



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL NO. 36 OF 2018

**JULIUS MEROGINI OLENKOME.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant **Julius Merogini Olenkome** was charged with the offence of defilement contrary to section 8(1) as read with section (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that, on the 10<sup>th</sup> September 2016 in Transmara west District within Narok County the appellant intentionally caused his penis to penetrate the vagina of ESO a girl aged 13 years. The appellant also faced an alternative charge of, indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that, on the 10<sup>th</sup> of September 2016 in Transmara West District within Narok County the appellant intentionally touched the vagina of ESO, a child aged 13 years.

2. The appellant was convicted of the charge of defilement and sentenced to 20 years imprisonment. His appeal is against the said conviction and sentence.

3. The appellant's grounds of appeal are summarised as follows; the prosecution failed to prove their case, there was no age assessment of the complainant and that his defence was not accorded due consideration.

4. The duty of the first appellate Court is to consider the evidence, evaluate it and come to an independent finding having regard to the fact that it neither heard nor saw the witnesses testify( **see Okeno v Republic [1972] E.A. 32**)

5. Pw1 Samuel Sankey Tarus a Clinician testified that on the 10/9/2016 he examined PW2 a girl aged 13 years was a history of defilement by a known person to her. Two hours had elapsed. She was in general condition. On her genitalia she had a whitish discharge and broken hymen. A vaginal swab done established that there was spermatozoa and it had epithelial cells. There was no bleeding. He concluded that the child had been defiled. On the 11/9/2016 he did assessment for age of the child and found she was 13 years, this was old based on her birth history, her molar tooth development and bone development.

6. ESO (PW2) after voire dire examination gave a sworn statement. She testified that on the 10/9/2016 she was at her sister's place. Her in law the appellant took her sister to hospital and then returned home. He sent her to his son's house to get maize. He followed her there, pulled her into the house removed all her clothes and had sex with her. She cried and no one went to her rescue. He threatened her. She reported the matter to Christine and her aunt. She was taken to hospital.

7. WO (PW3) testified that on 10/9/2016 he was called by Johana Ngombe and asked to go home urgently as the child had been arrested. He did so he found the child dusty all over. The child was taken to hospital.

8. PC Nicolas Ngeno (PW4) testified that on the 11/9/2016 he received a report of defilement from the complainant by her brother in law. He arrested the appellant and took the child for age assessment. He produced the complainant's clothes.

9. MM (PW5) testified that on the 11/9/2016 she met the complainant crying. Pw2 told her that she had been defiled, she told her to go report to the men. The child was examined they saw traces of sperm in her private parts. She was taken to hospital. She knew the appellant.

10. The appellant testified that on the 10/9/2016 he beat up the girl and asked her to go home. There was a certain boy at home. On the 21/9/2016 there was a dispute between him and another man. He went to Poroko and found that a certain woman had told the girl to say that he had caressed her.

11. WM (DW2) testified that he is a farmer at Poroko, he knows the appellant. On the 10/9/2016 he met the appellant going to attend a certain case. Later he heard her had been arrested. The appellant had not done this before.

12. DO (DW3) testified that the appellant is his nephew. That the appellant told him that the girl had alleged he wanted sex with her, but it was not true, that the appellant is innocent.

13. ET (DW4) the appellant's son testified that his father assaulted the girl and told her to take her bad habits to her home. She left and he went to herd cattle. That the girl used to sleep with boys.

14. The issue raised by the appellant is whether the prosecution proved their case. In order to prove the offence of defilement under section 8 (1) of the Sexual Offences Act, the prosecution must prove that there was penetration, the victim was a child and that the appellant was the preparatory of the offence.

15. The testimony of Pw2 was that the appellant sent her to his son's house and had sexual intercourse with her. Pw2 was examined after two hours by PW1. her examination revealed that PW2's genitalia had a whitish discharge and broken hymen. A vaginal swab established that there was spermatozoa and it had epithelial cells. He concluded that the child had been defiled. This medical evidence confirms that there was penetration.

16. The next issue is the age of the victim. PW1 established by way of examination that PW2 was 13 years old, this was done based on her birth history, her molar tooth development and bone development. PW2 is a child as defined under the Children Act.

17. On identification, the appellant was a person known to the complainant. He was her brother in law. The defilement took place during the day. PW2 narrated how the appellant defiled her in his son's house after he sent her there. PW5 met her after the incident and she told her that the appellant had defiled her. PW2 was examined by the doctor who confirmed penetration.

18. The trial court did consider the defence raised. The appellant's defence is that he beat up PW2 and asked her to go home. That he beat her up because PW2 had a habit of bringing boys home. This defence in my view was an afterthought. I would agree with the observations of the trial court that if it that was PW2 habit then the appellant would have ensured that the person to discipline her is his wife who is the victim's sister and why discipline her after he had taken the wife to hospital. His witnesses' evidence was merely that he could not have done it and that the allegations were false. His son testified that the girl was beaten by the appellant that she used to sleep with boys, but she did not sleep with anyone on the fateful day. His defence against the prosecution strong case cannot stand. There is no law that requires that the appellant had to be medically examined.

19. On the sentence section 8 (3) of the Act provides that , a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. The appellant was sentenced to 20 years the minimum sentence as per the law. I find no merit in the appeal. The conviction and sentence are affirmed. The appeal is dismissed.

**Dated signed and delivered at Kisii this 14<sup>th</sup> day of March 2019.**

**R.E.OUGO**

**JUDGE**

In the presence of;

Appellant      In Person

Mr. Otieno      Senior Prosecution Counsel/Respondent

Rael              Court clerk