



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 137 OF 2014**

**GILBERT KIBET RUTO.....APPELLANT**

**VERSUS**

**REPUBLIC.....STATE**

*(Appeal from the Judgment of the Chief Magistrate's Court at Molo Hon. A. Towett – Ag. Senior Resident Magistrate delivered on the 25<sup>th</sup> June, 2014 in CMCR Case No. 2405 of 2011)*

**JUDGMENT**

The appellant **GILBERT KIBET RUTO** has filed this appeal challenging his conviction and sentence by the learned Ag. Senior Resident Magistrate sitting at the Molo Law Courts.

The appellant had been arraigned before the trial court 30/11/2011 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1)(2) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

*“On the 17<sup>th</sup> day of July, 2008 of Molo District of Nakuru County intentionally and unlawfully caused his penis to penetrate the vagina of S C a girl aged 7 years in violation of the said Act”.*

The appellant also faced an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant pleaded ‘**Not Guilty**’ to both charges and his trial commenced in the lower court on 10/9/2012. The prosecution led by **INSPECTOR TANUI** called seven (7) witnesses in support of their case.

**PW1** complainant who was a minor was duly taken through a ‘*voire dire*’ examination. The trial magistrate ruled that the child properly understood the nature of an oath, thus she gave sworn evidence.

**PW1** told the court that she was a class five student at [*particulars withheld*]. The complainant testified that on 17/7/2008 she left school at 1.00pm and together with her school mates they proceeded home for lunch.

On the way the children met the appellant who began to chase them. The children scattered all running in different directions. The appellant managed to catch hold of the complainant and carried her into a thicket where he proceeded to defile her. After the incident the child ran home and informed her mother about the incident.

**PW2 N K** who was a twin brother to the complainant and **PW2 Z N** both testified that they were school mates of the complainant and were walking home with her on the material day. They met the appellant who began to chase them. **PW2** and **PW3** managed to evade the appellant and hid nearby. However the complainant who was not fast enough was caught by the appellant.

**PW2** and **PW3** both state that from their hid outs in the bushes they watched and saw the appellant defiling the complainant.

**PW5 B C** was the mother of the complainant. She told the court that on 17/7/2008 her children went to school as well. At lunch time the complainant returned home crying. **PW5** noticed that the child was walking with her legs apart. She informed her mother that she had been defiled. **PW5** checked the child's private parts and noted that they were swollen and sore. The complainant's parents then took her to hospital for treatment.

The matter was reported to police who took up investigations into the case. The appellant was eventually arrested and charged with this offence of Defilement.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied having defiled the complainant.

On 25/6/2014 the learned trial magistrate delivered her judgment in which she convicted the appellant on the main charge of Defilement and thereafter sentenced him to life imprisonment. Being aggrieved the appellant filed this appeal.

The appellant who was unrepresented during the hearing of this appeal opted to rely upon his written submissions which had been duly filed in court. **MR. MOTENDE** learned State Counsel made oral submissions in which he opposed the appeal.

This 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.

In **MWANGI Vs REPUBLIC [2004]2 KLR**, the Court of Appeal held thus

***“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 appellate court’s own decision on the evidence.***

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

***3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate findings should be supported. In doing so, it should make allowance for the fact that the trial court the advantage of hearing and seeing the witness”.***

In any case of defilement the prosecution must prove beyond reasonable doubt the following three (3) ingredients of the offence.

- (i) The age of the victim
- (ii) The fact of penetration
- (iii) The identity of the perpetrator

On the question of age – this is a crucial element in any defilement case. The age of the victim is a critical element requiring proof beyond reasonable doubt. This is because the victim’s age will dictate the sentence to be imposed if the court returns a conviction on the charge. In the case of **KAINGU ELIAS KASOMO Vs REPUBLIC Malindi Criminal Appeal No. 504 of 2010**, the Court held that

***“Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim”.***

In this case the complainant in her evidence told the court that she was aged 12 years old (this was at the time of the trial). **PW5** who was the mother of the complainant stated in her evidence that

***“I gave birth to PW1 in the year 2000...”***

**PW7 PC PATRICK KIOO** who was the investigating officer produced the complainant Immunization Card as an exhibit **P. exb 2**. I have perused the said exhibit and it indicates that the complainant was born on 27<sup>th</sup> June, 2000. This is an official government issued document and is satisfactory proof of the age of the child.

