



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 52 OF 2018**

**GMO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant, **GMO**, was charged in the Principal Magistrate's Court at Ogembo in Criminal Case No. 1895 of 2015 with the offence of defilement contrary to section 8(1) (2) of the **Sexual Offences Act. No. 3 of 2006**. The particulars were that the appellant, on the 21<sup>st</sup> day of September, 2015 in Gucha District, within Kisii County, caused his penis to penetrate the vagina of **LKM**, a girl aged 9 years.
2. Upon being found guilty, the appellant was convicted of the offence and sentenced to life imprisonment. The appellant dissatisfied with the conviction and sentence has lodged the instant appeal on the grounds that the trial magistrate failed to order mental assessment for the appellant, that the trial court failed to consider the appellant's defence and that the learned trial magistrate based the conviction on the evidence of the prosecution which did not meet the standard of proof, beyond reasonable doubt.
3. In support of the prosecution's case the prosecution called 5 witnesses.
4. The Complainant, **LKM (Pw3)** gave evidence that the appellant, **GA**, is her uncle. She recalled that on 21<sup>st</sup> September 2015 the appellant came to their home and asked if her father was around, the complainant told the appellant that her father was not around as he was out grazing. The complainant went to the toilet, the appellant followed her and grabbed her, defiled her and ran away. **Pw3** told court that she sat on the toilet and did not tell **S**. The following day when her mother returned from **Tabaka**, **Pw3** told her that her stomach was painful. **Pw3** testified that her mother together with her aunt **G** took her to hospital after examining her private part and found her bleeding. She testified that when the doctor asked her who did the act to her, **Pw3** stated that it was **GA**.
5. **Pw1**, **JK**, testified that the appellant is her brother in law and the complainant her daughter. She testified that on 20<sup>th</sup> at night she was attending a funeral at **Tabaka**. When she came back at 11:00 a.m. she found the complainant crying, upon checking her private parts she found out that she was bleeding. They took her to the hospital and the **Pw3** told the doctor that it was the appellant who committed the act. The assistant chief was called and he arrested the appellant. **GKK (Pw5)** testified that the complainant is her niece. After attending a funeral with **Pw1** they found **Pw3** sleeping and complaining of stomach pain. She told the court that they found her private part bleeding and took her to hospital. The doctor asked them to wait outside, and later asked if they knew **GO** who is her cousin.
6. **SK (Pw4)** gave evidence that he is a village elder and upon receiving information from the assistant chief, **Gakero** sub-location on a defilement case he accompanied him to the home of the appellant. The appellant was arrested at 5:30 a.m. and taken to **Barani** police post.
7. **O.P (Pw2)** a clinical officer based at **Gucha** level 4 hospital testified the complainant was first attended to at **Riotanchii** Health Centre with the complaint of pre-vaginal bleeding. The **PRC** form filled shows that the pre-vaginal bleeding was as a result of penetration. He told the court that the private parts had a perennial laceration and a tear. The suspect was also presented for examination and had bruises on the head of the penis and investigations found **VDRL** negative.
8. The investigating officer **Corporal Emily Rop** No. 77316 (**Pw6**) recalled that 22<sup>nd</sup> September 2015 the complainant's mother and a clan elder brought the appellant to the station, the complainant was also present. They reported a case of defilement. The Complainant's mother arrived home from a burial and found the complainant complaining of stomach pain. The complainant explained that around 8:00 p.m. the appellant asked her if her father was around, and she informed him that he was not in. The appellant started to leave and the complainant proceeded to use the toilet. The appellant came back, grabbed her by the neck, covered her mouth and defiled her. The complainant was taken by **Pw1** to **Riotachi** health center. Dry blood was found in the toilet and the complainant's pant was also soiled with blood. The complainant's birth certificate shows that she was born on 08.07.2007, and was 9 years old at the time of the offence.
9. The appellant was put on his defense and testified that he had gone to the home of the complainant to drink. The complainant said he defiled her child. He has a wife and children the complainant has brought shame to his name. He has not been involved in any crime. He

asked the court to look into his case.

