



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 124 OF 2014**

**{Being an appeal arising from the judgment of Kitale Resident Magistrate P.W. Wasike delivered on 20<sup>th</sup> day of November 2014 in Criminal Case NO. 1914 of 2013}**

**E W M.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged with the offence of Defilement of a child contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act NO 3/2006. The particulars was that on the diverse days between 1<sup>st</sup> day of March 2013 and 4<sup>th</sup> august 2013 at [particulars withheld] village within trans Nzoia County intentionally caused his penis to penetrate the vagina of L N a child aged 16 years.

He was also charged with the alternative charge of committing an indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3/2006. The charge was that on the diverse dates between 1<sup>st</sup> March 2013 and 4<sup>th</sup> August 2013 at [particular withheld] village within Trans Nzoia County intentionally caused his penis to penetrate the vagina of L N a child aged 16 years.

The second count was Assault causing actual bodily harm contrary to section 251 of the penal code.

The charge was that on the 4<sup>th</sup> day of August 2013 at [particulars withheld] village within Trans Nzoia County unlawfully assaulted L N thereby occasioning her actual bodily harm.

The appellant was convicted and sentenced to 15 years imprisonment on count 1 and 3 months for the 2<sup>nd</sup> count. He has appealed against the entire sentence and conviction via the petition herein. Its therefore worthy at this juncture to summarise the proceedings at the trial court . Caution however ought to be taken by this court for it did not have the luxury of seeing the witness or hearing their testimonies.

**PW1**, the minor herein was aged 16 years. She testified that in March 2013 at around 7pm he made the appellant who was a boda boda rider and who was the boyfriend to her aunty. He then took her to his house and proceeded to defile her for several months.

Eventually the complainant was assaulted by the appellant severally while she was with her. She managed to escape to her grandfather's place. The appellant with his other friends went to the complainant's grandfather house on 4/8/13 where they broke the door and forcefully assaulted the complainant and took her away. In the process she managed to escape and reported the matter at the

chief's place. The complainant's grandfather was called and took her to the police station and later to the hospital for treatment. The appellant was arrested and charged. The examination of the complainant showed that the complainant had been defiled and had physical bodily injuries.

On cross examination the complainant was categorical that it was the appellant who had locked her in the house for those several days and defiled her. She was also categorical that it was the appellant who had physically assaulted her causing her injuries.

**PW2 Bramwel Kituyi Makokha** is the assistant chief Kipsongo sub location. He testified that on 5/8/13 the complainant came and reported the assault by the appellant. She also reported that she had been defiled by the appellant. He reported the same to the police station at Kitale and had the appellant arrested.

**PW3 S M W** is the brother to the complainant . He testified that on 4/8/13 at around 9 pm the appellant and others came and forcefully broke their door and assaulted the complainant before taking her away using a motor bike. He reported the matter to his grandfather . She knew that the complainant had disappeared from march but she didn't know her whereabouts.

**PW4 J M S** is the grandfather to the complainant. He said that he was called by PW3 and told of the incident. He came the following day and he found the broken door. He reported the matter at Kitale police station.

**PW5 Linus Ligare** produced the P3 form which had conclusion that the complainant had been defiled and that her virginity had been broken. He also confirmed the injuries on the complainant's ribs side the upper back and thighs.

The said witness also produced the age assessment report by Dr Jonathan Kiprop which showed the complainant's age to be 16 years.

**PW6 Sergeant Josline Wabwire** testified on behalf of P.C. William Ambayi whom she jointly carried out the investigation. They found that the complainant had been staying with the appellant after running away from her parents. The appellant was arrested having assaulted the complainant and damaging the door of the complainant's grandfather. She produced the photographs taken at the scene by the scenes of crime officer.

When put on his defence the appellant gave unsworn evidence. He stated that on 5/8/2013 he received a report from his estranged wife J N requiring him to go to the Assistant Chief's office to discuss the issue of their child. She was arrested and accused of raping and beating the complainant. He was charged with the offence and still denied the same.

### **Analysis and Determination**

I have perused the entire proceedings together with the submissions by the parties herein as well as the grounds of appeal laid down by the appellant. For the offence of defilement to succeed one ought to establish that there was actual penetration of a minor and that the assailant was properly identified.

The age of the complainant was settled in my view by the dental formular analysis by one Dr Kiprop whose report was produced by Mr Ligare. Although there was no birth certificate or any other pieces of evidence, the said medical report clearly showed the complainants apparent age. This finding was not ousted by any other evidence or even on cross-examination.

On the question of identity of the assailant, I am satisfied by the evidence of all the prosecution witnesses that the appellant was well known to them. PW1 in particular knew the appellant to be a boyfriend to one J N her aunty. This was not controverted by the appellant. The mere fact that they spent close to over 3 months in my view was indeed sufficient.

The complainant brother PW3 equally saw the appellant with the aid of electric light when he came to pick the complainant from her grandfather's house. There mere exercise of breaking the door as well as assaulting the complainant must have given him sufficient time to recognize the appellant whom he knew as a motor bike rider earlier own.

Its therefore my findings that on this question of identity there was no mistaken identity.

The other issue is that of penetration. The complainant graphically testified of how the appellant defiled her that first night.

Subsequently he proceeded to do so for the next several days. According to the P3 form produced and the history, the complainant had gotten married to the appellant. There was evidence of broken virginity as the same was old looking.

Perhaps it would have been appropriate if the appellant had shed light even by cross-examination or in his defence to explain his whereabouts in the period between March and August. Infact his defence simply explained what transpired at the time of his arrest.

In the premises and despite his assertion in his submissions that he was set up by the complainant's grandfather, the sane holds no water. The courts findings on the first count was factual and based on sound law and this court cannot interfered with it.

As regards the 2<sup>nd</sup> count, the appellant brother testified that he saw the complainant being assaulted by the appellant as well as his friends. That finding was confirmed by the treatment documents as well as the P3 form. I do not find any other basis for the injuries suffered by the complainant. Infact I can easily conclude that the appellant seemed to have taken the complainant as his wife.

The sum total of my findings is that the appeal is not meritorious. I do not find any contradicting evidence as claimed by the appellant in his grounds of appeal. The evidence so far presented was consistent. Although there was no eye witness to the period of March and August when the appellant was staying with the appellant, the evidence on record does not oust the fact that the complainant was defiled.

I do not find any merit in the appeal and the same is dismissed.

**Delivered this 25<sup>th</sup> day of January 2017.**

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**H.K. CHEMITEI**

**JUDGE**

**In the presence of:**

**Kakoi for state**

**Appellant - present**

**Kirong – Court Assistant**