



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 30 OF 2018**

*(Appeal originating from the conviction and sentence by Hon. SOGOMO G.SRM AT TIGANIA, MERU in criminal case Number 1500 of 2010)*

**JOHN NTORIBI LENTARI.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

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

The Appellant was charged with 4 counts of offences under the Sexual Offences Act No.3 of 2006.

Count 1 is the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No.3 of 2006. The particulars were that, on 21<sup>st</sup> day of November 2010 and 30<sup>th</sup> June 2013 within Meru County the Appellant defiled F K M a child aged 14 years.

Alternative charge to count 1 is the offence of committing an indecent act with a child contrary to Section II (1) of the Sexual Offences Act No. 3 of 2006.

Count 2 is the offence of deprivation of liberty contrary to Section 18 (1) as read with Section 20 of Children Act No. 8 of 2001.

Particulars are that between 21<sup>st</sup> day and 22<sup>nd</sup> day of November, day of November 2010 within Meru County, defiled F K M a girl child aged 14 year old.

Count 3 is the offence of deprivation of liberty contrary to Section 18 (1) as read with Section 20 of Children Act No. 8 of 2001.

Particulars to count 3 are that between 21<sup>st</sup> day and 22<sup>nd</sup> day of November, day of November 2010 within Meru County, willfully deprived D K, a child aged 15 years of her liberty by locking her in his house.

Count 4 is the offence of deprivation of liberty contrary to Section 18 (1) as read with Section 20 of Children Act No. 8 of 2001.

Particulars to count 4 are that between 21<sup>st</sup> day and 22<sup>nd</sup> day of November, day of November 2010 within Meru County, willfully deprived M K, a child aged 15 years of her liberty by locking her in his house.

The Appellant was convicted of the above 4 counts on 12<sup>th</sup> March 2018. Sentenced was deferred to 13<sup>th</sup> March 2018 when he was sentenced to 25 years imprisonment for count 1 and 12 months imprisonment each for counts 2, 3 and 4 to run concurrently.

The Appellant challenged both conviction and sentences in all the counts. The Appellant filed 7 grounds of Appeal and written submissions.

Mr. Naikuni Counsel for the Appellant condensed the grounds of appeal in his oral submissions.

Mr. Naikuni submitted that the Appellant should be treated innocent until proven guilty and burden is on the prosecution to prove his guilt.

That for the Appellant to be committed he ought to have defiled a child between the age of 12 and 15 years and that the element of age is crucial.

He submitted that the Statements have different facts and circumstances. He submitted that the Investigating Officer submitted 2 Statements with two different set of facts and one does not talk of sexual offence and that he never came to Court to explain the difference.

Counsel submitted that the Statements are incriminating and the Appellant should be given the benefit of doubt.

Secondly, Counsel submitted that the clinical officer testified that the minor's hymen was broken while Pw1 (minor) said the clinical officer did not examine her private parts. Further, the clinical officer who is a pediatrician said the hymen can be broken by other circumstances; that his conclusion is not conclusive and cannot therefore be relied on.

The 3<sup>rd</sup> ground is that the evidence of Pw1, Pw3 and Pw7 all minors was not corroborated yet the trial Court anchored its conviction on their evidence.

Ground 4 is on estimated ages of Pw1, Pw1 and Pw7. Counsel cited the case of **Joseph Kiati Seet V Republic [2014] eKLR**, where the Court held that it was trite law for the age of the victim to be determined by medical document and apart from medical doctor certificate of birth. He submitted that the age of Pw1 seem to be varying. That the doctor said 14 years while Pw1 said 15 years. Counsel invited Court to find that the age of the victim has not been determined.

Counsel further submitted that there is protracted land dispute between the family of Pw1, Pw7 and the Appellant and that there could be ill motive behind the charge of the Appellant. He submitted that the complainant was coerced by her parents who went to the extent of beating her. He submitted that the Appellant never committed the offence as alleged and that he was not given fair hearing; that the fact that the Appellant was convicted and sentenced the next day is curious. He urged Court to find that the sentence of 25 years is extremely severe.

In response, Mr. Namiti for the State conceded count 2, 3 and what is left for Courts determination is count 1.

On the issue of fair trial, he submitted that during investigations all manner of things happen including plea bargaining and nothing is wrong with two Statements being recording. He added that one Statement was recorded in public and not all will be revealed in public.

On age, the State Counsel submitted that at the time the offence was committed the minor was 14 years old but she testified a year later. He submitted that Pw1's age was established as the Court can rely on P3 report.

On corroboration, the State Counsel submitted that the Court could rely on evidence of a minor as long as it believes that the minor is telling the truth.

State Counsel submitted that the girl explained her ordeal in the hands of the Appellant and that evidence of Pw1 and Pw4 are corroboration and based on the facts given; that the trial Court had no option but to met out the sentence provided by law.

In a rejoinder, Counsel for the Appellant thanked the State Counsel for conceding counts 2, 3 & 4 but argued that there was no prove that the second Statement was recorded in public and that evidence of a minor has to be corroborated. He urged the Court to allow the appeal.

This being the first appellate Court, I am obligated to reevaluate evidence adduced before the trial Court and make an independent determination. I however, wish to point out that the fact that unlike the Trial Magistrate, I have not had the benefit of taking evidence first hand and opportunity to observe demeanor of witnesses.

The guiding principles in handling first appeal have been set out in the case of **OKENO VS REPUBLIC [1972] EA 32** as hereunder:-

***“The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala V. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)***

I wish to consider whether ingredients for the offence of defilement have been established which are as follows:-

- Prove of penetration;
- Prove of age;
- Identification of assailant.

From record, identification of assailant is not an issue herein. What I consider to be in issue is whether there was prove of penetration and age of the complainant.

On penetration, record show that the clinical officer testified that the hymen of complainant was torn. He concluded that the girl was defiled based on broken hymen. On the other hand, the complainant testified that the clinical officer never examined her private parts. She said urine sample was taken from her. The question that arise is, how then did the Clinical Officer come up with conclusion of broken hymen if no physical examination was done? In cross-examination, the clinical testified that no traces of semen were found on the complainant; and that he relied on history and not scientific proof.

Further to the above, none of the other two girls Pw3 and Pw7 who were alleged to have been with the complainant in the Appellant's house witnessed what happened at the time the Appellant is alleged to have remained in the house with the complainant. Both witnesses testified that during the night, the 3 girls slept in one room while the Appellant slept alone in another room.

The complainant having contradicted the clinical officers evidence and in the absence of any other independent evidence, one cannot authoritatively conclude that the child's hymen was broken and therefore no proof of penetration.

On the issue of age, I have not seen any birth certificate or age assessment report in the file. The complainant testified that she had repeated classes severally in her previous school. It was necessary for her age to be established at the time of the alleged offence.

From the foregoing therefore, it is evident that there is no medical finding to corroborate the complainant's evidence.

The complainant never divulged to her two friends nor her mother any information of defilement. Instead, she told her mother that she was an adult and she should not toil for her. To her friend she only told them that there was something she would reveal.

From the foregoing, I find the Appellants appeal merited.

**FINAL ORDER**

Convictions and sentences in counts 1, 2, 3 & 4 are quashed.

The Appellant is hereby set free unless otherwise lawfully held.

**Judgment Dated and Signed at Nairobi this 19th day of November 2018.**

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**RACHEL NGETICH**

**HIGH COURT JUDGE**

**Delivered at Meru this 23<sup>rd</sup> day of November 2018.**

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**JUDGE**

**IN THE PRESENCE OF**

.....COURT ASSISTANT

.....COUNSEL FOR APPELLANT

.....STATE COUNSEL