



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BOMET**  
**CRIMINAL APPEAL NO. 2 OF 2016**

**BENARD KIPKURUI ALIAS BETT.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

(Being an appeal from the original conviction and sentence in criminal case No. 73 of 2014 PMs Court  
Sotik – Hon Omwansa SRM)

**JUDGMENT**

The appellant was convicted and sentenced to twenty five years (25 years) for the offence of defilement C/S 8 (1) as read with S. 8 (2) of the Sexual Offences Act No.3 of 2006.

The particulars being that on the 26th day of September 2014 in Bomet county intentionally caused his penis to penetrate the vagina of S C a child aged Seven years.

This is the first appellate court. It has a duty to evaluate and reconsider the evidence on record so as to arrive at its own conclusions bearing in mind that it did not have the opportunity of observing the demeanour of the witnesses.

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The prosecution in this case called four witnesses in support of their case. The defence called two.

**Brief facts**

The complainant a girl child aged seven years and in class 1 at [particulars withheld] Primary School had on the 26<sup>th</sup> day of September 2014 gone to draw water at a nearby river when she met with the appellant who was seated on a log beside a foot path. They had a conversation whereby he indicated that he had lost his money in the bushes where she was collecting firewood and he wanted her to help him search for it. She agreed to take water home and return. Upon return they looked for the money but in vain. It was at that juncture that the appellant got hold of her, removed her skirt and pants, removed his long trouser and proceeded to put his manhood into her private parts.

She screamed for help but he muffled her cries by the use of his hands. Upon finishing, he dressed her and himself and warned her not to tell anybody on what had transpired. However, she decided to report to her mother who in return reported to neighbours. The accused/appellant was sought for and was arrested. The following day she was taken to hospital for examination and treatment.

The ingredients of defilement are ;

1. Age
2. Penetration
3. Identification and corroboration

### **Age**

The complainant's mother PW2 did testify that her daughter (PW1) was born on 4/9/2007. She produced a birth certificate in court to that effect and which showed birth as 4/9/2007.

According to the charge sheet the incident took place on 26<sup>th</sup> September 2014, that places the age of the complainant at seven years.

### **Penetration**

The complainant did testify of how the appellant tricked her into going to the bushes to search for non-existent money and of how the appellant pounced on her and defiled her.

When the matter was reported to her mother (PW2) she proceeded to lock her and found brownish milkish substances on her private parts.

The complainant was examined by Dr. Koech (PW4). Upon examination he observed small abrasions on the spine abrasions on the right and left thigh. Both labia majora and minora were bruised and on the hymen was torn. Penetration was proved.

### **Identification**

The incident took place at 6.00 p.m. which was in broad daylight. The appellant was known to the complainant before. They had a chat and she agreed to return after taking water. She had drawn home. She returned and it is at this juncture that the appellant revealed his intentions. There was ample time and opportunity for the complainant to recognize the appellant and identify him.

### **Corroboration**

The evidence of the complainant has been corroborated by that of her mother (PW2) and PW 3 both who checked her private parts and that of the Doctor (PW4) who was satisfied that penetrative coitus .....was achieved.

In his defence the appellant opted to state that he knew nothing of the events of 26<sup>th</sup> September 2014. DW2 testified to have been on duty with the appellant at a Hotel where they both worked. He however, did concede that the appellant did go to the river to draw water. I am satisfied that the learned trial magistrate did consider his defence.

On the issue as to whether his rights to a fair hearing were violated. A perusal of the proceedings shows that on the day of plea there was an order for the appellant to be furnished with witness statements. At no time during the hearing that the appellant informed the court that he had not been supplied with witness statements.

On the issue of the investigations officer having not been called to testify, it's not mandatory in every case that he should be called. Indeed there are cases and instances where the investigating officer's input is required so as to collate and synthesize evidence adduced by witnesses more so on very complicated cases.

The present one does not present any complications at all. There are no gaps and or explanations which require the investigation officer's input.

Upon careful analysis and evaluation of the evidence on record, I am satisfied that the conviction was safe and sentence was lawful. Both are upheld.

The appeal has no merit and its dismissed.

**Judgment delivered dated and signed this 27<sup>th</sup> day of April, 2017** in open court and in the presence of learned counsel for the prosecution Wawire. The appellant in person present Court Assistant Rotich.

**M. MUYA**

**JUDGE**

**27/4/2017**