



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 1 OF 2018**

**(Being an appeal arising from conviction and sentence in Kitale**

**Chief Magistrate's Court Sexual offence case No. 169 of 2015**

**delivered by V.O. Adet Senior Resident Magistrate on 22/2/2017)**

**REUBEN KIPYEGO NDIWA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

1. The appellant was charged with the offence of **Defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006.**

The particulars of the offence were that **on the 24<sup>th</sup> day of September 2015 at [particulars withheld] farm, within Trans Nzoia County, intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of S.C. a child aged 4 years.**

2. He was equally charged with the offence of **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 the 24<sup>th</sup> day of September 2015 at [particulars withheld] farm, within Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of S.C. a child aged 4 years.**

3. The appellant was convicted and sentenced to Life Imprisonment hence this appeal. The brief summary of the evidence as presented at trial court was hereunder;

**PW1 Dr Charles Ngugi Macharia** from Endebess produced the P3 form filled in respect to the complainant . According to the contents the complainant had no visible injuries on the body and the hymen was broken and reddish. There was no bleeding spotted. He concluded that there was recent penetration.

4. **PW2 the complainant** gave unsworn evidence stating that her parents had left for work of selling Kangumu that morning. She remained at home with the appellant and her younger sister V. She said that the appellant removed her clothes and he did remove his and defiled her. She felt pain and she told her

not to tell her mother. He left. She however told her mother who then took her to the hospital.

5. **PW3 E R E** the mother to PW2 testified that PW2 was 6 years old and she produced the clinic card. She said that she left to sell Kangumu on 24/9/2015 and she left at home the complainant, her young sister and V and the appellant. She said that the appellant used to dig latrines and he had requested her to sleep in her kitchen.

6. When she came back at 11.00 am she found PW2 walking with difficulty and when she observed her private parts she saw sperms. She narrated to her how the appellant had defiled her. She said that the appellant had used Saliva to enable penetrate. She took her to the hospital and reported the matter to the police station. The appellant had taken off.

7. **PW4 P.C. Stanley Chepkwony** from Endebess police station carried out the investigations after receiving complaint on 28/9/2015 at 2.30 PM from PW3 who had come with the complainant. He gave them P3 form to be filled and later recorded statements from the witnesses and charged the appellant.

8. When put on his defence the appellant gave sworn evidence and stated that he had worked for PW3 and her husband in selling Kangumu business. That PW3 and her husband had fought severally because of infidelity. He said that he had not been paid for along time and that he was chased away. He said that she owed him kshs 15,000/- and thus all the allegations were as a result of a grudge she had with her.

### **Analysis and Determination**

9. This being a first appeal this court is enjoined to analyse the evidence afresh with a view of arriving at a fresh independent finding. ***(See Okeno Vs Republic (1973) E.A. 32).***

10. There are 3 ingredients now acceptable for the offence of defilement to be proved namely penetration, establishment of age and the identity of the perpetrator.

11. The appellant has equally raised issues in his grounds of appeal which in essence points out to the fact that the prosecution failed to prove its case beyond reasonable doubt. I find that the question of the age of the complainant is not contestable. The clinic card showed that she was born on 8/1/2010 and thus she was about 5 years or thereabouts.

12. Neither is there any dispute as to the identity of the perpetrator. The incident is alleged to have taken place in the morning hours after PW3 left for work. The appellant had stayed with the complainant's family for a long period and it was not possible for PW2 to mistake him.

13. The question however is whether it was the appellant who defiled her. PW2, narrated what happened that morning. It appears that the only other witness who was at the scene was her younger sister Val. She narrated how the appellant removed her clothes as well as his and lay on top of her. She felt a lot of pain.

14. Her mother came back at 11.00 am and observed "sperms on her private parts"

She took her to Endebess District Hospital for treatment.

15. Its generally acceptable that the evidence of minor in sexual offences needs to be corroborated except when the trial court believes that she is speaking the truth.

***(See Section 124 of the Evidence Act, the proviso thereof).***

16. The evidence of PW1 however must be corroborated with the rest of what the other witnesses stated. Looking at the crucial evidence of her mother, I respectively have issues with the same.

17. One of the areas I am unable to understand is her contention that she took the child to the hospital the

same day, that is on 24/9/2015. The treatment booklet from the hospital shows that she took the child on 26/9/2015 – two days after the incident.

18. Further she states that she reported the matter to Endeless police station on 24/9/2015 yet PW4 states that she reported the incident on 28/9/2015.

19. More significantly, it has been alleged by PW1, PW2 and PW4 that the appellant managed to penetrate the child with the aid of Saliva. This was a very crucial piece of evidence but the child did not allude to this. Where did they get the story?

20. I have equally looked at the P3 form produced. It was filled on 29/9/2015, about 5 days after the incident. Save for the broken hymen the doctor did not find any evidence of bruises nor laceration to labia majora and labia minora.

21. It is common knowledge that the child of such tender age has not fully developed strong muscles on her vaginal area. If indeed there was such penetration by an adult of the appellant's age, how come there was no tear visible even to PW3 who only saw sperms and not bleeding. Even if the Saliva was to lubricate the penetration I doubt whether PW3 would not have seen any bleeding.

22. I find the evidence of PW1, PW3 and PW4 not consistent. Infact when cross-examined by the appellant PW2 said that her mother had promised her sweets if she testified although the prosecution attempted to refute the same. This nevertheless in my view is a pointer that there was more than meet the eye.

23. That brings me to the appellant's defence. I find that there was bad blood between the appellant and PW3. It is true that he had been employed in the business of selling Kangumu. There was every reason to believe the appellant that he had not been paid. On several occasions in her testimony PW3 stated that she had chased away the appellant but kept coming. If this was true why did she allow him to remain in her kitchen for one month. Her admission that he had worked with them for 8 months at Kitalale is equally a pointer to their master/servant relationship.

24. The appellant has raised a pertinent issue in his submissions on the defects of the charge sheet. The section which the charge is brought is 8(1) as read with 8(4) of the Sexual Offences Act instead of 8(1) and 8(2) as the complainant was below 11 years. Whereas this is true I do not think the same would have generally affected the character of the suit. There was sufficient evidence that the child was below 11 years and the trial court's conviction based its sentencing on this. I do not see any prejudice suffered by the appellant.

25. For the foregoing reasons I find that this appeal ought to succeed. The evidence by PW2 was not clearly corroborated. PW3 simply failed to convince in her evidence that she treated the child on 24/9/2015. More importantly I think they exaggerated a lot of issues just to nail the appellant. The appellant's defence was more plausible.

26. The appeal is allowed. The appellant set free unless lawfully held.

**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**