



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 23 OF 2017**

**ANDREW KIANGA MOSE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from original conviction and sentence in Criminal Case No.1764 of 2012 of Principal Magistrate's Court at Ogembo of judgment was delivered on October 2014)***

**JUDGMENT**

1. The appellant was charged with Defilement contrary to Section 8 (1) (2) of the Sexual offences Act No. 3 of 2006. The particulars of the offence are that, 'On the 13<sup>th</sup> day of November 2012 in Gucha South district within Kisii county intentionally caused his penis to penetrate the vagina of ABO a child aged 3 years old. He also faced an alternative charge of, "Committing an indecent with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that, "On the 13<sup>th</sup> day of November 2012 in Gucha south district within Kisii County intentionally touched the vagina of ABO a child aged 3 years.
2. The appellant was convicted of the charge of Defilement contrary to section 8 (1) as read with section 8(2) of the Sexual Offence Act and sentenced to life imprisonment.
3. The appeal lodged by the appellant is against the effect said conviction and sentence. His grounds of appeal are that; the conviction was based on contradictory evidence, circumstantial evidence and mistaken identity, the age of the complainant was questionable and that his defense was dismissed without cogent reasons.
4. As a court of first appeal it's my duty to re-evaluate and consider the evidence adduced arrive at my own conclusion bearing in mind that I did not see nor hear the evidence ( **see Okeno vs. R [1972] E.A page 32** )
5. Pw1 DNS testified that IAB is her daughter. She was born on the 16/7/2009. On the 13/11/2012 she went to the shamba and left IA with a neighbor's child called FM. She returned home at about 2pm and was told by the other boy that the child had been taken by a man who said he was taking her to her father. F informed her that the man had given her a guava and walked off with her. She found her child defiled the child was not talking. She could not go as she was out of her mind. She identified the appellant as someone lives a distance from her home. She did not go where her child was found. Her daughter is also called m as she is light skinned.
6. Pw2 SON testified that I is his daughter aged 4 years. He explained that his daughter was given the name I in hospital as they did not know her name at the time of admission, her name is ABO. That the complainant was taken to hospital by Job Okari, Robert and Boniface. He was not there when the child was defiled.
7. Pw3 was Josephine Nyansiaboka Hamisi. She testified that on the 13/11/12 at 11am she was from the river. She found the appellant standing in the trees at Itibo. He was alone. She also met 3 children ABF and another child called mum. They were collecting firewood. She went to her home and after lunch she heard screams. She went to the place where the screaming was coming from and she found many people looking for a baby. She joined the search and they found the child in the sugarcane standing alone. She looked at her private parts and saw blood. F told them that the appellant had gone where they were and called the child to go with him and she had been given a guava. She had met the appellant 70 meters from where she met the children. She did not meet anyone else other than the appellant and the children. The complainant's parents are her neighbors.
8. Pw4 Evans Kenyatta testified that on the 13/11/12 whilst in his home he heard people screaming. He found the people looking for a child. He joined the search and boy who was with the child lead them to the place they were collecting firewood. The boy told them that a man with a bag on his back, white trousers and gum boots had approached them and called K and he told the child her father was calling her. They searched for the child and found her in a sugarcane plantation. She had blood and faeces on her. The child was taken to hospital. Nyansiaboka told them she had seen the appellant near where she met the children. The appellant was later on arrested by the assistant chief. The appellant is known to him he is from the next sub location.

9. Pw5 was FRO after voir dire gave an unsworn statement. He testified that he knows AB they call her K. That he was with her and Kianga Mose went to them and called K, "kuja nikupeleke kwa baba". He took her and went with her to the sugarcane. He did not accompany them. He returned home and informed Mama V. He knows Kianga as he usually see him heading towards the river. On being cross-examined he testified that the appellant took the baby telling her that he was taking her to her father. That he gave her a guava. When examined by court he testified that when Kianga took the baby he was wearing boots and black socks and that he was carrying a bag on his back bigger than the one he carries for school. That he followed them to where they were near the trees. The appellant was holding the baby's hand.

10. Pw6 testified that on the 29/1/2012 he examined ABO and filled the P3 form. The notes of 13/11/12 indicated that the clothes had stains resembling siemens. The said clothes were not brought for inspection. The patient had a history of being defiled by a person she could identify. The inspection file of 14/11/12 indicated that she had normal external genitalia with perennial tear and lacerations. The tear was graded as a 40% degree tear meaning it had extended from the vaginal opening to the vacuum. Lab findings were that HVS, epithelial cells were seen red blood cells were present. Pus cells were multiple. No spermatozoa was seen. VDRL syphilis and HIV tests were negative. The patient went to hospital on 13/11/2012 she was admitted in ward 1 until 19/11/2012. The tear was repaired in theatre and the injuries were assessed as grievous harm. It was observed that she might develop tears and fistula during birth in future. The findings were consistent with penetrative sexual contact and transmission of STI.

11. Pw7 was rearrested the appellant from Etago police station. He also visited the saw signs of a struggle, blood and stool.

12. The appellant gave an unsworn statement as follows; on the 14/11/2012 he was at home when he was woken up and taken to the assistant chief's office. He was not informed of the charges. He was taken to Etago police station then brought to court and charges were read to him, charges he knows nothing about.

