



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL CASE NO. 110 OF 2016**

**(Being an appeal arising from Kitale Chief Magistrate court Sexual Offence case No. 111 of 2015 delivered by C.C. Kipkorir Resident Magistrate on 24/11/2016)**

**ROBERT OMAR ALI alias NOBERT.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

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

1. **Robert Omar Ali alias Norbert** 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 being that the appellant on the **8<sup>th</sup> day of June 2015** within **Trans -Nzoia County** intentionally caused his **penis to penetrate into the vagina of J O W, a child aged 8 years**.

He also faced an alternative count of **Committing an indecent act with a child under the same Act**.

2. The appellant denied the charges and the trial proceeded to full hearing. He was found guilty, convicted and sentenced to life imprisonment on the main count. Being dissatisfied with the judgment he filed this appeal citing the following grounds:

**i) That the trial learned trial magistrate erred both in**

**law and facts in convicting the appellant in the**

**absence of the key witnesses.**

**ii) That the trial learned trial magistrate erred both**

**in law and facts in convicting the appellant without**

**considering my defense.**

**iii) That the trial learned trial magistrate erred both**

**in law and facts in convicting the appellant**

**without considering the evidence of the clinical**

**officer which was against the other defence.**

**iv) That the trial learned trial magistrate erred both in law and facts in convicting the appellant without considering the graving contradictions that rose in his case.**

**v) That the trial learned trial magistrate erred both law and facts in convicting the appellant without considering that there was fabrication in the evidence adduced by witnesses.**

**vi) That the trial learned trial magistrate erred both in law and facts by shifting the burden of prove to the appellant.**

3. During the hearing of the appeal, the appellant relied on his written submissions in which he stated that the prosecution case was full of contradictions, falsehoods and hatred. That he was not examined to prove that he was connected with this case.

Further he submitted that the case was not properly, investigated and so prays for a retrial.

4. Mr Kakoi for the State opposed the appeal, and submitted that all elements of this offence were proved. That age was proved to be 8 years; penetration was confirmed by PW1, PW2 and the medical evidence by PW5; identification was proved by PW1 and mother (PW2).

5. A summary of the case is that **PW1 (J O W)** a child aged 8 years was from school on 8<sup>th</sup> June 2015 about 4.00 pm. As she walked on a murram road a man wearing slippers, shorts with side pockets and a black T-shirt approached from the opposite direction. She did not know him, but he took her to the bush, and undressed her in some depressed place. She was in her school uniform. He also removed his clothes and lay on her causing her pain in her vagina, by putting his penis in it.

She cried and her mother came to her rescue. She described the man and what he wore and the direction he took, to her mother (PW2). She was taken to hospital and treated.

6. **PW2 D N** is the mother to PW1. She testified that PW1 was born in 2007. On 8<sup>th</sup> June 2015 at 5.00 PM she had gone to get her cows from the shamba when, she heard a child's cry. She thought it was her neighbour chasing away kids. Further she heard the child cry saying "mama eeh mama". That is when she identified the voice as that of PW1. She ran there and was shocked to see the state her daughter was in. She lay down quiet in a depressed place with bushes, trees and sugarcane and there was a road nearby. Her uniform, school bag and shoes were in the bush.

7) She testified that PW1 only had her socks on and was bleeding from her private parts with foam in her mouth. She carried her to where the cow was, and covered her with a sweater. PW1 explained to her what had happened to her. She had been defiled by a man whose description she gave as follows;

**" His hair was cut in a box shape with chemical in the remaining parts which were long. He had black short, side pocket shorts, blue slippers with a wire on the side."**

8. She left PW1 with the crowd that had gathered as she ran to look for the culprit. Near the child's school she saw the man fitting that description. She ran and fell on him, screaming . People came but he slipped away., though one of those who came knew him. A report was made to the administration. She called her husband and took PW1 to Ndalungu dispensary but was referred to Kitale District Hospital. She later learnt the man who defiled PW1 had been found. The child was treated and her age assessed at 8 years. She identified the appellant as the man who defiled PW1.

9. **PW3 Elijah Juma Wekesa** was at the Big tree stage on 8<sup>th</sup> June 2015 when the village elder called him. He mentioned the case of PW1 to him and the suspect's name. He was instructed to look for the suspect, whom he knew and he saw at Big tree market. He wore a black top and short side pocket. When he got to him he said “**Elijah Usinirudishe huko chini.**” He said if he went back he would be killed. So PW3 took him to Big tree police post and handed him over to the officers. He informed the village elder, of the progress.

10. PW3 then went to [particulars withheld] primary school where he found PW1, PW2 with a mob armed with pangas and rungas. He was informed that the appellant had tried to defile a child but was unsuccessful and that is when he found PW1 and defiled her. He asked the first victim to record a statement , with the police.

11. **PW4 Pharis Silali** examined PW1 for age assessment and found her to be 8 years old (Exhibit 3).

