



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 117 OF 2012**

**(Being an appeal from original conviction and sentence in criminal case no 2676 of 2009 delivered by S.K. Ngetich Senior resident Magistrate on 26/10/2012.)**

**BONFACE WAFULA WANJALA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

1. The appellant was charged with the offence of **Defilement of a child contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offences were that **on the diverse dates between 30<sup>th</sup> July 2009 and 6<sup>th</sup> August 2009 within Rift Valley province by the use of his genital organ namely penis unlawfully and intentionally caused penetration into the genital organ namely vagina of LN a girl aged 11 years**.
2. The alternative charge was **Indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the diverse dates between 30<sup>th</sup> July 2009 and 6<sup>th</sup> of August 2009 at [particulars withheld] within the Rift valley province, intentionally and unlawfully caused a contact by his genital organ namely penis with the genital organ namely vagina of LN a girl aged 11 years**.
3. The appellant was convicted and sentenced to 20 years imprisonment hence this appeal. Before looking at the merits or demerits of the same it shall be worthwhile to summarise the facts as they appeared at the trial court.
4. **PW1 the complainant** told the court that she was a class 5 pupil at [Particulars Withheld] primary school. That on 6/5/2009 while coming from school in the evening she was grabbed by the appellant who took her to his house where he proceeded to defile her. Her attempts to resist were futile as he threatened to kill her. After the ordeal she let her go and warned her not to say anything. The complainant however told her mother who proceeded to organise her to be taken to the hospital.
5. **PW2 Grace Maurice Walumuli** the village elder testified that she was informed of the complaint by the complainant's mother. They took her to the clinic and organised for the arrest of the appellant the following day.
6. **PW3 FW** the complainant's mother testified that when her child arrived home from school at around 6 pm her uniform looked dirty, smelly and had dirty spots. She inquired from the complainant what had happened but she was quiet. She then beat her up and she opened up and explained to her what had happened. She saw her biker which was torn and had sperms. Her vagina had some blood stains. She went to the village elder (PW2) who organised for her to take the child to the clinic. The next day they arrested the appellant and took him to the chief's office.
7. **PW4 Linus Ligare** a clinical officer from Kitale District Hospital produced the P3 form which he filled after examining the complainant. He found the hymen torn and fresh looking. There was also the presence of spermatozoa and he concluded that there was penetration.
8. **PW5 P.C. William Andayi** carried out the investigation after the appellant was arrested and brought to the station by Kenya Police Reservist. He recorded statements and preferred charges against the appellant.
9. **PW6 Dr Kennedy Ndege** carried out an age assessment on both the appellant as well as the complainant. He found the complainant to be 11 years old and the appellant 19 years old.
10. When put on his defence the appellant gave sworn evidence denying the charge. He denied the charges which according to him were strange. He denied on cross-examination that he knew the complainant.

## **Analysis and Determination**

11. I have perused the grounds raised in the appeal which in my view are general in nature. He argues that he was not taken to the hospital for medical test, that there was contradiction on the part of the witnesses especially PW1, PW2 and the clinical officer and that his defence was not taken into consideration.

12. I have equally read the written submissions by both the appellant and the learned state counsel. This being a first appeal the court is enjoined to re-evaluate afresh the evidence and arrive at a new conclusion or judgment.

13. The ingredients for the offence of defilement, namely, the age of the victim ought to be cogently established, the identity of the perpetrator must be crystal clear and there ought to be penetration.

14. Having read the proceedings herein I am satisfied that the age of the complainant and by extension the appellant was well proved by Dr. Ndege. He found the complainant to be 11 years and the appellant 19 years.

15. As to whether the complainant identified the complainant clearly, I find that the incident took place at around 6 pm when she came from school. The complainant was taken to the house of the appellant, defiled and let go. She went home and found her mother and her friend sitted. All the while it was still daytime. I do not think that there was a case of mistaken identity. In any event the complainant seemed not to have had any difficulty in identifying the appellant and telling her mother who had defiled her.

16. In terms of whether or not she was defiled, the evidence of Linus Ligare corroborated that of the complainant, as well as her mother. The hymen was freshly torn and there was spermatozoa. This medical examination took place the following day.

17. I do not find any reason not to doubt the complainant. Though the court did not give the appellant the chance to cross-examine the complainant which was procedurally wrong despite giving unsworn evidence, her evidence was forthright and straight forward. I do find that she was very clear and categorical on what happened. In short I find her truthful and although there was no eye witness she qualified to fall under those witnesses anticipated by the **Proviso to Section 124 of the Evidence Act** which states;-

***“ ----- Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

18. There was allegation by PW3 that the incident seemed to have happened more than once, but the child did not state so. I think this was simply spicing the case in favour of her child and against the appellant.

19. Although the appellant complained that his defence was not considered, I do not find the same to have shaken the prosecution case. He did not attempt to wriggle himself out of the allegations. He failed to explain his whereabouts on the material day. In short the defence was simply a sham.

20. In the premises I do not find any merit in the appeal and the same is hereby dismissed.

**Delivered, signed and dated at Kitale this 12<sup>th</sup> day of April 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**12/4/18**

**In the presence of:**

**Mr Kakoi for the State**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**