10. This being a first appeal and the court has a duty to evaluate, re-consider and analyze the evidence and come up with its own Independent decision but bearing in mind that the trial had chance to see the witnesses (See **Okeno –v- R(1972) EA.32.**)

11. In cases of defilement, the prosecution must prove the age of the child, penetration and the appellant must be positively identified as the perpetrator of the offence.

12. Pw6 produced into evidence the complainant's certificate of birth indicating that the complainant was 9 years at the time of the offence having been born on 8<sup>th</sup> July 2007. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000**, was observed as follows:

***“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”***

13. I therefore find and hold that the prosecution proved beyond any reasonable doubt that the complainant was a child aged 9 years.

14. I now turn to whether the prosecution proved penetration. Penetration is defined under **Section 2 (1) of the Sexual Offences Act No. 3 of 2006** to mean *the partial or complete insertion of the genital organs of a person into the genital organs of another person*. Pw3 testified as follows;

***“I went to the toilet when I was lifting my dress he held my neck and covered my mouth and told me not to scream then he did bad manners to me. He put his private parts into my private parts then when he finished he ran away”***

15. Pw2 testimony corroborates the complaint's evidence on penetration, Pw2 testified that the child had pre-vaginal bleeding. On cross examination Pw2 testified that the child had a tear in the private parts, evidence of penetration. There is therefore sufficient evidence on record to prove penetration, I find and hold that penetration was proved by the prosecution.

16. It is also paramount for the prosecution to satisfy to the court that the appellant was positively identified. The incident took place at night, at 8:00 p.m. Pw3 stated that it was not dark though she did not mention the source of lighting at the toilet. It is the duty of the court to interrogate whether or not the circumstances in the case at hand were favorable for positive identification so as to prevent any miscarriage of justice. Pw3 identified the appellant as GA and stated that he was her uncle and thus the appellant was a person well known to the complainant. In **Wamunga v Republic [1989] KLR 424** the Court of Appeal warned that;

***“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely be the basis of a conviction.”***

17. Evidence of identification or recognition at night must be absolutely watertight to justify conviction (**See Nzaro vs. Republic (1991) KAR 212 and Kiarie vs Republic (1984) KLR 739.**) Despite the fact that it was 8:00 p.m. and the lack of clarity from Pw3's evidence as to the presence of a source of light, her evidence that the appellant was known to her remained unshaken. The appellant had talked to her when he asked if her father was around and also talked to her before defiling her when he warned her not to scream. Further, taking into consideration that the complainant was in close proximity with the appellant when he was committing the act I find and hold that the appellant was positively identified.

18. It is also worth noting that the conviction was based on evidence of the complainant who was the main witness for the prosecution case. The trial court accordingly conducted *voire dire* examination before taking the evidence of Pw3. Pw3 elaborately described the events leading to the offence and the manner in which the appellant committed the offence. I am therefore constrained to agree with the trial court that the complainant was telling the truth as I see no reason for her to lie.

19. After evaluating the entire record and evidence before the trial court, I find the prosecution proved its case beyond all reasonable doubts and that the complainant was defiled by the appellant in the manner described. The defense by the appellant was a mere denial and did not amount to much when compared with the evidence of the prosecution. The circumstances surrounding the offence did not raise any doubt as to the appellant's mental status necessitating the need of carrying a mental assessment on the appellant.

20. The upshot is that the appeal is not merited. It is hereby dismissed, and the decision of the trial court is affirmed.

**Dated, signed and delivered at Kisii this 28<sup>th</sup> day of March 2019.**

**R. E. OUGO**

**JUDGE**

**In the presence of;**

**Appellant in person**

**Mr. Otieno Senior Prosecution Counsel Office of the DPP**

**Rael Court clerk**