



**REPUBLIC OF KENYA**

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

**CRIMINAL APEPAL NO. 93 OF 2017**

**(Being an appeal arising from conviction and sentence in Eldoret Chief Magistrate's Court in Criminal case No. 190 of 2016 delivered by H.O. Barasa Principal Magistrate on 6/9/2017)**

**ROGGERS BUGONGO NYAJOTI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

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 6<sup>th</sup> day of August 2016 in Wareng district within Uasin- Gishu County intentionally and unlawfully caused his genital organ (penis) to penetrate genital organ (vagina) of WA 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 are that **on the 6<sup>th</sup> day of August 2016 in Wareng district within Uasin- Gishu County intentionally and unlawfully caused his genital organ (penis) come into contact with genital organ (vagina) of WA a child aged 16 years.**
3. He was convicted and sentenced to 15 years imprisonment hence this appeal.
4. The brief facts and summary of the evidence as presented at the trial court was as follows. **PW1 Dr Eunice Temet** produced the P3 form on behalf of Dr Yatich. The same showed that her hymen was broke at position 3, 6 and 9 Oclock and had bruises on both the labia and minora. There was white discharge on the vagina.
5. **PW2 WA** the complainant testified that she was a class 8 pupil at [particulars withheld] primary school. That on 6/8/2016 she was in the appellant's sister place where they had sexual intercourse with him. On 7/8/2016 they again had sexual intercourse with the appellant at Kipkargot. They left for Langas and when they arrived home her mother beat her up and took her to Moi Teaching and Referral Hospital to be examined. She was taken to Langas police station where she recorded her statement. She stated that the appellant was her boyfriend.
6. **PW3 RAO** the mother to the complainant stated how she disappeared from home on 7/8/2016 and never came back. She reported to the police and when she showed up on the same day 7/8/2016 she took her to Moi Teaching and Referral Hospital where she was found to have been defiled. She produced the P3 form as well as the certificate of birth which showed that she was 16 years old.
7. **PW4 MAM** the village elder at Langas testified that PW3 reported that her daughter had disappeared. She advised that she reports at the police station. Later she told her that one I had come with her daughter and were heading to the police. Her neighbour (I) told her that the child had visited her.
8. **PW6 Corporal Benard Koech** carried out the investigations and preferred charges against the appellant.
9. The appellant gave sworn evidence denying the charge. She said that she went to Langas police station as her sister had been arrested. He went looking for Kshs 20,000/= demanded at the police station. He came back the following day but was instead put in and later charged. He denied knowing the complainant as well as her mother.

**Analysis and Determination**

10. The 3 ingredients of defilement are now known, namely, the age of the minor, whether penetration was proved and the identity of the perpetrator.

11. In this case and having read the proceedings as well as the submissions by both the appellant and the learned State counsel I am satisfied that the age of the complainant was clearly proved by her own evidence and the production of the certificate of birth.

12. As to whether she was defiled, the P3 form produced by PW1 shows that she was defiled.

13. Who defiled her? Except for the complainant there is no other eye witness. The complainant stated that the appellant was his boyfriend and that they had sexual intercourse on 6<sup>th</sup> and 7<sup>th</sup> August 2016.

14. In the absence of any eye witness, the proviso to Section 124 of the Evidence Act then kicks in, namely whether her testimony was believable.

15. I have carefully analysed her evidence and that of the other witnesses and I am not convinced that her evidence alone can be trusted. This is for the simple reason that she admitted that the appellant was her boyfriend while at the same time she stated that she did not know that it was wrong to engage in sex at that age. The P3 form shows that the hymen was old and had healed. If she had engaged herself in sex that day, then the doctor in my view would have found it fresh and torn.

16. She infact told the doctor that they had sexual intercourse previously and on several occasions. She was not an innocent girl as one would have expected.

17. Her mother in my view had been suspicious and perhaps, this was the time to nail her. If her child disappeared on 7/8/2015 why would she report to the police on that day? Was she a toddler so to speak.

18. In my view the appellant should be granted a benefit of doubt which I hereby do and set him free unless lawfully held.

**Delivered, signed and dated at Eldoret on 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.**