



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL 289 OF 2011**

**PHILEMON TIEMOSI KIPROTICH..... APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

*(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. H. O. Barasa– Resident Magistrate delivered on the 24<sup>th</sup> February, 2011 in CMCR Case No. 76 of 2010)*

**JUDGEMENT**

The appellant herein **PHILEMON TIEMOSI KIPROTICH** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting the Nakuru Law Courts.

The appellant was arraigned before the trial court on 7/6/210 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(3) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

*“On diverse dates between 1<sup>st</sup> May, 2010 at 3<sup>rd</sup> June, 2010 [particulars withheld ] in Nakuru District within the Rift Valley province, unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of B W a child aged 12 years which act caused penetration”.*

The appellant also faces an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant pleaded ‘**Not Guilty**’ to both charges and his trial commenced on 14/6/2010. The prosecution led by **CORPORAL MUREITHI** called a total of six (6) witnesses in support of their case.

**PW1** was the complainant. After being taken through a ‘**voire dire**’ examination, the child gave sworn evidence. She told the court that on the material day she left school. On her way home the complainant realized that she had left her sweater in school and returned to collect it. As she walked back home, she walked through a short cut through the thicket near Timsales. The appellant accosted her and dragged her into the bushes. He showed her a knife and told her to undress. The child complied. The appellant then lay on top of her and defiled her. After the act the appellant gave her Ksh 50/=. The child dressed up and went home. Later the child’s parents saw her with the Ksh 50/- and demanded to know where she got the money. The complainant revealed to them that she had been defiled. She stated that this was not the first time the appellant had defiled her. The complainant identified the appellant as the man who had defiled

her. The matter was reported to police. The appellant was arrested and the child was taken to hospital for medical attention.

At the close of the prosecution case the appellant was found to have a case to answer and was onto his defence. The appellant gave an unsworn defence in which he denied having defiled the child. On 24/2/2011 the learned trial magistrate delivered his judgment in which he convicted the appellant on the main charge of Defilement and thereafter sentenced him to serve twenty (20) years imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this present appeal.

This being a first appeal the court is obliged to re-examine and re-evaluate the prosecution case and draw its own conclusions on the same. **(see AJODE Vs REPUBLIC [2004] KLR).**

In any case of defilement the prosecution must prove beyond reasonable doubt the following

1. The age of the victim
2. The fact of penetration
3. The identity of the assailant

The age of the victim is an essential ingredient in any charge of defilement as the child's age will determine the sentence to be imposed should the accused be convicted.

In this case the complainant in her evidence said that at the material time she was in class 6 and was 13 years old. **PW4 R K W** the complainant's mother said that her child was 14 years old. She produced as an exhibit the complainant's Immunization Card **P. exb 3**. This is an official document and the same indicates that the complainant was born on 14/2/1998. Therefore in May/June 2010 when this incident occurred the complainant was aged 12 years old. I am satisfied that the complainant's age has been proved beyond any doubt.

The next element requiring proof is the fact of penetration. The complainant told the court, that on the material day in May, 2010 she was accosted as she walked home, was dragged into the nearby bushes and defiled. In her own words the complainant stated at page 5 line 15

***“He then grabbed me, covered my mouth and took me into the bush. I saw him well. He told me to remove my pant. I refused but he showed me a knife. I was afraid so I removed my pant. He told me to lie down I complied. I lay on my back. He then removed his trouser and shot and lay on me. He defiled me.....”***

The child has given here a detailed account of what happened to her. I see no reason at all why the complainant would claim to have been defiled if no such thing occurred. She had nothing to gain by making such an allegation.

**PW3 ROBISON KIPSUT** a clinical officer attached to the Njoro Health Centre told the court that he examined the complainant on 5/6/2010. He noted that her hymen was perforated and she had a bacterial infection. In a child so young the torn hymen is conclusive proof that penetration had occurred. The evidence of the doctor corroborates the complainant's testimony that she had been defiled.

The final ingredient requiring proof in a charge of Defilement is the identity of the perpetrator. The complainant had identified the appellant as the man who defiled her. The incident occurred during the day time as she was walking home from school. Visibility was good and the child was able to see her attacker. The complainant obviously spent several minutes in close proximity with the man who defiled her. He spoke to her as he ordered her to undress. I find that the complainant had ample time and opportunity to see and identify her assailant. When questioned by her family the complainant identified the appellant as the man who defiled her. Though she did not know his name, she knew him as a regular customer in her mother's hotel. Thus he was a man she knew well.

**PW2 F W** a brother to the complainant and **PW4** the child's mother confirm that the complainant pointed at the appellant when he came to take tea in their hotel. **PW4** confirms that the appellant was a regular customer in her hotel.

**PW5 APC YUSSUF SORE** was the officer who received and booked the report on 3/6/2010. He stated that the following day he was called to the hotel of **PW4** upon arrival there the child pointed out the appellant as the man who had defiled her. **PW5** arrested the appellant and took him to the police station.

At no time did the complainant waver in her identification of the appellant. The complainant was a mere child. She had no grudge against the appellant nor was there any history of a family feud. The child had no reason to falsely implicate the appellant. I am satisfied that there has been a clear, positive and reliable identification of the appellant by the complainant.

The accused merely gave a blanket denial in his defence. The trial court did consider his defence but rightfully in my view dismissed the same.

From the evidence adduced during the trial I am satisfied that the charge of Defilement was proved beyond reasonable doubt. The appellant's conviction was in my view sound and I do uphold that conviction. Section 8(3) of the Sexual Offences Act provides for a mandatory minimum sentence of twenty (20) years where one is convicted of having defiled a child aged between twelve to fifteen years of age. The sentence imposed upon the appellant by the trial court was therefore lawful and I do confirm that sentence.

Finally this appeal fails in its entirety and is hereby dismissed.

**Dated in Nakuru this 28<sup>th</sup> day of July, 2017**

Read in open court

**Maureen A. Odera**

**Judge**