



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 1 OF 2016**

**S B N.....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

*(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. C. A Otieno –Resident Magistrate delivered on the 6<sup>18h</sup> March, 2010 in CMCR Case No. 122 of 2009)*

**JUDGMENT**

Before court is the appeal filed by **S B N** challenging his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts.

The appellant had been arraigned before the trial court on 10/6/2009 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) (3) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

*“On the 7<sup>th</sup> day of June, 2009 at about 1.00pm am in Nakuru District in the Rift Valley Province intentionally and unlawfully had sexual intercourse with **G W**, a girl aged 10 years”*

In addition the appellant faced an alternative charge of **INDECENT ACT ON A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES CAT 2006**.

The appellant pleaded ‘**Not Guilty**’ to both charges and his trial commenced on 18/6/2009. The prosecution led by **CORPORAL MAVOKO** called a total of four (4) witnesses in support of their case.

The complainant **G W** told the court that she was ten (10) years old. She told the court that on the night of 7/6/2009 at about 1.00am she and her younger sister ‘**V**’ were asleep on a bed in the sitting room. The appellant who was a cousin to the children’s mother was sleeping on the sofa set. During the night the appellant woke up and went over to the bed in which the children were sleeping. He climbed into their bed. He then undressed the complainant by removing her trouser and under pant. The appellant lowered his own trouser and defiled the child.

**PW2 A W** was the mother of the complainant. She told the court that on 7/6/2009 the appellant who was her maternal cousin had visited her home. During the night **PW2** stated that her two daughters shared a bed in the living-room while the appellant slept on the sofa set. At about 1.00am **PW2** heard noises from the living-room. She went out to check. She found the appellant lying on top of her daughter ‘**G**’. **PW2** asked the appellant what he was doing. He did not respond but merely returned to his bed. **PW2** slept the rest of the night in the same bed as her children. The next day she reported the matter to Bondeni Police Station. The child was taken to the hospital for medical examination. The appellant was later arrested and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He elected to give a sworn defence in which he denied having defiled the complainant. On 18/3/2010 the learned trial magistrate delivered her judgment in which she convicted the appellant on the main charge of Defilement and thereafter sentenced him to serve life imprisonment. Being aggrieved the appellant filed this appeal.

Being a first appeal the court is obliged to re-examine and re-evaluate the prosecution case and to draw its own conclusions on the same (see **AJODE Vs REPUBLIC [2004] KLR 81**). Similarly in **MWANGI Vs REPUBLIC [2004] KLR 28** the court held that

*“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appeal court’s own decision on the evidence.*

**2. The appellate court must itself weigh the conflicting evidence and draw its own conclusions”.**

In a case of defilement such as the present one the prosecution must prove the following

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

In any matter of defilement the age of the victim is a crucial ingredient as it is this age which will determine the sentence to be imposed if the accused is convicted. Ordinarily age will be proved by production of a document e.g birth certificate, immunization card or Baptism card. However even where no document proving age is available, the court may rely on oral evidence as proof of age. In **FAUSTINE MGANGA Vs REPUBLIC [2012]eKLR** the court citing **Colling woods Criminal Law of East and Central Africa 1967 Edn** observed as follows:-

**“Age may be proved by a birth certificate, or particularly in the case of Africans, by the evidence of a person present at the birth”.**

In **WAHOME Vs REPUBLIC (2014)eKLR** the court of appeal held that

**“What better evidence [of age] can one get than that of the mother who gave birth”**

In this case the fact that the complainant was a minor is not in any doubt. The trial court deemed it necessary to conduct a ‘voire dire’ examination before recording her evidence is proof of that fact.

The complainant herself told the court that she was ten (10) years old and in class 5. **PW2** the mother of the complainant and the woman who bore her confirmed that she was ten (10) years old. From the evidence available I find that it was proved that the complainant was indeed ten (10) years old.

On the question of proof of penetration the complainant narrated how her mother’s cousin climbed into the bed in which she and her younger sister were sleeping. In her own words the complainant stated at page 6 line 2

**“The accused called S B who is my mother’s cousin left the sofa-set and came to sleep on the bed where me and V were sleeping in. He removed my clothes and started defiling me. I was wearing a panty and a trouser. He removed both my trouser and my panty. The accused person had a shirt and a trouser. He removed his trouser and put his penis on my private part (pointing at her vagina).....”**

The child has given a clear account of the events of that night. She had nothing to gain by claiming that she had been defiled if no such thing had actually occurred. She said she was not able to scream as the man covered her mouth with his hand.

**PW2** the complainant’s mother corroborated her evidence. She told the court that she heard noises from the living-room where her children were sleeping and went to check. She found the appellant lying on top of the complainant. The complainant informed her mother that she had been defiled. Indeed there would be no other reason for a male adult man to be lying on top of a 10 year old child in the dead of the night other than that he was defiling her.

Further corroborative evidence was provided by **PW4 DR. SAMUEL ONCHERE** the doctor who examined the complainant. He stated that a vaginal swab taken from the child revealed present of pus cells and spermatozoa. The only way that male spermatozoa could have entered the child’s vaginal canal was by way of penetration (either partial or complete) by a male organ (penis). From the evidence available I find that the fact of penetration was proved beyond reasonable doubt.

The final ingredient requiring proof is the identity of the offender. The complainant identified the appellant as the man who defiled her. Aside from her younger sister and her mother **PW2** the only male person in the house was the appellant. The fact that **PW2** found the appellant kneeling between the child’s legs is proof that he was in the very act of defiling her.

The appellant was a cousin to **PW2**. He was well known to the child as a relative. The child told the court that when her mother came into the room she switched on the light enabling her to see the appellant well. The complainant was able to identify the appellant by his given name ‘S B’. **PW2** also identified the appellant as the man she found defiling her child. I find there was no possibility of a mistaken identity.

The appellant in his defence claimed that he had merely woken up to attend to a medical problem he had. He denies having been found defiling the child. I do agree with the learned trial magistrate that this was a mere afterthought. In any event the appellant was found lying on the child in her bed, what medical problem would necessitate the appellant having to move from his bed to the bed in which the complainant and her sister were sleeping

In her judgment at page 24 the trial magistrate observed as follows:

**“PW1 the complainant herein was consistent, credible, and convincing in her testimony on how the defilement took place and by whom. The complainant’s testimony was elaborate and clear and her demeanour was not that of a coached witness without [any]**

*feelings. She appeared traumatized as she recalled what happened to her on 7<sup>th</sup> June 2009 at the hands of her mother's cousin".*

These were the observations of the trial magistrate – it was she who saw and heard the child testify. I have no reason to doubt these observations regarding the demeanour of the complainant.

On the whole I find that the prosecution did prove the charge of Defilement beyond reasonable doubt. The appellant's conviction was sound and I do uphold that conviction. The sentence of life imprisonment is the mandatory sentence provided by Section 8(1) Sexual Offences Act where the victim is aged 11 years or below. The sentence imposed was lawful and I do confirm the same. The upshot is that this appeal fails in its entirety and is hereby dismissed.

**Dated in Nakuru this 3<sup>rd</sup> day of August, 2017.**

Appellant in person

Mr. Chigiti for DPP

**Maureen A. Odero**

**Judge**