



**REPUBLIC OF KENYA**

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

**CORAM: D.S MAJANJA J.**

**CRIMINAL APPEAL NO. 98 OF 2018**

**BETWEEN**

**DENIS KIPNGETICH NGENO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. R.M Oanda – PM dated 1<sup>st</sup> November 2017 at the Magistrate’s Court at Kilgoris in Criminal Case No.1446 of 2015)*

**JUDGMENT**

1. The appellant, **DENIS KIPNGETICH NGENO**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (3)** of the **Sexual Offences Act** (“the Act”). The particulars of the offence were that on 21<sup>st</sup> September 2015 in Narok County, he caused his penis to penetrate the vagina of CC, a child aged 14 years.

2. The appellant was sentenced to 20 years’ imprisonment and he now appeals against conviction and sentence. The thrust of his appeal is that the prosecution failed to prove its case beyond reasonable doubt. He also claimed that he was framed. The respondent contended that the offence was proved beyond reasonable doubt.

3. Since this is a first appeal, I am required to re-appraise the evidence and reach my own conclusions as to whether to sustain the conviction bearing in mind that I neither heard or saw the witnesses testify (**Okeno v Republic [1972] EA 32**). In order to do so I now set out briefly the evidence as it emerged before the trial court.

4. The child, PW 1, testified that she was in primary school, Class 6, when on 20<sup>th</sup> September 2015 at 7.00pm, the appellant approached her. She narrated what took place as follows;

*On 20<sup>th</sup> September 2015 at 7pm I was with accused at his home. He wanted to marry me. We used to talk earlier. We had known each other for a month. I was not permitted by anybody to go to his place. We were staying at [Particular Withheld]. We had sex one day on a Tuesday. We did this after removing my clothes. He removed my clothes. He also removed his. He assaulted me na akanifanyia tabia mbaya. We did this on Tuesday and police came on Thursday. When they came, accused was not in. I was taken to hospital.*

5. The child’s father, PW 2, told the court that on 20<sup>th</sup> September 2015, he received information that his daughter, PW 2 had run away with a certain man. He reported to her teachers and the police and they began looking for her. He later received information that PW 1 was at the appellant’s home. When they went to the appellant’s home, they found PW 1 but not the appellant. He was arrested later.

6. When PW 1 was taken to hospital on 25<sup>th</sup> September 2015, she was examined by PW 3, a clinical officer. He noted that her the private parts had no bruises or lacerations but the hymen was broken. There was a whitish discharge and the laboratory tests showed pus cells and yeast. He concluded that there was penetration on that basis that there was urinary tract infection and that the hymen was broken.

7. The investigating officer, PW 4, recalled that PW 2 reported that his daughter was missing on 23<sup>rd</sup> September 2015. He later told him that he had traced the appellant. They went to the appellant’s house and got PW 1. He issued a P3 form and later arrested the appellant on 16<sup>th</sup> October 2016 when he resurfaced.

8. In his defence, the appellant denied the offence. He stated that he was arrested on 15<sup>th</sup> October 2015 when the area chief called him while

he was working from his shamba. He said he PW 2 had a grudge against him.

9. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. “Penetration” under **section 2** of the **Act** means, “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

10. I have considered the evidence and I find the evidence of PW 1 was clear and concise. It was not shaken on cross examination. She left no doubt that the appellant did an act that caused penetration. She knew the appellant and stayed with him for three days until she was found in his house. Her testimony was corroborated by that of PW 2 and PW 4 who found her in the appellant’s house after she had disappeared from home. The medical evidence presented by PW 3 also indicated that there had been penetration.

11. The appellant’s defence could not withstand the solid prosecution evidence against him. He could not explain why PW 1 was found in his house and when he was given an opportunity to cross-examine PW 2, he did not ask him about the nature of the grudge he was alleging.

12. Proof of age of child is a question of fact. The offence of defilement is proved when the child is aged below 18 years. In this case there is no doubt that PW 1 was below the age of 18. The apparent age of the child is necessary to determine the appropriate sentence as the sentence under **section 8** of the **Act** is dependent on the age of the child. In this case, the trial magistrate came to the conclusion that the age of the child had been proved. He observed as follows:

*Both the P3 form, the treatment notes produced and the testimony of the father indicate that the child was 14 years old. Further on this, the investigating officer stated that she was then a class 6 pupil and therefore she was aged 14 at the time.*

13. I agree with the analysis of the evidence and I too, on consideration of the evidence, find and hold that PW 1 was aged 14 years. In the circumstances, the sentence of 20 years’ imprisonment under **section 8(3)** of the **Act**, being the mandatory minimum sentence, was warranted.

14. The conviction and sentence are affirmed. The appeal is dismissed save the sentence shall run from 20<sup>th</sup> October 2015.

**Dated and delivered at Kisii this 30<sup>th</sup> day of April 2019.**

**D.S MAJANJA**

**JUDGE**

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.