



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 17 OF 2016**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court in criminal case No. 462 of 2013 by J.A. Owiti AG Principal Magistrate on 14/11/13)**

**SIMON MOGARE.....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) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 12<sup>th</sup> day of February 2013 in Trans Nzoia County, intentionally caused his genital organ namely penis to penetrate the vagina of TNO a child aged 7 years.**
2. The alternative charge was **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 12<sup>th</sup> day of February 2013 in Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of TNO a child aged 7 years.**
3. The appellant was convicted and sentenced to life imprisonment hence this appeal. The substance of the grounds raised in the appeal are basically attack on the evidence as presented by the prosecution during trial. According to the Appellant the same were totally contradictory and that it could not sustain the charge.
4. Before looking at the same it shall be appropriate to summarise the evidence as presented by the witnesses herein.
5. **PW1 FK** testified that the complainant was her niece whom she had sent on the material day at around 3.00 pm to get a bathing soap from the neighbourhood. She took long and she sent her mother after her. She came back crying and her mother told her that the Appellant had defiled her in a pit latrine. The Appellant was shouting at the pit latrine and pw1 then called police reservist (KPR) who managed to arrest him as he flee from the scene. He was escorted to Kapkoi police post. The following day she took the child to Kitale District Hospital. He said that the child could not walk properly as she came home crying. She saw some white discharge when she examined her private parts.
6. **PW2 EMO**, the mother to the complainant stated that she was 7 years old. She said that PW1 had sent the child to get a bathing soap. She followed her and when she reached near a pit latrine she heard a voice crying therein. She entered the pit latrine and she found the Appellant on top of the minor and was defiling her. He had removed his panty and clothes. When he confronted him he became wild. She raised alarm and PW1 came and called a Kenya Police Reservist who came and arrested the appellant as he attempted to run away. She accompanied the child to the hospital the following day where she was examined and treated.
7. **PW3, the complainant** stated that she was a pupil at M primary school and that on the material day she was heading to the shop to buy soap after being sent by PW1. She was waylaid by the Appellant who held her hand and took her to a pit latrine where he proceeded to remove her clothes and defiled her. She cried to raise alarm but the Appellant blocked her mouth using his hand. Her mother however came to the latrine and rescued her. People came and arrested the Appellant.
8. **PW4 Kepha Magaro** attached to Kapkoi police post booked the report at the O.B. when he received it from PW1. The Appellant was escorted by the Kenya Police Reservist and members of the public and he re-arrested him. He saw the child who could not walk properly. He issued her with a P3 form and recorded statements from the witness. He thereafter escorted the Appellant to Endebess police station.
9. **PW5 Kirwa Labatt** a clinical officer from Kitale District Hospital examined the complainant and filled the P3 form. He opined that there were bruises on both labias and that the hymen was freshly torn and thus defilement had occurred.

10. **PW6 Dr Jonathan Kiprop** a Dentist from Kitale District Hospital examined the complainant and formed an opinion that she was aged between 6-7 years old.

11. When placed on his defence the Appellant gave unsworn evidence denying the charge. He said that on 12/2/2013 he went to his place of work. He was a mason by profession. At around 4.00 pm he was arrested by 4 Kenya Police Reservists officers without any apparent reason. He said that 2 months prior to 12/2/2013 the complainant mother's house had burned, and he had been suspected. He therefore concluded that that was the reason for his arrest. He did not call any witness.

### **Analysis and Determination**

12. The court has perused the entire evidence as well as the written submissions by the appellant. As stated earlier the appellant appeal gravitated around the fact that there was contradiction on the evidence as presented by the prosecution witnesses. He has gone ahead in his handwritten submissions to pin point some of them.

13. This court is enjoined to analyse the evidence afresh and come up with independent conclusion that it did not have the benefit of seeing the witness testify. *See Okeno Vs Republic (1972) E.A. 32.*

14. The 3 ingredient of the offence of defilement to be established are now obvious, namely, the age of the complainant must be established, the identity of the perpetrator and proof of penetration.

15. The question of whether the complainant was defiled was clearly prove by the evidence of PW1, PW2 as well as the clinical officer. The clinical officer who examined the child the following day saw the injuries on both labias and the freshly torn hymen. This occurred hardly 24 hours after the incident.

16. PW2 on his part found the appellant on the act. PW1 and PW4 stated that the child could not walk properly.

17. As to the age of the child the evidence of Dr Kiprop was conclusive, namely, that she was aged between 6 -7 years according to the dental age assessment which ordinarily is more accurate.

18. Did the Appellant defile the minor? It was basically the evidence of the minor and her mother PW2 that was more direct. PW1 came to the scene and raised the alarm. PW1, PW2 and PW3 agreed that the police Reservist arrested the Appellant as he attempted to flee.

19. I have examined the unsworn evidence by the Appellant and there is no probative value since he was never cross-examined. More importantly, the allegation that he was suspected of burning PW1 house was a serious one which he ought to have raised during cross-examination. Needless to State that the same becomes an allegation and does not aid the appellant in proofing that there was a vendetta between him and PW1.

20. All in all I find that the Appellant was placed at the scene. Although there was a contradiction between PW3 and PW4 regarding the state of the latrine and how it was constructed, I do not think the same goes to the root of the case. The bottomline is that the complainant was defiled at the pit latrine.

21. At any rate the incident occurred during daytime and there was no evidence of any mistaken identity on the part of the prosecution witnesses.

22. This appeal is unmeritorious and the same is hereby dismissed.

**Delivered, signed and dated at Kitale this 25<sup>th</sup> day of March, 2019**

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**H.K. CHEMITEI**

**JUDGE**

**25/3/19**

**In the presence of:-**

**Mr Omoria for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**