



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 68 OF 2016**

**(Being an appeal from conviction and sentence in Kitale Sexual Case No. 21 of 2015 delivered by C.C. Kipkorir Resident Magistrate on 10/6/2016).**

**MARTIN WANOYNYI KUSIMBA.....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(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on **the 20th January 2015 within Trans Nzoia County, intentionally caused his penis to penetrate into the vagina of A.L.E a child aged 15 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 were that **on the 20<sup>th</sup> January 2015 within Trans Nzoia County intentionally caused contact between his genital organ namely penis and genital organ namely vagina of A.L. E. a child aged 15 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 is appropriate to summarise the evidence as presented at the trial court.

**4. PW1 the complainant** told the court that she was a class 4 pupil at [particulars withheld] primary school. That on 20/1/2015 at around 8.00 Pm she was asleep alone in their single roomed house, her mother having gone to visit their neighbour. She had a tin lamp which was on. The appellant then went in and removed her clothes and defiled her. She started screaming but he closed her mouth using his hand and threatened to kill her if she raised any alarm.

5. Her mother noticed later that she was not walking well. She told her and with the help of NGO (Handicap) she was taken to the hospital and later to the police station. A P3 form was filled which concluded that she had been defiled. Her age was assessed and was found to be 15 years old.

**6. PW2 H.N** the complainant's mother testified that she had gone to visit her neighbour that day, when she came back that night the complainant did not tell her what had transpired. She went to school but when she came back for lunch she noticed that she was not walking well. On inquiry she opened up on what had happened. With the help of one Jose from handicap the appellant was arrested. The complainant was then taken to hospital for treatment.

**7. PW2 Linus Ligare** the clinical officer from Kitale District hospital filled the P3 form. He found that the hymen was broken and it looked recent. He concluded that she had been defiled.

**8. PW3 Pharis Silali** produced the dental age assessment report which showed the complainant aged 15 years old.

**9. PW4 P.C. Peter Kwatenge** took over the file from one Michael Muchir who carried out the investigations and preferred charges against the appellant.

10. When put on his defence the appellant gave unsworn evidence denying the charges. His explanation only centered around what transpired on 23/1/2015 when he was arrested by 3 vigilantes and taken to Kitale police station.

**Analysis and Determination**

11. I have perused the evidence on record, as well as the written submissions by the parties herein. The appellant's grounds of appeal dated

24/6/2016 centered majorly on the fact that the evidence as prescribed was contradictory, the same was based on hearsay and that the age of the complainant was not certain.

12. Looking at the evidence as presented it is clear that the age of the complainant was clearly established by the dental age assessment report produced. Although the complainant stated that she was 12 years old her mother counteracted this. The medical report however cleared the air.

13. As to the identity of the perpetrator, I am satisfied that the minor's evidence seemed not to have been contradicted. She said that she had a tin lamp which was on and that when she woke up from the sleep and shock she saw the appellant. She further said that she knew the appellant who was a neighbour 200 metres away from their home. The appellant did not say that he did not know the complainant nor her mother.

14. On the question of penetration, the minor explained that she was defiled and warned not to scream or tell anyone. It appears that what betrayed her was her walking style a day thereafter which attracted her mother. The evidence by the clinical officer coupled with the P3 form and the treatment notes clearly showed that the complainant was defiled.

15. The unsworn defence by the appellant did not elicit much. He did not even try to explain his whereabouts on the material night. By failing to give sworn evidence he denied the respondent/prosecution the chance to have him cross-examined.

16. I do not find the appeal meritorious at all. I do not think the grounds raised in the appeal disturbs the findings of the trial court or at all. There were no essential witnesses left out by the prosecution as the appellant suggests.

17. In the premises I find the trial court, which had the opportunity of seeing the witness first had clearly exercised its discretion well and there is nothing to fault.

18. The appeal 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.**