



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 45 OF 2017**

*(Being an appeal arising from conviction and sentence in Kitale*

*Chief Magistrate's Court Sexual Offence No. 128 of 2016*

*delivered by P.C. Biwott Senior Principal Magistrate on 24/5/2017)*

DENNIS EKAMAIS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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

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 7<sup>th</sup> day of September 2016 within Trans Nzoia County, intentionally caused his penis to penetrate the vagina of ENW a child aged 10 years.**
2. The 2<sup>nd</sup> count was **Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on the 7<sup>th</sup> day of September 2016 within Trans Nzoia County, intentionally touched the vagina of ENW a child aged 10 years with his penis.**
3. The appellant was convicted and sentenced to life imprisonment hence this appeal. His grounds of appeal centres on the questions of his Constitutional rights being violated, the *voire dire* evidence as well as the age of the victim not proved and that there was mistaken identity.
4. The summary of the proceedings at the trial court is worth reproducing herein before looking at the grounds raised in the appeal.
5. **PW1 the complainant** stated that she was a class 4 pupil at [particulars withheld] primary school and was then aged 12 years. She stated that on 7/6/2016 at 6.00 pm she was with her mother at Kipkeikei market when she felt cold and her mother told her to go home which was 300 m away to put on a sweater. On her way back she met the appellant who took her to a nearby public toilet and defiled her. She attempted to screen but the appellant put a nylon paper on her mouth. He then defiled her and thereafter she went home but was bleeding from her private parts.
6. While in the house her sister found her and she was bleeding. She told her what had happened. Her mother too came and was given the same report. Her elder brother organised for the appellant to be arrested. After the arrest of the appellant the complainant was taken to Kitale District Hospital where she was admitted for 2 days.
7. **PW2 Linus Ligare** from Kitale District hospital examined the complainant and filled the P3 form. He found that the hymen had recently been torn and the vaginal walls bruised.
8. **PW3 JN** was the Complainant's mother who testified that the complainant was born on 1/12/2005. She said that she was with her at her vegetable stall at Kipkeikei trading centre that evening when she felt cold and she advised her to go for her sweater at her home which was 100 metres away. She then followed and as she arrived home she found her bleeding from her private parts. She told her that she had been defiled by the appellant whom she knew. Her son **BW** then went looking for the appellant and had him arrested and taken to the police. She took the complainant to Cherengany hospital and later referred to Kitale District Hospital where she was admitted for 2 days. She said that she had known the appellant for 2 years.

9. **PW4 BW** stated that PW1 was her younger sister. She said that she was called by PW3 and went to the house he got to the house he found PW1 bleeding and she told him that the appellant had defiled her. He then went looking for him at 5 Star hotel and with assistance from his friends they arrested him. He was taken to Cherengany police station.

10. **PW5 CPL Sheila Kerich** from Cherengany police station carried out the investigations after Sergeant Margaret Mbugua left. She then preferred charges against the appellant. She produced the clinic card which showed that the complainant was born on 1/12/2005. She also produced her clothes.

11. When put on his defence the appellant gave sworn evidence denying the charges. He said that he was at Kachibora on 7/9/2016 and he went for ID registration and he was advised to look for his father identity card. He met him at Kiradi and Photocopied it. On 7/9/2016 the registration staff refused to have him registered. He went to take super at a hotel at Kipkeikei when he was arrested and taken to the complainant's home. He was later taken to Cherengany police station.

### **Analysis and Determination**

12. This court has perused the proceedings as well as the submissions by both the appellant and the learned State counsel. The duty of his court is to re evaluate a fresh the evidence and arrive at a new finding altogether. (*See Okeno Vs Republic (1973) EA 32*).

13. The ingredients of the offence of defilement are now generally known, namely the age of the victim, the identity of the perpetrator and whether penetration occurred.

14. As regards the last ground, I find the evidence of PW1, PW2 and PW3 as well as PW4 clear on this. There was blood emanating from the child's private parts that evening. She was taken to Cherengany Sub County hospital and later Kitale District Hospital where she was admitted for 2 days. PW2 concluded that indeed she was defiled as the injuries were fresh.

15. As to the identity of the perpetrator I am satisfied that the appellant was clearly identified by the complainant. She stated that the incident occurred around 7.00 pm outside a public toilet. She said that she knew the appellant's voice and I find that 7.00 pm is not pitch dark ordinarily for one to identify an assailant.

16. Moreover, the complainant did inform her sister as well as her mother as of first instance that it was the appellant who defiled her. Under the Provisions of **Section 124 of the Evidence Act**, (the Provisio thereof) I find that the minor spoke the truth. The incident had taken place hardly an hour before.

17. As regards the age of the complainant, the charge sheet indicated that she was 10 years old. Her mother stated that she was 11 years old having been born on 1/12/2005.

18. PW5 produced the clinic card, exhibit P3 which I have perused. A close look at the original clinic card showed that figure "5" has been superimposed in all the last digits showing the year when she was born. I do not think this was a "coincidence." Even if the medical staff at the clinic were mistaken, they all would not have been mistaken on the date the child was taken to the hospital even after birth. This in my view is very crucial. Ordinarily, the clinic card would supercede a birth certificate as what is indicated in the certificate of birth proceeds from the clinic card.

19. This court having noticed such clairing anomalies would not follow blindly. It is known that in sentencing the age of the accused is critical. Even on a naked eye, it appears that the complainant was born on 1/12/2004 and not 2005.

20. The proper direction would have been that age assessment be undertaken on the minor. However I find that all in all she was a minor and the proper age at the time of the committal of the offence was between 11 and 12 years. In the premises I shall take that she was 12 years old.

21. The other issues raised by the appellant as grounds of appeal are peripheral. In the first instance I find that the voire dire evidence was properly conducted by the trial court.

22. Nothing was exhibited by the appellant to suggest any breach by the respondent of his Constitutional rights or at all.

23. In the premise I do not find any merit in this appeal save only on the question of sentencing. Having found that the complainant was aged 12 years and not 10 years as her handlers made the trial court believe, I shall proceed to alter the sentencing of life imprisonment and substitute it with imprisonment of 20 years which should run from 13/9/2016 when the appellant was first arraigned in court.

Orders accordingly.

**Delivered, signed and dated at Kitale this 30<sup>th</sup> day of January, 2019.**

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**H.K. CHEMITEI**

**JUDGE**

30/1/19

**In the presence of:**

**Mr Kakoi for the Respondent**

**Appellant present**

**Court Assistant – Kirong**

**Judgment read in open court.**