



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCRA NO. 3 OF 2018**

**HARON MUNGETI KIRAGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*((Being an Appeal from the Judgment of the Resident Magistrate at Marimanti*

*(HON. S.M. NYAGA - RM) delivered on 24/10/2017 Marimanti Principal Magistrate's*

*Court Criminal Case No. (SO) NO. 11 of 2017).*

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**JUDGEMENT**

1. HARON MUNGETI KIRAGU, the Appellant herein was charged vide Marimanti Principal Magistrate's Criminal Case (SO) No. 11 of 2017 with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of Sexual Offences Act No.3 of 2006. The particulars were that on 25<sup>th</sup> January 2017 he defiled a child (name withheld) aged 2 1/2 years old. He had denied committing the offence but upon trial he was convicted and sentenced to serve life imprisonment.

2. The Appellant felt dissatisfied with both the conviction and sentence and preferred this appeal raising the following grounds namely:-

- i. That the learned trial magistrate erred by failing to note that no independent witness was called to testify.*
- ii. That the learned trial magistrate failed to observe that no high swab examination was done on the complainant to ascertain if there was some spermatozoa in her vagina.*
- iii. That the learned trial magistrate erred by not noting that the undergarments worn by the victim during and after the alleged incident were not tendered in evidence.*
- iv. That the prosecution case was not proved beyond reasonable doubt and the trial magistrate failed to note that.*
- v. That the trial magistrate erred by convicting the Appellant on conflicting and uncorroborated evidence.*
- vi. That D.N.A test was not done to ascertain the truth.*

3. The prosecution's case at the trial hinged on the evidence by the complainant who though of tender age (2 1/2 years) was able to recall what happened to her. When the trial court inquired from her if she knew the Appellant she shyly responded "**Abagire nthoni**" (trial court understood the same to mean the accused lacked manners to her). The mother to the victim, JK (PW2) tendered the birth notification (Exhibit 1) which showed that the minor was born on 23<sup>rd</sup> June, 2014. She told the trial court that she had left her child with the father (PW3) who in turn left her with the Appellant - a brother to the father of the victim..

4. On returning home, the mother found the victim who notified her about the ordeal and that when she checked her, "**she was crying while urinating. She was swollen on her private parts.**" She was not able to do anything else as her father had already washed her.

5. DMK (PW3) the father to the victim corroborated the evidence given by the wife (PW2). He confirmed that the child was left with him and when he left to fetch for some water, he left the child with the Appellant who took the opportunity to defile her and when he returned from the river, he found his daughter who reported to him as he washed her that she had been defiled by the Appellant. He also stated that he checked at her private parts and found them swollen apart from the fact that she cried when urinating.

6. Maritha Karimi (PW4), the Area Manager of Kareria area where the parents of the victim resided told the trial court that she was informed of the incident and when she went to the victim's home to find out, she realized that the family wanted to sort out the issue amicably and conceal the incident. When she saw the victim, she also observed that her private parts were swollen.

7. Patricia Gatumi Kamunde (PW6) the clinical officer at Marimanti level 4 Hospital told the trial court that she treated the victim and filled P3 form which she tendered as P. Exhibit 2. Her finding were that the victim's vaginal walls were swollen and there was redness. She concluded that the minor had been defiled though penetration was partial in her view.

7. When placed on his defence, the Appellant denied committing the offence claiming that he was framed. He claimed that the victim's father had sold his land and now wanted to take his. He stated that their father was aware of the issue between him on one hand and PW2 and PW3 on the other. He however failed to call the said father as a witness. He claimed that he was beaten and does not have anywhere to live as his own father did not want him. He casted doubts about the medical officer's opinion saying that the hymen of the minor was found to be intact.

8. The trial court assessed the evidence tendered before him and found the Appellant to be liar and inconsistent. It also found prosecution's witness credible and found that the prosecution's case had been proved beyond reasonable doubt.

9. In his written submissions the Appellant conceded that he was indeed left with the victim but there was no evidence linking him with the act because there were no independent witnesses. He further contended that the case was fabricated as there was no way a child of 2 years could be defiled by a grown up man like him and the hymen remain intact. He submits that because the clinical officer opined that the injuries she observed on the victim's genitalia could be caused by a penis or a blunt object, the blunt object could have caused them because if it was a penis here could have been full penetration.

10. The Appellant further contends that PW4 was not an expert to examine and confirm that defilement had taken place. He contends that she is the one who attracted members of the public with her screams but faults prosecution for not availing any of those witnesses.

11. The Appellant contends that the evidence adduces was insufficient and conviction was not proper.

12. On the other hand the State/Respondent has contended that it proved its case and that all the elements of the offence were proved which are that there was partial penetration of the organ of the minor aged 2 1/2 years and the fact that the Appellant was positively identified. The Respondent has submitted that the child was examined a day after the incident and given that the father had inadvertently washed her much evidence like spermatozoa could not be found upon examination.

