



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT SIAYA**  
**CRIMINAL APPEAL NO. 123 OF 2016**  
**(CORAM: D. S. MAJANJA J.)**

**BETWEEN**

**ANTONY ACHACH MOHAMMED.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against the original conviction and sentence dated 26<sup>th</sup> September 2016 in Criminal Case No. 122 of 2016 at Bondo Law Courts before Hon. M. Obiero, PM)***

**JUDGMENT**

1. The appellant, **ANTONY ACHACH MOHAMMED**, was charged with the offence of defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act***. The particulars of the offence were that on 30<sup>th</sup> January 2016 at about 1800 Hrs at [particulars withheld] in Gem Sub-county within Siaya County, he intentionally and unlawfully caused his penis to penetrate the vagina of L A O, a child aged 15 years. The appellant was convicted and sentenced to 15 years' imprisonment.
2. He now appeals against conviction and sentence. The thrust of his appeal is the prosecution failed to prove its case beyond reasonable doubt. He complained that there was a glaring lack of evidence. In his written submissions before the court, the appellant stated that the evidence before the court was neither credible nor reliable, that the case against him was fabricated and lacked probative value and that it was full of contradictions and founded on hearsay evidence.
3. The respondent supported the conviction. Counsel for the respondent submitted that the testimony of PW 1 was corroborated by other evidence and the prosecution proved its case beyond reasonable doubt.
4. As this is a first appeal, the duty of the court is to subject the evidence on record to a fresh review and scrutiny and come to its own conclusion while bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic [1972] EA 32***).
5. The complainant (PW 3) was aged 16 years attending class 8 in primary school. In her evidence she denied that the appellant was her boyfriend and suggested that the appellant was being framed as he was fighting with her brother. She was declared a hostile witness.
6. PW 5, a watchman at the primary school where the PW 3 was going to school and the appellant was teaching recalled that on the evening of 30<sup>th</sup> January 2016 at about 7.00pm, he reported to school and

found some people had detained the appellant on suspicion that he was having sexual intercourse with PW 3 in one of the classrooms. PW 5 escorted the appellant and PW 3 to Akala Police Station where, the investigating officer, PW 2, received them and rearrested the appellant. He escorted the appellant and PW 3 to the hospital. He issued the P3 form.

7. PW 3's mother, PW 1, recalled that on 30<sup>th</sup> January 2016, she was informed that a teacher had been found having sex with her daughter. She went to Akala Police Station where she found the appellant and PW 3. She accompanied PW 3 to the hospital for examination.

8. PW 4, the clinical officer, testified that he examined PW 3 on 30<sup>th</sup> January 2016. Her general condition was fair. He observed an inflamed vaginal mucosa and the lining vagina had been swollen and bruised. When he performed a laboratory test, spermatozoa and pus cells were detected. He therefore concluded that there was penetration.

9. The appellant gave sworn testimony in his defence. He testified that he was an untrained teacher. He recalled that on the evening of 30<sup>th</sup> January 2016, he at the school gate with his cousin when he met three drunk boda boda riders. One of them owed him some money and when he demanded it, a fight ensued between them. The school watchman arrived and told them to go to the police station to resolve their differences. When he arrived at the police station, he was placed in the cell. At the cells he met PW 1 and when he went for medical examination at the hospital, he saw PW 1 and PW 3.

10. The principle witness in this case was PW 3. She was declared a hostile witness after she retracted what she had recorded in her earlier statement to the police. The law on hostile witnesses is that the probative value of such evidence is negligible and it may only be relied upon in clear cases to support the prosecution or the defence case. In **Abel Monari Nyanamba & 4 Others v Republic NRB CA Criminal Appeal No. 86 of 1994 [1996]eKLR** it was held that;

*[T]he evidence of a hostile witness is indeed evidence though generally of little value obviously, no court found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt*

11. To support a conviction, the evidence of a hostile witness must be corroborated in material particulars by other evidence. Without the testimony of PW 3, the case against the appellant rests on circumstantial evidence. In **Ndurya v Republic [2008] KLR 135** the Court of Appeal held that before convicting someone on the basis of circumstantial evidence, the court has to be sure there are no other co-existing circumstances which would weaken or destroy the inference of guilt (see also **Sawe v Republic [2003] KLR 364** and **R v Kipkering arap Koske and Another 16 EACA 135**).

12. In this case although appellant denied that she had anything to do with the offence. The testimony of PW 5 placed the appellant and PW 3 at the school on that evening. PW 2 confirmed that both the appellant and PW 3 were brought together at the police station. The irresistible inference is that they were together at the school that evening. As regards penetration, PW 4 examined PW 3 on 31<sup>st</sup> January 2016. PW 3 had spent the night in custody and was examined the next day. The examination of her genitalia and laboratory tests confirmed penetration.

13. Although PW 2 denied that she had sexual intercourse with the appellant, from the evidence there can be no other explanation of the bruises on her vagina and presence of spermatozoa other than the fact of penetration. When considered alongside all this evidence, the appellant's defence, apart from putting him at the school at the material time, is a sham. The totality of the evidence is that on the evening of 30<sup>th</sup> January 2016, the appellant had sexual intercourse with PW 3. He was caught and taken with PW 3 to the police station. Examination of PW 3 on the next day confirmed penetration. The circumstances were such that no other person other than the appellant could have done the act that caused penetration. The conviction is therefore affirmed.

14. The fact that the PW 3 was aged 16 years was confirmed by PW 1 and the birth certificate produced

by PW 2. The sentence imposed of 15 years' imprisonment was the mandatory minimum under **section 8(3)** of the *Sexual Offences Act*. It is affirmed.

15. The appeal is dismissed.

**SIGNED IN NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED, SIGNED and DELIVERED at SIAYA this 19<sup>th</sup> day of February 2018**

**T. W. CHERERE**

**JUDGE**

Appellant in Person

Ms Odumba, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State

Court Assistants: Laban O. Odhiambo, Ishmael Orwa