



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 53 OF 2017**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court in Sexual Offence No. 64 of 2016 delivered by G.N. Sitati Resident Magistrate on 3/7/2017)**

**EVANS WEKESA OKIRU ..... 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) (3) of the Sexual Offences Act No. 2 of 2006**. The particulars of the offence were that **on the 13<sup>th</sup> day of May 2016 within Elgeyo Marakwet County, intentionally caused his penis to penetrate the vagina of C. N., a child aged 14 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 of the charge were that **on the 13<sup>th</sup> day of May 2016 within Elgeyo Marakwet County, intentionally touched the vagina of C. N., a child aged 14 years with his penis.**
3. The appellant was convicted and sentenced to 20 years imprisonment hence this appeal. In his amended grounds of appeal, the appellant has argued that the complainant's evidence was not corroborated and that key witnesses were not called and the age of the complainant was not determined.
4. The brief summary of the evidence as presented during trial was as follows. **PW1 , the complainant** stated that she was 14 years old having been born on 31/5/2002 and a class 5 student at [particulars withheld] primary school. She said that she was sent by her mother to buy sugar and vegetables as well as charge her phone at Kamoi trading Centre. On her way back she decided to use a shortcut road . On the way she was followed by the appellant, a person whom she knew as their neighbour. He then pushed her to the ground and began strangling her. He undressed her and began defiling her. She felt pain and a certain lady (Mama Nanjala) came to her rescue.
5. She then went to report to her in-laws. The appellant apparently waited for her again and tried to pin her down. She escaped and was taken to Kamoi dispensary at Cherenganyi. She was treated at Suwerwa health centre. They reported with her mum at Kapcherop police station.
6. On cross-examination by the appellant the complainant stated that she did not have any difference with the appellant.
7. **PW2 Rosemary Naliaka** is a neighbour to both the complainant and the appellant. She testified that on the material day she was from a church meeting when she passed through a shortcut path heading home. She heard some screams and as she went to find out she found the appellant strangling the complainant. He escaped by running away with the phone. She took PW1 to her mother and advised them to report to the police station.
8. On cross-examination by the appellant she insisted that she found him on a top the complainant.
9. **PW3 G S W** testified that on 15/5/2016 she was told by one Jeremiah his cousin that PW1 had been defiled. He said that he was among those who took her to the hospital – Suwerwa health centre. He said that the appellant was his friend and a neighbour.
10. **PW4 Reuben Kiptoo** a Clinical Officer at Kamoi dispensary examined the complainant and found that she had injury on her neck and vaginal area. The neck was swollen and tender and muddy. Her labia minora and majora had sperms on the surface and discharge on the cervix and vaginal walls. The hymen was absent. He concluded that there was penetration.
11. **PW5 CPL William Manyonge** from Kapsowar police station carried out the investigations while by then at Kapcherop police station.

He gave her P3 form and recorded statements from the witnesses. The accused had escaped to Chepkoiyo near Sibanga area where he was traced and arrested.

12. When put on his defence the appellant gave unsworn evidence denying the charge. He said that he was not at home during that time as he had taken his wife to Sibanga hospital as she was expectant. He was arrested on the 17<sup>th</sup>. He thought the offence he had committed was assaulting a canteen lady on 28/4/2016. He admitted that she was a neighbour to the appellant. He generally denied the charge.

### **Analysis and Determination**

13. The court has carefully read the proceedings herein as well as peruse the medical documents produced. The handwritten submissions by the appellant has equally been read. The respondent apparently did not file any submissions.

14. The three issues which must be proved for this nature of offence are now obvious, namely the age of the victim, the identity of the perpetrator and the question of penetration.

15. The question of whether the complainant was defiled in my view was well corroborated by the production of the treatment documents from Kamoi dispensary and Suwerwa health Centre. The Clinical Officer went ahead to find that the complainant had injuries on her neck which lends credence to her assertion that she was strangled by the assailant. The injuries seen on her vaginal area and the absence of the hymen shows that she had been defiled.

16. Did the appellant defile the minor? The evidence by the minor in my view was not shaken during cross-examination. She was able to see clearly the perpetrator as it was day time.

17. PW2 equally testified that he saw the appellant on top of the minor and he asked him what he was doing. It is PW2 who took her to her parents and advised them to report to the police as well as take her to the hospital.

18. Was there malice on the part of PW2? I do not see any. There was nothing to suggest that PW2 and the appellant did not know each other. They were all neighbours. There was no suggestion of any conspiracy between PW1 and PW2.

19. The question of whether the appellant attempted to defile the complainant twice did not come out clearly. Nevertheless, the hearing established the first time, in my view, that was sufficient.

20. Then the question of the complainant's age has been submitted hotly by the appellant. Looking at the record, it is clear that there was no documentary or age assessment report to show the age of the minor. However, from her own evidence and that of the Clinical officer and the police, they all gravitate at the age of 14 years.

21. Section 2 of the Children's Act defines a 'child' as a human being under the age of 18 years. It defines a "child of tender years" to be a child under 10 years.

22. Even if there was no birth certificate produced or age assessment or school records, I find the age of 14 years consistent with the definition given by the Children's Act above. In other words, the complainant was a child for all intent and purposes. That refutation by the prosecution did not in any way oust out the fact that the appellant was not found guilty of the offence. The complainant was a child.

23. The age bracket of the child was not suggested to be beyond 15 years. Even if this court was to give a benefit in terms of age the same cannot go beyond 15 years to afford the sentence to be below 20 years as envisaged by the provisions of Section 8(3) of the Sexual Offences Act. In other words he cannot benefit from the provisions of Section 8(4) of the Sexual Offences Act.

21. In a nutshell, the prosecution did prove its case beyond reasonable doubt. The appellant well known to the minor as well as PW2 was found in the act. His alibi unsworn evidence was not tested on cross-examination. It was not clear whether on the material day he was at Chepkoiyo nursing his expectant wife. The defence was a sham.

22. Consequently, I do not find any merit in this appeal. The same is hereby dismissed.

**Delivered, signed and dated at Kitale this 17<sup>th</sup> day of December, 2018.**

\_\_\_\_\_  
**H.K. CHEMITEI**

**JUDGE**

**17/12/18**

**In the presence of:**

**Mr Kakoi for Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**