



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 111 OF 2016**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Sexual Offence No. 16 /2016 delivered by P.C. Biwott Senior Principal Magistrate on 13/2/2018)**

**FREDRICK JUMA WAWIRE.....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) (4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on diverse dates between 15<sup>th</sup> January, 2016 and 23<sup>rd</sup> January, 2016 within Trans Nzoia County, intentionally caused his penis penetrate into the vagina of P.N.S. a child aged 16 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 of the offence were that **on diverse dates between 15<sup>th</sup> January, 2016 and 23<sup>rd</sup> January, 2016 within Trans Nzoia County, intentionally caused contact between his genital organ namely penis and genital organ namely vagina of P.N. S. a child aged 16 years.**

3. The appellant was convicted and sentenced to 20 years imprisonment hence this appeal. The summary of the evidence as presented during trial was that **PW1 the complainant** stated that she was a class 6 pupil at [particulars] primary school . That on 15<sup>th</sup> January, 2016 she went fetching water with her sister who then left her behind. She met the appellant who took her to his house and stayed with her while the appellant defiled her severally. She was saved by her father who came with police officers and arrested them while at the appellant's house. She was taken to Kitale District Hospital where she was examined and treated.

4. **PW2 Kirwa Labbatt** a clinical officer from Kitale District Hospital examined both the complainant as well as the appellant and filled their respective P3 forms. He found that her hymen was lost and old looking and she had her periods. She was also HIV Positive. The appellant on the other hand was HIV Negative.

5. **PW3 C N** the complainant's father testified that on 15/1/2015 at 12.00 noon he left the complainant with the rest of the children at home. When he came back she was missing. He reported to the Administration Police Camp nearby and continued looking for her at the neighbourhood. He reported the matter at Kitale police station on 22/1/2016. Later he received a call that she was near [particulars withheld]. He was led to the suspect house. He notified the Administration Police Officer. At 4.30 am they raided the appellant house and rescued the complainant. She was taken to the hospital as well as the matter reported at Kitale police station.

6. **PW3 P.C. Peter Kwatenge** carried out the investigations and recorded statements from the witnesses. He also produced the health card showing her age.

7. When put on his defence **the appellant** gave sworn testimony denying the charge . He said that while headed to work at [particulars withheld], he met PW3 with an Ap Officer who arrested him and accused him of defilement against a child. Previously PW3 had told him that he was in a relationship with his wife and that he wanted him to negotiate so that he could pay some money. He said that PW2 said that she did not know him. They were both taken to the hospital and examined where he was found to be HIV Negative but the girl HIV positive.

**Analysis and Determination**

8. I have carefully read the proceedings herein as well as the submissions by both the learned state counsel as well as the appellant.

9. The 3 ingredients of defilement charges are well settled namely; the age of the victim, the identity of the perpetrator as well as prove of penetration.

10. In the case at hand, I do not think there was any issue contested in respect to the complainant's age. The clinic card produced showed when she was born namely 10/8/1999.
11. As to whether she was defiled the report by the clinical officer showed that her hymen was lost and old looking. She had taken shower and changed clothes. The examination was done on 23/1/2016. She was nevertheless on her period. She was HIV Positive.
12. The evidence from her father corroborates what PW1 stated that she was held in the house of the appellant till the 23rd January 2016 when she was rescued.
13. What then was she doing for all the three days? Why did she not scream or alert her neighbours? It appears from cross examination that she did not make any effort to escape.
14. This brings me to the question of identification. I do not think that the minor would have failed to identify her assailant having stayed with him for 3 days.
15. While any reasonable person would have expected the minor to react by freeing herself, this did not absolve the appellant from liability. I do not think PW3, the father to the minor had any grudge or malice against the appellant. All that he was doing was tracing her daughter with the assistance of good Samaritans he managed to trace her and which led to the appellant's arrest.
16. The appellant on his part ought to have warned himself that he was dealing with a minor. His defence evidence was not tested at all for he was not cross-examined. If he had differences with PW3 over an allegation that he had an affair with his wife, he should have allowed the prosecution to cross-examine him. In fact he should have raised it with PW3 during cross-examination. In the absence of such a test or cross-examination this court would believe what PW3 stated.
17. The question of PW1 being HIV Positive and the appellant being negative does not hold water. The fact that they had protected sex lends credence to then fact that the appellant should count himself lucky for being negative.
18. In light of the above, I do not think this appeal is meritorious. Even though the arresting officer nor the neighbours who saw the complainant for the 3 days in the appellant's house failed to recorded statements or testify, I find that there was sufficient evidence that the complainant was with the appellant for 3 days in his house and he defiled her.
19. The appeal is hereby dismissed.
20. In regard to the sentence, I noticed from the proceedings that the appellant though granted bond was in custody all through. The 20 years sentence should be computed to run from 26/1/2016.

Orders accordingly.

**Delivered, signed and dated at Kitale this 27<sup>th</sup> day of September, 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**27/09/18**

**In the presence of:**

**Mr. Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**