



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.65 OF 2017**

**(Appeal Originating from Nyahururu CM's Court. SOA No.1309/2012 by: Hon. P.O. Muholi – R.M.)**

**JAMES NJUGUNA NDICHU.....APPELLANT**

**- V E R S U S -**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The appellant, **James Njuguna Ndichu** was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2001.

The particulars of the charge were that on 13/11/2010 in Rurii Location, intentionally and unlawfully caused his genital organ to penetrate the genital organ of N.W.R., a child aged 6 years.

In the alternative, he faced a charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offence Act in that on 13/11/2011 at [particulars withheld] Village, intentionally and unlawfully touched the genital organ of N.W.R., a child aged 6 years.

He was sentenced to serve life imprisonment.

The appellant is aggrieved by both the conviction and sentence and filed this appeal. The grounds of appeal were filed in court on 5/3/2015 and further grounds were contained in the written submissions filed in court on 20/9/2017. The grounds can be summarized as follows:

- (1) That the identification of the appellant was not watertight;***
- (2) That the court failed to consider that the appellant's rights under Article 49(f)(i)(ii) were breached;***
- (3) That he was not supplied with witness statements before the trial;***
- (4) That the conviction was based on contradictory evidence;***
- (5) That the court failed to consider the appellant's defence;***
- (6) That the conviction went against the weight of the evidence.***

The appellant therefore prays that the appeal be allowed, conviction be quashed and sentence set aside.

The appeal was opposed by learned counsel, Mr. Mutembei, who submitted that the appellant was identified by way of recognition by PW1, 2 and 3: that there was no grudge between the witnesses and the appellant; that the evidence of PW1, 2 & 3 was corroborated by the medical evidence; counsel denied that the appellant's rights were breached.

This is the first appeal and this court has the duty of examining all the evidence tendered in the trial court, analyze it and make its own determinations and conclusions: See ***Okeno v Republic (1972)EA 32.***

The prosecution called a total of 6 witnesses in support of their case.

**PW1 (NWR)** a child aged 6 years, gave unsworn evidence after the court conducted a *voire dire* examination and found that she did not understand the meaning of the oath. PW1 recalled that on 13/11/2010, she went to the appellant's house to see pictures; that the appellant

whose name she said she did not know, removed his thing for urinating and inserted in her organ for urinating; that he had removed her clothes and his too; that M and K were present and when she went back home, she told her mother who beat her and took her to the hospital then to Ol Kalou Police Station. She identified the appellant in court.

**PW2 MM** aged 12 and **PW3 FK** aged 14 years told the court that they were going to fetch firewood when they decided to borrow an axe from the appellant's home. They heard people talking in appellant's house and on peeping, found the appellant lying on the complainant and that he was naked and pretended to be sleeping. They told PW1 to go home. PW2 and 3 went and reported what they had seen to complainant's mother **PW4 NWR**.

PW4 said that she had left PW1 with her grandmother when going to work in the garden; that about 1.00 p.m. PW2 and PW3 went to inform her that PW1 and Njuguna were doing bad manners. She went home, found PW1 lying on the ground crying and PW1 told her that Njuguna had taken her to his bed and done 'tabia mbaya' to her. PW4 inspected the child, found blood on her underwear; her vagina had blood and mucus like substance. She called Njuguna and asked him to go to her home, questioned him on the allegations which he denied and on the way to hospital they met police who had received the report. They arrested the appellant. PW4 produced PW1's birth certificate which shows that she was born on 4/11/2005. PW4 knew the appellant as a neighbour.

**PW5 Peter Nginyo** is a Clinical Officer at J.M. Kariuki District Hospital. On 14/11/2010, he examined PW1 with a history of sexual assault. He found that her innerwear was stained with blood, right thigh was swollen, tender and radiant; he also found that labia majora was bruised, hymen was freshly perforated and external genitalia were bloody. He did not find any spermatozoa. He concluded that there was forceful penetration of PW1.

**PW6 PC Samuel Kankano** of Ol Kalou Police Station was at the Police Station when police from Passenga took the appellant to the station, accompanied with the complainant.

When placed on his defence, the appellant said he went to work and left at noon to go and eat; that he worked till 3.00 p.m., then he went to his friend, Wahome's home where he stayed till people went there and arrested him and took him to the police station.