**PW5 Charles Nekoko Mateti** is attached to Big tree patrol base doing policing duties. He stated that on 8<sup>th</sup> June 2015 he was at the office when a big crowd came, with the appellant whom they had arrested.

12. **PW6 Kirwa Labatt** is the clinical officer who examined PW1.

His findings were:

- swollen vulva

Hyperemic vulva (i.e it was inflamed, swollen and tender)

- red hymen broken and still fresh

- Whitish discharge in her private parts.

- Urine test showed red blood cells and sperms.

He concluded that there was penetration, he produced the P3 form (Exhibit 1) plus treatment notes (Exhibit 2).

13. **PW7 P.C Mary Umazi** is the investigating officer. She testified that investigations commenced when the culprit had already been arrested. She did charge the appellant after PW1 identified him.

14. The appellant gave an unsworn statement of defence. He said on 8<sup>th</sup> June 2015 6 .00 PM he was from school. He was in Form 3 at Big tree secondary. When he reached the Canteen his father was called and told that he needed to go home. He got home and changed . His mother sent him to the centre to buy vegetables. He decided to go and watch a movie, and thereafter went to the barber's shop at 7.00 pm where he found Elijah (PW3) and Ben. When he finished these two people told him to go where they were. He did and he left with them on a motorbike. He was beaten badly and taken to the police station. He does not say who beat him. He however denied the charges.

15. Being a first appeal this court has the duty of re-evaluating the evidence and arriving at its own conclusion. It has to bear in mind that it did not see or hear the witnesses and give an allowance for that. (See Soki V Republic [2004] 2 KLR 21; Ogeto V Republic [2004] 2 Klr 14; Okeno V republic 1972 EA 32.

16. I have considered the evidence on record, grounds of appeal plus the submissions by both parties.

I find the following to fall for determination.

- i) whether a retrial should be ordered.
- ii) whether the age of PW1 was established.
- iii) whether sexual penetration was proved
- iv) If (iii) is proved then, whether the appellant was the perpetrator.

**Issue No.( I) whether a retrial should be ordered.**

17. I have gone through the entire record and I find no procedural irregularities that would make me order for a retrial.

**Issue No. (ii) whether the age of PW1 was established.**

18. PW2 who is the mother of PW1 testified that the minor was born in 2007. An age assessment was done by PW4 who produced a report (Exhibit 3) showing the age of PW1 as 8 years. Infact the issue of age has not been contested. The age assessment report and the testimony of the mother are sufficient proof of age.

**(See Francis Omuroni V Uganda Criminal Appeal NO 2 of 2000.; Hadson Ali Mwachongo V Republic Mombasa Criminal Appeal No. 65 of 2015.**

I therefore find age to have been proved to be 8 years.

**Issue No. (iii) whether sexual penetration was proved**

19. PW1 explained what happened to her as she came from school. She was defiled by a man who put his penis in her vagina.

PW2 explained the condition in which she found her daughter. The girl was naked with only socks on her feet. She was foaming in her mouth and was bleeding in her private parts. This was all confirmed by the P3 form (Exhibit 1) and the evidence of PW5 which was so detailed.

I find the evidence on penetration of PW1's vagina to have been sufficiently proved.

**Issue No. (iv) If (iii) is proved then, whether the appellant was the perpetrator.**

20. PW1 had never seen the appellant before. She however described to her mother (PW2) how the culprit was dressed and the route he had taken. PW2 acted with speed and spotted a man near PW1's school fitting that description. He was apprehended within the shortest time.

PW3 also confirmed that the description given by PW1 and PW2 fitted the appellant well. He even asked PW3 not to take him back down there as he would be killed. He was aware people were baying for his blood. He had slipped when PW2 had caught him and people had started gathering. I find no contradictions or falsehoods in the evidence of the witnesses.

21. I have considered his defence. There was nothing produced before the court to show that indeed the appellant was a student and had been sent by his mother to the market; this fear of being taken back down there confirms he is the one who had narrowly escaped, PW2's grip. PW3 confirmed that after

arresting him he had gone down to [particulars withheld] primary school and found PW1, PW2 and a mob armed with pangas and rungas waiting for the appellant. He was right, as they would have harmed him.

22. In his defence he does not speak to the description given by PW1 to her mother (PW2) and finally to the village elder and PW3. The evidence of the prosecution witnesses remains unchallenged.

23. I am satisfied that the appellant is the person who defiled PW1. The sentence meted out is provided for under the Sexual offences Act No. 3 of 2006.

24. I find no merits in the appeal which I dismiss and uphold the conviction and sentence.

Orders accordingly.

Delivered, signed and dated on this 30th day of August 2017 at Kitale

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**H. ONG'UDI**

**JUDGE**

**In the presence of;**

**Ms Kagai for Mr. Kakoi for State**

**Appellant – present**

**Kirong – Court Assistant**

**Court: Judgment delivered in open court.**

**Right of Appeal explained.**

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**H. ONG'UDI**

**JUDGE**

**30/8/2017**