



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 122 OF 2015

*(Being an appeal arising from conviction and sentence in Kitale*

*ChiefMagistrate's Court Criminal case No. 2568 of 2014 delivered*

*by C.C. Kipkorir – Resident Magistrate on 20/11/2015)*

ABRAHAM WAMALWA MATITWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGMENT**

1. The appellant was charged with 2 counts of **Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 30<sup>th</sup> day of June 2014 at [Particulars Withheld]village, within Trans Nzoia County, intentionally caused your penis to penetrate the vagina of J A a child aged 10 years.
2. The appellant was charged with an alternative charge of **Committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act NO. 3 of 2006**. The particulars were that on the 30<sup>th</sup> day of June 2014 at [Particulars Withheld]village , within Trans-Nzoia County, intentionally touched the vagina of J A N a child aged 10 years with his penis.
3. The appellant was also charged in Count II with **Defilement contrary to section 8(1) as read with Section 8 of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 30<sup>th</sup> day of June 2014 at [particulars withheld]village, within Trans Nzoia County, intentionally caused his penis to penetrate the vagina of M N a child aged 8 years.
4. The appellant was charged with alternative charge of **Committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the 30<sup>th</sup> day of June 2014 at [particulars withheld]Village , within Trans Nzoia County, intentionally touched the vagina of M Na child aged 8 years with his penis.
5. He denied the charges and the prosecution witnesses testified as hereunder;
6. **PW1 JA** a class 3 pupil at [particulars withheld] primary school told the court that they were heading home from school together with PW2 when on the way they met the appellant whom they knew. He

pulled the two girls into his house which was nearby. He then proceeded to defile them while he had covered their mouths. PW1 stated that she could not scream as the appellant had threatened to stab her with a knife which was in his pocket.

7. After he was done with her he proceeded to defile PW2. Later the appellants aunt one Mama Mkamba came and demanded that he frees the children. The appellant opened the door and beat the said Mama Mkamba. The complainant managed to escape and they went and told their parents. They were then taken to hospital and later report made at the police station Suwerwa centre as well as Kitale Police Station.

8. **PW2 M N** said in her unsworn evidence that she was aged 8 years and a class 3 pupil at [particulars withheld] primary school. She testified that on 30/6/2014 she was with PW1 picking firewood on their way from school. They met the appellant who took them to his house and began defiling them. She said that the incident took place inside the appellants house on his bed. She could not scream although she cried as the appellant had threatened to stab them with a knife which he had in his pocket. One Mama Mkamba came and ordered the appellant to open the door and at that time the children managed to escape. Just like PW1 she was also taken to Suwerwa hospital and later to Kitale police station.

9. **PW3 S J** is the father to PW2 . He testified that on the material day her child came home crying at around 4 pm together with PW1. They told him that the appellant had done bad manners to them. He went to the appellant house but did not find him in the first instance but found him the 2<sup>nd</sup> time. He found him speaking to the neighbours and he proceed to arrest him and took him to Suwerwa Police Station. They also brought the children to Kitale District Hospital.

10. **PW4 A N W** was working on the material day and he received report that the child had been defiled. He was told by his in - law R N. Her daughter is PW2 J A. By then the appellant had already been arrested and was at the police station. He went and saw her daughter at the hospital who was injured and could not walk. He said that her daughter developed complications thereafter and began fainting after the incident.

11. **PW5 John Koima** a clinical officer produced the P3 forms in respect to the minors. He said PW1 when he examined found that she had bruises on her vagina but did not have any discharge.

PW2 J A had her cervix open and laceration on her vaginal wall.

12. **PW6 PC Simon Kimutai** the investigating officer rearrested the appellant when he was brought by the members of the public. He recorded statements from the witnesses and preferred charges against the appellant. He also produced the birth notifications of the complainants herein.

13. When put on his defence the appellant gave unsworn evidence. He talked of a lady friend whom he was with during the incident. He said that he was on the road with others where he was beaten and taken to the police station. He did not understand what was going on. He generally denied the charge and said that the same was a lie.

### **Analysis and Determination**

14. This being a first appeal the court is bound to analyse the evidence afresh and come up with independent findings with full knowledge that it did not have the benefit of trying the matter and so seeing the witnesses testify.

15. In his grounds of appeal the appellant has basically attacked the medical evidence produced as well as the ages of the complainants which according to him was not proved.

16. It is now clear that for the offence of defilement to be proved, the age of the victim ought to be established, the identity of the perpetrator as well as actual penetration ought to be proved.

17. In the first instance the age of the children in my view was proved. The notifications of births of both minors was sufficient in my view. In any case there was no objection on the part of the appellant during trial. To argue as he has done in his written submissions that the document appear new and recent is too pedestrian to say the least.

18. The incident occurred during the day. Consequently the children were not mistaken in my view. They knew the perpetrator well that is why they readily informed their parents immediately they left the scene. Although one Mama Mkamba was not called to testify I find that the evidence of the two minors corroborated each other.

19. Were they defiled? I think the answer is on the affirmative. Both girls explained how they were lured into the appellant's house. They were each undressed and the appellant did "bad manners" to them. Both conceded that they felt pain and cried but were unable to raise any alarm as the appellant was armed with a knife which was in his pocket. Both saw the knife.

20. The P3 forms together with the treatment forms corroborated the findings that they were defiled. There was laceration on the minors private parts which according to the conclusion of the medical assessment showed that they were defiled. The appellant has advanced an argument that the complainants would have sustained the injuries elsewhere for instance while playing or such other place. I think the same is not true following the evidence on record.

21. In the premises I do not find this appeal meritorious. The appellant's sentence was to run concurrently which I find proper in the circumstances. Neither do I find the charge sheet defective contrary to the averments by the appellant.

22. The appeal is otherwise dismissed.

Delivered this 27<sup>th</sup> day of July, 2017.

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**H.K. CHEMITEI**

**JUDGE**

**In the presence of:**

**Kakoi for the respondent present**

**Appellant – present**

**Kirong/Silvia – Court Assistants**

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**H.K. CHEMITEI**

**JUDGE**

**27/7/2017**