of the clinical officer. The finding was that the hymen was torn and it appeared recent. There is no evidence that the appellant used his penis. The minor told the doctor that the appellant inserted his finger inside her vagina was simply creation of the Complainant and her mother.

32. More importantly a child of tender years is obviously not ready for any sexual intercourse. For that reason, it is not possible for the appellant to defile the minor in the manner she explained and not suffer serious major injuries in her private parts. The Medical Officers who attended to her must have seen it on the day she was taken to them.

33. This court does not find the evidence by PW1 truthful but full of exaggerations. How come for instance didn’t the Medical Officers get to see the oozing vaginal discharge as well as the sperms she alleged to have seen on the minor? Was she for instance an expert to note that the hymen was missing?

34. The court in as much as the minor may have been defiled does not agree with the evidence of the minor. The scene where the incident occurred was said to be on the busy road. This incident occurred at around 7.30 am. As PW1 was going for her duties of that day, the rest of the Kenyans must also have hit the road just like her. There must have been people who saw the Appellant lay down the minor, remove his trouser and insert his penis into the child’s vagina, assuming it was true.

35. The defence by the appellant was worth a consideration taking into account the nature of his arrest. The investigating officer and the rest of the witnesses were not clear on how he was arrested and where.

36. For the foregoing reasons, this court finds that the appellant ought to have been granted a benefit of doubt. The identification of the appellant was not full proof for the reasons stated above. Neither was PW1 and PW2 evidence believable. The same were full of exaggerations.

37. The appeal is hereby allowed, the Appellant set free unless lawfully held.

**Dated, Signed and Delivered at Kitale this 29<sup>th</sup> day of October 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**29/10/2020**