13. I have considered the evidence and the submissions by the appellant based its conviction and the prosecution. The trial court convicted the appellant on circumstantial evidence. In **Criminal Appeal Case No. 135 of 2016** the Court of appeal whilst dealing with the issue of conviction on circumstantial evidence stated as follows;

*"However, it is altruism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence. Way back in 1928 Lord Heward, CJ, stated as follows on circumstantial evidence in R v. Taylor, Weaver & Donovan[1928] CR. App. R. 21:*

*"It has been said that the evidence against applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of proving a proposition with the accuracy of Mathematics. It is no derogation from evidence to say that is circumstantial."*(See also Musili Tulo v. Republic Cr. App. No. 30 of 2013). Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v Republic, Cr. App No. 32 of 1990 this Court set out the conditions as follows:

14. *"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*

15. *(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."*(See also Sawe v. Republic (supra) and GMI v. Republic, Cr. Ap. No. 308 of 2011). In addition, the prosecution must establish that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt.(See Teper v. R. [1952] All ER 480 and Musoke v. R. [1958] EA 715). In Dhalay Singh v Republic, Cr App. No. 10 of 1997, this Court reiterated this principle as follows:

16. *"For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal."*

17. The appellant's conviction was based on circumstantial evidence. There was no direct evidence or evidence of an eye witness who saw the appellant commit the offence. The only evidence that linked the appellant to the offence was that of Pw3 and Pw5. Pw5 after being examined by the court gave an unsworn statement and was cross examined by the appellant. He testified that he was with the complainant at the time the appellant approached them and told the complainant that he was going to take her to her father. He saw the appellant give the complainant a guava and he left with her. He testified that he followed the appellant and complainant near the trees. The appellant was holding the hand of the baby. The appellant was a person known to him, he stated, "I usually see him heading towards the river". Pw3 was from the river and she met the appellant standing alone she also met the 3 children the complainant being one of them collecting firewood. The appellant was about 70 meters from where she met the children. The appellant was someone she knew. She helped in searching for the child when she was informed that she was missing. She described the area as flat and with trees. She went home after meeting with the children and she was later informed that the complainant was missing. She helped in looking for the child and they found her. This is the evidence that lead to the conviction of the appellant. The evidence of Pw3 placed the appellant within the area the child was found. It was not her evidence that she saw the child with the appellant. Pw5 was a minor testified that he saw the appellant leave with the child. His evidence was that "Nobody has told me to come and say Kianga took K. I saw him with my eyes. I am telling the truth. It is bad to tell lies." During cross examination by the appellant he replied, "When you took the baby you said "Kuja nikupele kwa baba" you gave her a guava I did not eat the guava" When examined by the court he replied "When Kianga took the baby he was wearing boots and black socks. He was carrying a big bag bigger than the one I carry to school. Pw5 evidence is corroborated by the Pw3 whose evidence placed the appellant within the vicinity the complainant was with the other children. Pw3 heard the screams about 2 hours from the time she saw the appellant. There is evidence that he took the complainant, thus what happened to the complainant can only in the circumstances be linked to the appellant as the one who defiled the complainant minor of 3 years. The trial court had the occasion to observe and record Pw5 evidence. I find his evidence consistent he informed the court that he saw the appellant take the complainant from them. There was no contradiction in the evidence of

Pw3 and Pw5. Pw7s evidence was on arrest of the appellant, he stated he visited the scene and saw signs of struggle, blood and stool. The same things Pw4 saw when he visited the scene on the 13/11/2012. Both narrated what they saw and heard both knew the appellant before. There was nothing to show that Pw5 was influenced and coached to fabricate and doctor evidence against the appellant. In my view there was no issue of mistaken identity. The appellant was known to Pw3 and Pw5.

18. There is evidence from Pw1 and Pw2 that their daughter was 3 years old. Pw1 had a birth certificate which indicated that the complainant was born on the 16/7/2009. So on the 13/11/2012 she was three years 4 months. PW2 explained that the complainant referred to as I at the hospital because she did not give her name and that the birth certificate shows her name ABO, the patient card produced in court indicated examination as 4 year old girl. The difference in this age indication is not fatal to the charge as the complainant was a child below the age of 11 years old. There is evidence from Pw6 that the complainant was defiled the P3 form indicated that the complainant was sexually assaulted. The complainant had perennial tear and lacerations. The tear was graded as a 40% degree tear. Pus cells were multiple no spermatozoa was seen. The tear was repaired in theater and her injury was assessed as grievous harm, the findings were consistent with penetrative sexual contact and transmission of STI. In cross examination Pw6 stated that the lack spermatozoa didn't mean there is no defilement. On the issue that no samples were taken from the appellant, the Court of Appeal in Geoffrey Kionji –vs- Republic Criminal Appeal No.270 of 2010 the Court of Appeal stated as follows;

**“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement”.**

19. On the appellant's defense. The trial court did not overlook it. The trial court considered the defense. The appellant's defense was his arrest. It does not dislodge the prosecution evidence. I find that the conviction was proper and safe. I find that the appeal has no merit and it is dismissed. The conviction is upheld.

Dated signed and delivered this 29<sup>th</sup> day of **October 2018**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

Appellant in person

Mr. Otieno For State

M/s. Rael Court/clerk