



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KAKAMEGA**

**HCRA NO. 92 OF 2015**

**BRITSON MUKAISII ALIAS OJWANG:::::::::::::APPELLANT**

**V E R S U S**

**REPUBLIC:::::::::::::RESPONDENT**

***(Arising from the judgment of Hon. T.K. Kwambai in Criminal case No. 735 of 2013 at Principal Magistrate's court Butali )***

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

1. **Britson Mukaisii alias Ojwang** the appellant was charged with the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. The particulars being that the appellant on the 8<sup>th</sup> day of November, 2013 in Kakamega North District within Kakamega County, unlawfully and intentionally caused his penis to penetrate the vagina of **D K** a child aged 14 years.
2. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars being that the appellant on the 8<sup>th</sup> day of November, 2013 in Kakamega North District within Kakamega County intentionally and unlawfully touched the private parts namely vagina of **D K** a child aged 14 years with his penis.
3. The appellant denied the charges and the case proceeded to full hearing. The prosecution called a total of five (5) witnesses while the appellant gave a sworn statement of defence. He was convicted of the alternative count and sentenced to ten (10) years imprisonment.

Being dissatisfied with the judgment he has appealed raising the following grounds of appeal:

- (i). THAT the trial court convicted him on the evidence that was uncorroborated, fabricated, malicious, discredited, inconsistent and lacked probative values.
- (ii) THAT the age of the complainant was not ascertained as required by law and or the person who confirmed her age was not a qualified person in that line of duty.
- (iii). THAT the trial magistrate did not consider that the prosecution shifted the burden of proof to him the appellant herein.
- (iv). THAT he was not medically tested to verify if it was indeed him who committed the alleged act.
- (v). THAT the trial court did not consider his sufficient alibi defense which was cogent and

sufficient enough to exonerate him from any wrong doing.

(vi). THAT the trial court did not consider that the evidence of PW1 and PW2 did not tally as far as the time of the commission of the said act and in other several areas of their testimony .

(vi) THAT the sentence ordered was very harsh in the circumstances.

4. When the appeal came for hearing the appellant relied on his written submissions where he argues that he was not provided with witness statements thus being denied his rights under article 50(2) (j) of the constitution.

He also questions the age of the complainant which he says was not adequately proved.

5. He submitted that the baptismal card was not sufficient proof of age . He argued that penetration was not proved as the doctor who produced the P3 form is not the one who examined PW1.

He opposed the request by the State to have him convicted of the offence of sexual assault since there had been no proof of penetration.

6. The appeal was opposed by the State through Mr. Juma who submitted that there was proof of penetration contrary to the finding by the trial magistrate .

He invited the court to invoke its powers under Section 179 Criminal Procedure Code and convict the appellant for the offence of sexual assault under Section 5 of the Sexual Offences Act, and enhance the sentence to 20 years imprisonment .

7. A summary of the case before the trial court is that PW1 a minor aged 14 years and in a Special School was on 8<sup>th</sup> November, 2013 5am asleep in a rental room when she heard a knock on the door.

The lantern was on, and she saw the appellant come into the room. He came to where she slept , removed her pants and had sexual intercourse with her. She screamed and her in-law **PW4 (E M S)** came and found the appellant inside the room and locked him there .

8. Her mother **PW2 A I** was called and she came . A report was made before she was taken to hospital .

Treatment notes EXB2 and a P3 form (EXB1 ) were produced. Her age was assessed and a report of the assessment was produced as EXB 3.

**PW2** was categorical that the appellant told her he had raped, PW1.

9. Pw3 **Pauline Murango** a Clinical Officer who examined PW1 confirmed that the minor had been defiled.

PW4 heard PW1 making noise in her room. He went and knocked on the door and pushed it as it was open .On opening the partitioning sheet he was pushed by the appellant whom he knew as Ojwang alias Briston Mukaisi.

10. He pushed the witness and disappeared into the sugarcane plantation . PW1 was crying saying the appellant had raped her. He called neighbours including PW2. The matter was reported to the nearest AP Post and Malava ( Kabras) Police Station.

PW5 P.C. **Phelemon Chebii** the investigating officer received the report and visited the scene . He confirmed that the appellant lived in a rental house No. 4 while PW1 lived in house No. 8 on the same premises.

11. The appellant in his defence gave a sworn statement saying he was arrested at Kambi ya Mwanza doing his touting business. He denied defiling PW1 and added that he is married. Infact he said he is related to PW2 and PW4.

