



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 27 OF 2014**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's court in Criminal case No. 1612 of 2011 delivered by P.W. Wasike Resident Magistrate on 31/7/2013)**

**TIMOTHY WEKESA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

1. The Appellant was charged with the offence of **defilement of a child contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence was that **on the 13<sup>th</sup> day of July 2011 within Trans Nzoia County, intentionally caused his penis to penetrate into the vagina of JWN, a child aged 16 years.**

2. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal. The gist of the appeal as indicated in the grounds are to do with the attack on the entire evidence as presented by the prosecution and in particular that the complainant was not mentally retarded as per the evidence by the prosecution. He stated that the entire prosecution evidence was not water tight enough to have warranted conviction.

3. The summary of the evidence as presented was that PW1 the complainant stated that she was previously a pupil at [particulars withheld] primary school in class 7. She said that on 13/7/2011 she had been sent by her mum to buy vegetables from her grandmother's place. She met the appellant on the way who agreed to show her the way. He instead held her to a maize field where he proceeded to defile her. Her screams because of the pain she felt attracted some passerby who came to her rescue. She was taken to hospital where P3 form was filled and was equally treated.

4. **PW2 AMG** the mother to the complainant testified that the complainant was born on 3/6/1995 as per the clinic card. She had sent the complainant to get vegetables from her mother. At around noon 3 women from the neighbourhood came and informed her of the defilement incident. She proceeded to the scene and met one Joseph Ngotha holding on to the appellant and there was a mob who wanted to assault him. She then took her to Kitale District hospital where she was confirmed to have been sexually assaulted.

5. **PW3 Linus Ligare** the clinical officer from Kitale District hospital who examined the complainant and filled the P3 form found that indeed she was mentally challenged and that she found her hymen freshly torn.

6. **PW4 P.C. Wanjiru Kimani** from the Kitale Police station Gender and children Desk carried out the investigation and preferred charges against the appellant. She equally produced the clinic card which indicated the complainant's date of birth.

7. **PW5 Joseph Ngotha** testified that he was home on 13/7/2011 at around noon when he heard screams near a maize farm and he went checking. He found a crowd. They were looking for a suspect who had defiled the complainant. He emerged from a maize farm and he was arrested. He took him to his home and conducted the complainant's parents. The minor told him that it was the appellant who had defiled her.

8. When placed on his defence the appellant gave unsworn evidence. He said that on 11/7/2011 he came from Eldoret where he worked and took a motorcycle and as he went home he said that at Naisambu he disagreed with the boda boda guy on fare. He then reversed his motorcycle and took him to Kitale police station where he accused him of robbery. He was booked in the cells and later charged with the offence of defilement.

**Analysis and Determination**

9. The court has perused carefully the appeal herein as well as the written submissions by the appellant. The now standard ingredients that must be established in the offence of defilement are the age of the victim, the identity of the perpetrator and whether there was penetration.

10. On the first score, the age of the minor was established by the production of the clinic card which showed that she was 16 years old. The same was not contested.

11. The question of defilement in my view was proved. The clinical officer's report established this through the production of the treatment notes as well as the P3 form. The injuries were still fresh as the examination was done the same day.

12. On the question of whether the appellant defiled the minor, the answer in my view is on the affirmative. This is based on the fact that although the minor was said to have some mental retardation she appeared clear and straight forward in her evidence before the trial court. She knew that she had been sent by her mother to get vegetables from her grandmother. She was clear that she met the appellant on her way back and that she had conversation together. The appellant requested that she takes her through another route as she headed home.

13. The scene of the incident was maize farm. This is where she was found when she raised alarm. Even if she had some mental challenge I find her answer on cross-examination clear and straight forward. Infact looking at his submissions, the appellant concedes that there was nothing to suggest that she was unable to comprehend her environment or answer any questions put to her.

14. PW5 was almost the eye witness who arrived at the scene. Although he did not get the appellant on the act, his arrival saved him from the irate members of the public.

15. The appellant's unsworn defence was of no probative value. The same did not challenge the issues raised by the prosecution witnesses or at all.

16. In the premises I do find that there is no merit in the appeal. I find that the complainant though mentally challenged spoke the truth. She complied with the proviso to Section 124 of the Evidence Act. Her evidence was corroborated by the rest of the prosecution witnesses.

17. The appellant handwritten submissions veinly admitted to the commission of the offence especially where it was alleged that both the appellant as well as the minor screamed during the act.

18. In the premises the appeal is hereby dismissed.

19. Under the inherent discretion of this court, I notice that the appellant has been in custody since 15/7/2011 which in essence meant that he has been in custody for about 8 years or thereabouts. I find that the appellant has learned his lesson very well.

20. The appellant is hereby set free unless lawfully held.

**Delivered, signed and dated at Kitale this 30th 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.**