



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 71 OF 2015**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal Case No. 45 of 2014 delivered by C.N. Mugo Resident Magistrate on 4/6/2015)**

**E W C.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

1. The appellant was charged with the offence of **Defilement of a child 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 31<sup>st</sup> December 2013 at [*Particulars Withheld*] Trans Nzoia County intentionally and unlawfully caused your penis to penetrate the vagina of E N S a child aged 6 years.
2. The alternative count was **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 31<sup>st</sup> December 2013 [*particulars withheld*] within Trans Nzoia County intentionally caused the contact between your genital organ (penis) and the genital organ (vagina) of E N S a child aged 6 years.
3. The appellant denied the offence, he was convicted and sentenced to Life imprisonment hence this appeal. The summary of the evidence as presented during trial is as hereunder;
4. **PW1 A N S** the mother of the complainant testified that on the material day at around 5.30 pm she was in her house doing her chores when the appellant passed by and greeted her. The appellant was the son to her in law and therefore a person well known to her. The child (PW2) was outside playing. After about 30 minutes she went outside and the child was nowhere. She searched around the neighbourhood to no avail. After a while D, the sister to the appellant, came shouting that the appellant and the complainant were inside a bush nearby. She rushed to the scene and she found the child crying and with no pant. She sent D to call people who managed to arrest the appellant and on being searched the child's panty was found in the pocket of his jacket. The village elder arrested and took him to the police. She examined the private parts of the child and saw mucus like substance. She took her to the hospital and later recored statement after the P3 form was filled. The birth notification card showed that she was born on 21/2/2008.
5. **PW2 the complainant** gave unsworn evidence . She said that she was in class 1 at [*particulars withheld*] primary school. She said that on 31/12/2013 she was with the appellant in the bush when the appellant removed her clothes and did bad manners to her. She managed to identify her panty. She said that the appellant took her to the bush when she was at home and PW1 did not know.

6. **PW3 D C** who was aged 14 years testified that on the material day she had gone to fetch water at the river when she saw some movements in the bush. On checking she saw the appellant lying on top of the complainant and had removed his trouser upto the knees. She shouted and called PW1 who came. The appellant took off but he was arrested. She identified the complainant party as she used to bath with her and knew the same.

7. **PW4 Robert Wanamu Nabiba** the village elder of [*particulars withheld*] . On the material day he rescued the appellant who had been badly beaten by the members of the public. He rescued him using bodaboda and took him to Saboti police station.

8. **PW5 William Mayoo** attached to Saboti police post received the appellant when he was brought by PW4. He re arrested him and referred the complainant to Saboti sub District hospital and later Kitale District hospital for further treatment.

9. **PW6 Sergeant Josephine Nabwile** investigated the matter after receiving the file from Saboti police post. She also produced the panty worn by the complainant which was recovered from the appellant. She equally produced the child's notification card.

10. **PW7 John Koima** a clinical officer based at Kitale District hospital examined the child and filled the P3 form. He opined that the hymen was torn and it was swollen, there were bruises on the labia and discharge.

11. When put on his defence the appellant gave unsworn evidence stating that PW1 owed him Kshs 1,200 which she refused to pay as agreed. When he went to demand on 31/12/2013 he was arrested by the village elder and taken to Saboti police post and charged with the offence.

### **Analysis and Determination**

12. I have read through the proceedings as well as the parties written submissions. In his amended grounds of appeal the appellant has generally attacked the judgement of the trial court on the entire evidence especially the fact that penetration was not proved, he was not taken for medical examination and that there existed a grudge between him and PW1.

13. The ingredients of defilement case, are now clear and well settled. The prosecution ought to prove the age of the victim, that there was actual penetration and the perpetrator was clearly identified.

14. In the instance case, the age of the complainant was not controverted. The birth notification card clearly showed her age. This issue was not contested by the appellant.

15. Was she defiled? The answer in my view is yes. The evidence of PW1 and PW3 corroborated that of the child. The appellant was found in the act by PW3 who is actually her blood sister. He attempted to take off but was arrested. PW1 rushed to the scene and found the child crying and shaking. On examination she found that there was mucus like (sperm) on her private parts.

The clinical officer found that the child had lost her hymen and there were injuries on her private parts which were swollen. Clearly one has no option but to conclude that she was indeed defiled.

16. The appellant was found with the child's panty. He did not rebutt this. What was he doing with the same save to conclude that he had removed it during the process.

17. On the question of identity I have no doubt that the appellant was clearly identified. He was found in the act by PW3 her sister.

Moreover the appellant had just passed through PW1 house and greeted her. Subsequently PW1 was unable to trace the child. Within that moments PW3 saw the appellant lying on top of the child. All these chain of events took place at around 5.30 pm which was day time.

18. In short, I do not find this appeal meritorious. The same is 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**