



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 32 OF 2015**

*(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal case No. 1193 of 2014 delivered on 4/3/2015 by C.N. Mugo Resident Magistrate.)*

**SAMUEL MUTISO KALULU .....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 offence were that **on diverse dates between 1<sup>st</sup> December 2013 and 20<sup>th</sup> March 2014 within Trans Nzoia County, intentionally caused his penis to penetrate into the vagina of VY a child aged 11 years.**

2. The alternative count 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 diverse dates between 1<sup>st</sup> December 2013 and 20<sup>th</sup> March 2014 within Trans Nzoia County intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of VY a child aged 11 years.

He was convicted and sentenced to life imprisonment.

3. The facts and evidence as presented in summary during trial were that **PW1 Pharis Silali** produced the dental age assessment prepared by Dr Kiprop which estimated the age of the complainant to be between 11-12 years.

4. **PW2 the complainant** testified that she was 12 years old and a pupil at [Particulars withheld] primary school in class 5. she said that on diverse dates between 1/12/2013 and 20/3/2014 she was playing with the appellant's children when he lured her into his house and defiled her. This occurred in December 2013 for the first occasion and again the second time when he gave her Kshs 50. The complainant testified that all the while the rest of the children would be playing outside.

5. On 18/3/2014 at 6.00 pm while escorting her friend L she decided to pass through the appellant's house. She met him and for two days that is upto 20/3/2014 she stayed with him and had sex together. On 20/3/2014 she was apprehended from the appellant house by some boys namely Simiyu, Osama and Jiji and took her to her grandmother's place. The appellant was later arrested and taken to the police station. The complainant was taken to Kitale District hospital where she was treated and P3 form filled.

6. **PW3 RM** is the grandmother to the complainant. She testified that on 18/3/2014 she woke up and found that the complainant had thrown down her books and she had not gone to school. By then she was at [Particulars Withheld] primary school class 5. She inquired around for 2 days to no avail. She informed the village elder as well as one Margaret regarding the incident. Later one Mama Kamama called and informed her that the child had been found near the appellant place. She found Margaret and the boys holding the child. The child told her that she had been at the appellant's place. Margaret told her that she had seen the child leaves Sammy place. Sammy then admitted. They went to Kapchonge police station and the child taken to Ndaluh health Centre where she was examined. Later she was taken to Kitale District hospital.

7. **PW4 Agripina Shimola Lukalia** testified that she knew the appellant who was her neighbour. She was told by JK the mother to the complainant and informed about her disappearance. She was working in Nairobi. On 20/3/2014 she called her and informed her that the child had been found living with the appellant. She went to Kapchonge police station where the minor and the appellant had already been taken. They later took the child to Ndaluh health Centre as well as Kitale District hospital.

8. **PW5 Margaret Khatemeshi** who is a neighbour to both the appellant as well as the minor testified that she was going to the river which is close to the appellant's house on 20/3/2014. she saw the appellant door opened and saw the complainant. She was aware that she had gotten lost and was being looked for. She called some boys whom she instructed to hold the minor. They also apprehended the appellant and took him to Kapchonge police station. The child was taken to Ndaluh Health Centre who apparently after examination found that the child

had not been raped. She said that the police at Kapchonge were hostile. They took the child to Kitale District Hospital. The child told her that the appellant used to give her Kshs 50 and Muhogo.

**9. PW6 P.C. Michael Machira** took over the investigations further from P.C. Yator who recorded statements from the witnesses and preferred charges against the appellant.

**10. PW7 John Koima** the Clinical Officer from Kitale District Hospital produced the treatment notes as well as the P3 form. When he examined the minor he found the hymen torn and she was HIV Negative.

**11.** The appellant when put on his defence, gave unsworn evidence denying the charge. He only explained how he was arrested on 20/3/2014 at 6.00 am by 2 people and taken to Kitale Police station. He was later charged with the offence.

**12. DW2 Joseph Juma Chemoti** a village elder at Muhoo said that he had known the appellant for 3 years. That on 18/3/2014 he met many people on the road including the appellant as well as the minor. The appellant had been accused of defiling the minor. He asked the minor but she denied that the appellant had defiled her. Later the appellant was arrested and taken to Kitale hospital.

### **Analysis and Determination**

13. The appellant has raised various grounds in his 12 paragraphs grounds of appeal. The subtotal of the grounds were that the prosecution failed to establish the case beyond reasonable doubt, that there were no sufficient evidence that the appellant had defiled the minor, that the minor was untruthful but a serial liar.

14. I have equally perused the submissions by both the appellant and the Respondent's counsel. What ought to be established in such offences are whether the age of the minor was clearly proved, whether there was penetration and whether there was prove of the identity of the perpetrator.

15. The age in my view was clearly proved by the dental age assessment produced by PW1 who estimated the age to be between 11-12 years old. The minor equally testified that she was 12 years, so to her grandmother.

16. On the question of whether she was defiled, I am satisfied that she was. The complainant evidence was clear, straightforward and without any ambiguity. She clearly explained the three occasions which she was defiled including the names of those children she was playing with like J and K and those who arrested her who included Davy, Simiyu Osama and Jiji. The minor equally gave graphic details of the three incidences when she was defiled including the description of the appellant's house.

17. Clearly, and pursuant to Section 124 of the Evidence Act I find that the minor was truthful in her testimony.

18. As to whether it was the appellant who defiled her, I find the holding of the trial court to be true and uncontroverted. The appellant was well known to the minor. He was a neighbour whom she even played with her children.

19. More importantly on the material day, the child was found in the appellant's house after getting lost for 2 days and failing to go to school. Clearly in his defence he did not explain what the child was doing in his house. It is a coincidence that PW5 saw her as she went to fetch water.

20. Although DW2 attempted in his testimony to suggest that the appellant was a good person, he had no idea what had transpired. He simply arrived when both the appellant as well as the minor had been arrested. His evidence did not assist much. Nobody heard him question the minor who according to him told him that she had not been defiled.

21. Neither did Ndaluh health centre and Kapchonge police station help much. In my view the two public facilities were a disgrace and failed to meet their expectations.

22. In the premises, and despite the fact that nobody else saw the appellant defiling the minor, I find her single evidence uncontroverted, clear and truthful. Although there was no discharge found in her private parts as submitted by the clinical officer and amplified by the appellant, the lack of hymen and the fact that the minor had engaged herself in Sexual activity with the appellant was clear proof of the offence facing the appellant.

23. The appeal is clearly unmeritorious and is dismissed. The only area which I think is worth considering is the age of the minor Viz a viz the sentencing. The doctor found her to be between 11-12 years. The complainant as well as the grandmother zeroed in on 12 years. I think for avoidance of doubt its safe to take the last age since in any event, age normally increases and does not reduce.

24. I shall consequently hold that the proper age in which the trial court ought to have used in convicting the appellant is 12 years. Having stated so, I shall set aside the life imprisonment term imposed against the appellant and hold that he be and is hereby sentenced to 20 years imprisonment from 4/3/2015 pursuant to the Provisions of Section 8(3) of the Sexual Offences Act No. 3 of 2006.

Orders accordingly.

**Delivered, signed and dated at Kitale this 11<sup>th</sup> day of April 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**11/4/2018**

**In the presence of:**

**Mr Kakoi for State**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**