



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 45 OF 2017**

**(Being an appeal arising from conviction and sentence in Eldoret Chief Magistrate's Court in Criminal Case NO. 3480 of 2010 delivered by G.A. Mmasi Senior Resident Magistrate on 6/11/2010)**

ASM.....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(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 13<sup>th</sup> day of June 2010 in Keiyo South District within Rift Valley province, unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ (vagina) of SW a girl aged 5 years.**
2. The alternative charge was **Indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence was that **on the 13<sup>th</sup> day of June 2010 in Keiyo South District within Rift Valley province, unlawfully and indecently touched the private parts namely breast and vagina of SW.**
3. The appellant was convicted and sentenced to life imprisonment hence this appeal which raises several grounds. The brief facts and evidence as presented is worth reproducing herein.
4. **PW1 the complainant** testified that she was 5 years old and that on the material day the appellant took her to a maize plantation and defiled her. The appellant threatened to kill her if she screamed. She bled from her private parts. She walked home and told her aunt.
5. **MMS** testifies that the appellant was her husband and the complainant her cousin's child. She said that on 13/6/2010 she left home at 12.30 pm to look for vegetables and left the complainant with other children. On the way she met the appellant driving home the Chief's cows which he was herding. When she came back she did not find the complainant. Her daughter told her that the appellant had taken her to the maize plantation. She called her and she emerged crying and blood was coming out of her private parts. She told her that she had been defiled by the appellant. She took the child to Kaptagat police station and later Moi Teaching and Referral Hospital for treatment. She was also issued with a P3 form which was filled.
6. **PW3 Dr Florence Jaguga** from Moi Teaching and Referral Hospital produced the P3 form which showed that the minor had sustained injuries on her external genitalia which was red and swollen, hymen was torn, and anus had a tear. There was blood in the vagina and the anus. He also produced the age assessment report which showed the child to be aged between 4-5 years. He did also produce the P3 form for the appellant.
7. **PW4 James Titi Musegenya** is the Chief Plateau location. He said that he was called by PW2 on 13/6/2010 concerning the incident. He met on the way the complainant who was bleeding from her private parts. Police officer came and arrested the appellant whom he had employed.
8. **PW5 P.C. Leah Tanui** from Kaptagat police station carried out the investigations after receiving report from PW2. She saw the child who came with her and was bleeding from her private parts. She recorded statements after the P3 form was filled. She preferred charges against the appellant.
9. When put on his defence the appellant gave sworn evidence denying the charge. He narrated how he woke up on 13/6/2010 milked PW4 cows and later went to herd them. In the course of the day he met his wife and her sister going to look for vegetables and later heard her screaming and when he went to inquire she told him that the complainant had been defiled by "Baba". The Chief later came and arrested him while at his friend Isabwa's house.

## **Analysis and Determination**

10. Having perused the proceedings herein as well as the written submissions by both the appellant as well as the learned State counsel, what is clear here is that the age of the complainant was clearly proved by the production of age assessment report. She was a minor aged 5 years.
11. As to whether she was defiled, the answer is on the affirmative. Her evidence and that of PW2 as well as the doctor and all the other witnesses testified to this. The P3 form produced attest to this.
12. The only challenge which I have had to consider is whether it was the appellant who defiled her. Her evidence is simple, clear and straight forward. Yet a key step was overlooked by the trial court, namely, her evidence was not tested through voir dire examination.
13. Voir dire examination is defiled by Black Law Dictionary, 10<sup>th</sup> Edition as:
- “ A preliminary examination to test the competence of a witness or evidence.”***
14. This is the general practice applicable to minors evidence or such person of suspected unsound mind. In this case, the court did not attempt to do so.
15. More importantly there was no evidence to show what nature of evidence the minor gave. Was it sworn or unsworn? Worst of all the language used by the witness was not recorded.
16. Again and more significantly, the appellant was not granted a chance to cross-examine the complainant. The usual practice is to ensure that whether the witnesses give sworn or unsworn testimony, the accused must be granted the chance and opportunity to test the veracity of the witness testimony by cross-examination. In this case none was done as per the proceedings.
17. Without going into any other issues raised in the appeal, I think this appeal has to succeed only on the reasons of procedural technicalities and lapses by the trial court.
18. I have attempted to see whether the same could be salvaged by the Proviso to Section 124 of the Evidence Act Cap 80, namely that the minor spoke the truth. In the absence of voir dire evidence and cross-examination of the child, it is an onerous task.
19. Should this matter be remitted for retrial? It would have been easier if the period between the date of the incident and this appeal was still less. However I reckoned that it had taken about 8 years since the incidence and getting the witnesses may be difficult.
20. I shall therefore grant the appellant that benefit, namely, due to procedural technicality he has to be set free.
21. The appeal is hereby allowed, the appellant set free unless lawfully held.

**Delivered, signed and dated at Eldoret this 19<sup>th</sup> day of October, 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**19/10/18**

**In the presence of:**

**R. Karanja for the Respondent**

**Appellant – present**

**Court Assistant – Christine**

**Judgment read in open court.**