### 13. **Analysis and Determination:**

This is the first appeal and the court's duty as first appellate court as held in *Kiilu & Another -vs- Republic (2005) 1 KLR* is to reason and re-evaluate the evidence as a whole and weight conflicting evidence before arriving at own conclusion.

14. The main issue in this appeal is whether the prosecution's case was proved beyond doubt. To understand whether the evidence I have summarized above supported the conviction one must look at the elements or necessary ingredients to be established and proved going by the Sexual Offences Act. In *John Mulua Munyoki -vs- Republic [2017] eKLR*, the Court of Appeal observed;

***"under Sexual Offences Act the main elements of the offence of defilement are as follows:-***

***i. The victim must be a minor***

***ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice. Therefore in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond doubt."***

15. In this instance the minor was aged 2 1/2 years as per Exhibit 1 (birth notification No.XXX) and P3 form (Exhibit 2). The mother testified and re-affirmed the age of her child. The question of age was established and/or proved beyond doubt.

16. The minor testified in court and the trial court noted finer details about her. That she is open and an intelligent girl. When asked about the Appellant she responded that "*Abagira Nthoni*" and that "*he removed my pant while in his bed.*" Her evidence and mannerism convinced the trial magistrate that she was truthful and credible. Under **Section 124 of Evidence Act**, even without any corroboration, that sort of evidence is sufficient to sustain a charge of defilement. However in this matter, there were further evidence which I have upon re-evaluation found consistent with what the victim told the trial court. The mother of the victim (PW2) found her daughter in pain. She noted that her genitals were swollen and that the girl was crying when urinating. The same fact was observed by the father (PW3) and the Sub-Area Manager (PW4). The medical officer in her evidence had no doubt that the child had been defiled even though penetration was partial. Now under Sexual Offence Act, penetration as we have observed above need not be complete for the offence of that nature to be deemed to have been committed.

17. In his submissions, the Appellant has conceded that she was left with the minor for some time and that admission clearly shows that the Appellant had the chance and opportunity to commit the heinous crime. It is totally unfounded to contend that it must have been a blunt object and not his penis that caused the sort of injuries noted by PW6. I find his contention to be somewhat conflicting because while on one hand he contends that he is a grown up man who could not have penetrated a minor, on the other hand he says if he was the one he could have penetration the minor fully because he had more than two hours with her after her father left her with him as he went to fetch water. The other inconsistency or conflicting arguments advanced during his defence is that while on one hand he stated that he had differed with his brother- the (father of the victim) over land and that their father was aware of the dispute, on the other hand he also says that their father do not want him. He however did state the reasons why he feels his father did not want him. In that regard one would understand the conclusion made by the trial court that the Appellant was appeared to be a liar.

18. I am also not convinced by the Appellant's contention that the prosecution's case was not proved because no "**independent**" witnesses were called to testify when one goes through the witnesses who testified, it is easy to note that PW4 PW5 and PW6 were not related to the victim in any way. It is also a fallacy to hold that conviction in a sexual offence case can only be sustained if there are independent witnesses or if medical examination like vaginal swab, DNA etc is done. The law requires that the case must be proved beyond doubt by the evidence tendered but it does not state the type of evidence to be tendered for the conviction to be sustained.

19. The Appellant has claimed that he was framed because of land dispute but no evidence in that regard was tendered. All the defence witnesses called had nothing useful to aid the Appellant in his defence. This court finds the issue of a land dispute was raised as an afterthought and it is clearly unfounded. The court finds that the evidence tendered at the trial was sufficient to support the conviction. The case was proved to the required standard in law.

20. On sentence as I have observed above, the victim was 2 $\frac{1}{2}$  years old. The ordeal that child underwent is traumatizing and will continue to remain a lasting scar in her life. The law under **Section 8(2) of Sexual Offence Act** states that anyone found guilty of defiling a girl aged 11 years or less shall be sentenced to life imprisonment. The child in this instance was aged 2  $\frac{1}{2}$  years and the Appellant has not cited any basis for me to intervene. I find no reason whatsoever to disturb the sentence.

The upshot of the foregoing is that this court find no merit in this appeal. The same is disallowed. The conviction and sentence are upheld.

**Dated, signed and delivered at Chuka this 29<sup>th</sup> day of October 2019.**

**R.K. LIMO**

**JUDGE**

**29/10/2019**

Judgment signed, dated and delivered in the open court in presence of Appellant in person and Momanyi for Respondent.

**R.K. LIMO**

**JUDGE**

**29/10/2019**