The appellant has alleged that his rights under Article 49(1)(f)(i)(ii) were breached. Article 49 offers protection for arrested persons. It reads:

**“Article 49(1) An arrested person has the right –**

- **(f) to be brought before a court as soon as reasonably possible but not later than:**
- **(i) twenty-four (24) hours after being arrested; or**
- **(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day:”**

From the evidence on record, the offence was committed on 13/11/2010; the appellant was arrested on the same day; that the complainant was taken to hospital on same day, examined by the doctor on 14/11/2010; that the appellant was arraigned before court on 15/11/2010. He took plea in Criminal Case No.2768/2010, where he was convicted on his own plea but on 30/7/2012, J. Omondi ordered a retrial and this appeal arises out of the retrial. 13/11/2010 was a Saturday while 14/11/2010 was a Sunday. The courts do not work on Saturdays and Sundays. The earliest day the appellant could have been arraigned in court is 15/11/2010 which was done. No breach was committed.

The prosecution is required to supply to an accused, the evidence (statements & exhibits) it will to base its case upon within reasonable time. When the appellant appeared before the magistrate for trial on 6/8/2012, the witness statements had not yet been supplied to the appellant because the prosecution said 25/= was required for the statements. The case was fixed for hearing on 27/8/2012 but it did not proceed. On 29/8/2012, the appellant complained that he had not been given the statements and the prosecutor said he would give the statements at the appellant's own cost. At 3.00 p.m. on same day the accused stated:

**“I am now ready to proceed with the case having been supplied with witness statements and prepared well for my case.”**

If accused was not ready because he had just got the statements, he should have asked for time. He prompted the court to proceed with the hearing of his case that day. He cannot turn around now and complain that he was denied time to prepare his case. That ground is baseless.

In a charge of defilement under Section 8(1) of the Sexual Offences Act, the prosecution has to prove the following:

- (1) Penetration;**
- (2) The age of the complainant;**
- (3) Who was the perpetrator.**

PW1 told the court that she went to see pictures in the appellant's house when he did 'tabia mbaya' to her. PW1 vividly described the act done to her; that the appellant inserted his thing for urinating into hers for urinating. PW2 & 3 told the court how they stumbled on the appellant in the act of defiling PW1 in his house. It is PW2 & 3 who went to tell PW4, the mother of PW1 what they had seen. PW4 then found PW1 crying and on inspecting her found that indeed she had blood in her inner wear and her genitalia were injured. The evidence of

PW1, 2, 3 & 4 was corroborated by PW5's evidence who examined PW1 the next day, found her genitalia injured and bloody with freshly perforated hymen. Because of the injuries, PW5 was of the view that there was forcible penetration of PW1. Penetration is defined in Section 2 of the Sexual Offences Act as:

***“Penetration means that partial or complete insertion of the genital organs of a person into the genital organs of another person.”***

There is overwhelming evidence that PW1 was defiled.

As to who the perpetrator was: I find that PW1's evidence is corroborated by PW2 & 3's evidence. PW2 & 3 found the appellant in the act. The scene was the appellant house. The incident occurred in broad daylight. PW4 identified the appellant as their neighbour. Though the appellant alleges that there was a grudge between them, none was alluded to during the hearing of the case or his defence. I doubt that PW1, 2 & 3 would have gone to the appellant's house had there been any pre-existing dispute. The allegation of grudge is an afterthought.

In his defence the appellant seemed to be raising an alibi defence, that he was at work, on the said day, then went to his friend's house at 3.00 p.m. from where he was arrested.

Even when an accused raises an alibi defence, the onus always remains on the prosecution to prove their case beyond reasonable doubt and that duty never shifts to the accused. In ***Sentale v Uganda (1968) EA 365***. The court held that the burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution.

The appellant raised an alibi defence for the first time in his defence. He stated that he went to work, but never said where he was working. In my view, the alibi was an afterthought. PW1, 2, 3 all placed him at the scene of crime and that is where PW4 found him. The alibi did not dislodge the prosecution evidence.

The appellant complained that his defence was not considered. However, I find that the trial court did take the defence into consideration though the magistrate tended to shift the burden of proof, when he said that the appellant did not call his friend Wahome to corroborate his defence. After considering the defence against the prosecution evidence, the court believed the prosecution witnesses.

I have considered all the evidence on record as is required of this court and the only conclusion this court can arrive at is that there was overwhelming evidence against the appellant, that he is the one who defiled PW1.

PW1's birth certificate was produced in evidence – she was born on 4/4/2005 and was therefore just over 5 years old at the time she was defiled.

In the end, I find that the trial court arrived at the proper finding that it is the appellant who defiled PW1. The conviction is sound. Under Section 8(2) of the Sexual Offences Act, the only sentence is life imprisonment and the court cannot interfere.

The appeal is therefore unmerited and it is hereby dismissed in its entirety.

**Dated, Signed and Delivered at NYAHURURU this 19<sup>th</sup> day of January, 2018.**

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**R.P.V. Wendoh**

**JUDGE**

**Present:**

Ms. Rugut – for prosecution

Mr. Soi - court assistant

Present in person – appellant