



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 64 OF 2016**

**(Being an appeal arising from Conviction and Sentence from S.O. case No. 133 of 2015**

**delivered by Hon. V. O. Adet SRM)**

JC.....APPELLANT

**VERSES**

REPUBLIC.....RESPONDENT

**JUDGEMENT**

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1) and (2) of the Sexual offences Act No. 3 of 2006**. The particulars of the charge were that **on the 14<sup>th</sup> day of July, 2015 at [Particulars Withheld] farm within Trans Nzoia County intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of MC a child aged 7 years .**
2. The alternative charge was committing an **indecent act with a child contrary to Section 11 (1) of the Sexual offences Act No. 3 of 2006**. The particulars of the charge was that **on the 14<sup>th</sup> day of July, 2015 at [Particulars Withheld] farm within Trans Nzoia county intentionally touched the genital organ namely vagina of MC a child aged 7 years.**
3. The Appellant has appealed against the conviction and sentence. He was sentence to life imprisonment. The parties were ordered to file written submissions so as to dispose the appeal.
4. The summary of the evidence and facts as presented during trial was as hereunder. The complainant gave unsworn evidence as he was found unable to understand the meaning of an oath.
5. She said that she was a class one pupil at [Particulars Withheld] and the appellant was her father. She said that on the material day she went to school late and she was turned back. When she arrived back home she met the appellant who forcefully dragged her to a maize field and defiled her. She tried screaming but she was held on the throat. One A told her mother what had happened and she was taken to the hospital.
6. When cross examined she confirmed that she was aware that she had differences with her mother and had once beaten her.
7. **PW2 AC** testified that she was the mother to the minor and the appellant was her husband and a step father to the minor. When she arrived home that afternoon she was told by one M that the appellant had defiled the minor. She told her that A had informed her. A took her to the scene where she saw the vegetation disturbed especially the beans.
8. She examined the child and saw some whitish substance. The child did confirm and she took her to Birirbiriet hospital where it was confirmed that she had been defiled. The matter was reported at the police station and the appellant arrested. She was referred to Kitale district hospital where the P3 form was filled.
9. When cross examined she said that they had domestic disputes with the appellant as he worked and did not bring his money home. She also admitted of an extra-marital affair once which caused some problems.
10. **PW3 AK** a minor gave unsworn evidence. He said he was in class 2. On the material day the Appellant came home with bread and gave it to the complainant and took her to the farm and defiled her.
11. **PW4 PHANISE SILALI** from Kitale district hospital produced the dental age assessment form which showed that the complainant was aged about 7 years old.

12. **PW 5 KIRWA LABAT** from Kitale district hospital examined the minor and found the outside genitalia okay save the hymen was torn and old looking. He examined her after 3 days.

13. **PW6 PC CAROLINE BUSIENEI** from Sibanga police base carried out investigation and preferred charges against the Appellant.

14. When placed on his defence the appellant gave sworn evidence stating that he was on his way on the 14<sup>th</sup> day of July, 2015 and they both went home. As he wanted to leave for his work his son told him that C stole some items from people and he wanted to discipline her. She found those items in the kitchen which included rice and Kshs.500. The wife intervened and said that he was punishing the child because she was not his.

15. He left for his work and on 16<sup>th</sup> July, 2015 while in his place of work he was arrested and taken to the police station. He generally denied the offence and blamed his wife over the whole story.

### **ANALYSIS AND DETERMINATION**

16. The court has perused the evidence carefully as well as the written submission on record. There is no need to reproduce the said submissions so as to save on judicial time.

17. The duty of this court is to re-evaluate a fresh the evidence and come up with a fresh conclusion taking into account that the court did not have the benefit of seeing the witnesses during trial. The three ingredients of defilement are now clear, namely, the age of the minor, the identity of the perpetrator and whether or not penetration actually occurred.

18. In the first instance, the age of the minor was proved by the production of the dental age assessment report which showed that she was about 7 years old. In my view and contrary to the appellant's submission this was a sure and almost an accurate way of assessing her age. There was no evidence that she was about 13 years as submitted by the Appellant.

19. As to the question of identity, that was not in dispute. The appellant was a step father to the complainant although because of her tender age she may not have appreciated.

20. Did the appellant defile the minor? The only evidence is that of the minor and A whom the court presumes that they are related together. Both of them are minors though as found out by the trial court and they gave their evidence without taking oath.

21. The provisions of Section 124 of the Evidence Act grants that the evidence of minors must be carefully taken and only admitted if the court believes that they spoke the truth.

22. The complainant in this case stated that she came back from school as she was late and thus sent away. When she arrived home the appellant then dragged her to the maize farm and defiled her. She could not scream because he held her throat.

23. PW3 on the other hand said that she was given bread and then taken to the maize field and defiled. What baffles me is the accuracy with which PW3 describes the incidence. Apparently pw1 does not mention that she was given bread by the Appellant. Is it possible that the child can forget this line of food?

24. Secondly, why was she not taken to the hospital the same day and yet the discovery was made around lunch time? Why wait until expiry of three days then take her for treatment?

25. If the child of 7 years is defiled in the manner it was described how was she able to survive such injuries without her mother taking her for treatment. The injuries as seen by the clinical officer in my view are a little bit not clear. How comes there were no injuries on the vulva considering the age of the child.

26. In my view, there are many dots that do not add up. I have considered the defence by the appellant and the same has some truths. The wife confirmed that they have had marital differences and one can conclude that there may have been some fixing done against the appellant.

27. The sum total of this matter is that the complainant cannot enjoy the benefits provided under Section 124 of the Evidence Act especially the proviso thereof. Her evidence did not tally with that of her brother. More importantly, there was no explanation how and why it took her mother 3 days to take her to the hospital if indeed she sustained such injuries.

28. The court should have granted the appellant the benefit of doubt considering that the matter was weighty and the appellant was to be confined in prison forever.

29. The appeal is hereby allowed and the Appellant set free unless lawfully held.

**Dated signed and delivered in Kitale this 7<sup>th</sup> day of August, 2019.**

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**H K CHEMITEI**

**JUDGE**

**In the presence of:-**

**Mr Omoria for Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court**