12. This is a first appeal and this court has a duty to reevaluate and reconsider the evidence to arrive at its own conclusion. It should do this bearing in mind that it did not see or hear the witnesses . See **Okeno vs R 1972 E.A 32; Njoroge vs R 1989 KLR 313.**

13. I have considered the evidence on record , grounds of appeal and the submissions by both parties . I find the following issues to be falling for determination :

- i. Whether the complainant was aged 14 years.
- ii. Whether there was sexual penetration of the complainant or any indecent act .
- iii. Whether there is sufficient evidence connecting the appellant with this offence.
- iv. Whether this court can invoke section 179 of Criminal Procedure Act, in this case.

14. The appellant submitted that the only documents that could have proved age were either a birth certificate or a doctor's evidence .The record shows that the mother of PW1 who is PW2 testified that the minor was born in November 1999. Her baptismal card (EXB4) was produced showing she was born on 4<sup>th</sup> November, 1999. An age assessment report done by a doctor at Malava Sub-District Hospital was produced as EXB3.It showed that PW1 was approximately 14 years as at 13<sup>th</sup> November, 2013 . This court takes judicial notice of the fact that not all persons have access to the office of the Registrar of birth and deaths .

I am satisfied that the evidence adduced confirmed the age of PW1 as 14 years.

Issue no. (ii) **Whether there was sexual penetration of the complainant or any indecent act .**

15. PW1 explained what was done to her and how she felt pain when a male organ was inserted in her female organ . The pain caused her to scream attracting her brother in law (PW4) who was going to check on his wife. She was taken to hospital from where she was treated and tests run. The P3 form (EXB1) confirms that the following were noted after a High Vaginal Swab(HVS):

- i. Presence of pus cells.
- ii. Numerous epithelial cells and red blood cells seen
- iii. Spermatozoa seen

16. The presence of epithelial cells and red blood cells is a confirmation that there had been friction in the complainant's vagina . That is what the High Vaginal Swab revealed .

Secondly the presence of spermatozoa in her vaginal goes further to confirm that a male organ deposited them there. I find the finding by the learned trial magistrate on this to be an error.

17. It is not the breaking of the hymen only that confirms penetration. Penetration whether partial or complete is penetration . The P3 form ( EXB1) at page 2 section B (5) assessed the injury as “ **defilement** “ . The learned trial magistrate could therefore not go against this medical findings unless for very good reasons. I therefore find that there was sexual penetration of PW1's vagina .

**Issue No. iii).Whether there is sufficient evidence connecting the appellant with this offence.**

18. PW1 testified that there was a lantern which was “on” in the room in which she slept. It was around

5 am . She was therefore able to see the appellant . She screamed and PW4 came to her rescue . PW4 confirmed that evidence by his own testimony. He found the appellant with PW1. He locked the door but the appellant pushed him and ran into the sugarcane plantation .

19. The appellant merely explains how he was arrested , without mentioning any date or even where he was on the morning of 8<sup>th</sup> November, 2013 . In cross examination by the prosecution he said PW4 woke him up on 8<sup>th</sup> November, 2013 5am requesting for a panga to help him as he looked for PW1 who had left . That he gave him a rungu and he took PW1 to Kakunga bar. He never put this to PW1, PW2 or PW4. I find this to be a mere afterthought with no weight at all. The appellant is the person who defiled PW1.

Issued No. iv). **Whether this court can invoke section 179 of Criminal Procedure Act, in this case.**

20. The respondent requested the court to invoke section 179 Criminal Procedure Act and convict the appellant of the lesser offence of sexual assault contrary section 5 of the Sexual Offence Act , and enhance the sentence to 20 years imprisonment. The said section 5 provides as follows:

Section 5. (1) **Any person who unlawfully -**

**(a) penetrates the genital organs of another person with -**

**(i) any part of the body of another or that person; or**

**(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;**

**(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body,**

**is guilty of an offence termed sexual assault.**

**(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life,**

21. My understanding of this provision is that it applies to any other part of the body besides the genital organs, being used to cause penetration of the genital organs. The offences of Rape, defilement, incest cover offences where by the genital organs are used to cause penetration of other genital organs . Section 5 talks of any other part of the body or an object used to cause penetration . I am therefore unable to find that sexual assault is a lesser offence of defilement. Sexual offence is a distinct offence and should be treated as such. I also wish to point out that defilement is brought under section 8 (1) as read with section(8) of the Sexual Offences Act , and not Section 8(1) (3) of the Sexual Offences Act.

22. I have found that indeed the appellant defiled PW1 as penetration was proved . I am however unable to enhance the conviction or sentence for the simple reason that the State did not bother to issue a notice to the court and the appellant of its intentions to request for such enhancement. The appellant will escape a heavier punishment because of that omission by the State.

23. I find the appeal to lack merit and I dismiss it. I confirm the conviction and sentence .

Order accordingly .

**Delivered , signed and dated this 31st day of August, 2017**

**H.I. ONG'UDI**

**JUDGE**