Having been born in June 2000, the complainant was therefore aged 8 years in July 2008 when this incident occurred. I am satisfied that the age of the complainant has been proved beyond reasonable doubt.

The second element of the offence of defilement requiring proof is the fact of penetration. The complainant told the court that she and her school mates were on their way going home from school for lunch when they met the appellant. The appellant began to chase the children. The other children escaped but the complainant was caught.

The child stated that after grabbing her, the appellant took her into a nearby thicket. There he undressed her and defiled her. In her own words the complainant stated at page 11 line 1

***“I ran but he caught up with me. Accused then took me into the forest. I screamed. The other children had gone into hiding in a thicket. Accused then strangled me. Accused then did bad things to me. He took me into the thicket before doing the bad things to me. Accused then took off my sweater and forced it into my mouth. He then took out my pants did bad things in my private parts.....”***

The complainant has given a vivid narration of what happened to her. Being a young child she lacked sufficient vocabulary to describe the sexual act. As a court I do take judicial notice of the fact that young children invariably refer to sexual intercourse as '**tabia mbaya**' or '**bad things**'. The complainant told the court that the man did bad things on her private parts. This was how she was able to explain the sexual assault.

This is one of the very unusual cases where an act of defilement was witnessed by third parties. The complainant school mates who were with her at the time. **PW2** and **PW3** both told the court that they ran away from the appellant and hid in the nearby bushes. From there they watched and saw what the appellant was doing to their friend. In his evidence at page 12 line 20 **PW2** (who was the twin brother to complainant) stated

***"..... From where I had hidden I saw accused taking off my sister PW1's sweater and placed it on my sister PW1's mouth. Accused then carried my sister on his hands as she screamed. I then saw accused doing bad things to my sister PW1. I watched accused do bad things to my sister until he finished and went away"***

On his part **PW3** stated in his evidence at page 14 line 16 that

***"I then saw him (accused) hold PW1 (S). I went into hiding with K. I could then see accused doing bad thing to S PW1 after taking S deep into the thicket. He had carried S on his hands. S had tried to scream but accused placed S sweater on her mouth. He (accused) placed S on the ground and slept on top of S. I could see clearly what accused was doing on top of S I left the hiding place before K. When I left accused was still doing bad things on S....."***

Thus the actions of the appellant were witnessed by four little eyes. The children have both given clear description of what they saw. Their evidence is consistent as they both describe the same thing. The incident occurred in broad daylight at 1.00pm. Both **PW2** and **PW3** describe having seen the appellant put a sweater over the mouth of the complainant (probably in order to muffle her screams). The fact that both boys describe having witnessed this action on the part of the defiler persuades me that they have both given a truthful account of what they saw.

**PW3** says that he saw the man place the complainant on the ground and lie on top of the child. Why would a grown adult man lie on top of a child other than for purposes of sexually assaulting that child?

**PW4 L M** and **PW5** the child's mother both told the court that when the complainant came home she was crying. Her neck was swollen and she had difficulties walking. The child was walking with her legs apart. This is a clear indication that there had been some interference in the private parts the child.

**PW6 DR. ROBINSON KIPSUT** was the clinical officer who examined the complainant after the incident. **PW6** told the court that upon examining the complainant he noted that she had bruises on her vaginal area and that her hymen was broken. **PW6** gave his conclusion at page 35 line 13 where he stated

***"In conclusion, I confirm that there was penetration inside the vagina of the victim".***

**PW6** filled and signed the P3 form which was produced as an exhibit **P. exb 1**.

The fact of the missing hymen as well as the bruises around the vagina are sufficient proof that the child had been defiled.

In his submissions the appellant raises the issue that no spermatozoa was found in a vaginal swab taken from the complainant. He submits that this proves that no defilement had occurred.

Firstly the offence of defilement does not require that there be a total penetration of the vagina. A partial penetration will suffice to prove the fact of defilement. Section 2 of the **Sexual Offences Act, 2006** states that

***"Penetration' means the partial or complete insertion of the genital organ of a person into the genital organs of another person"***.

Secondly the absence of spermatozoa does not negate an act of defilement, as it is not necessary that the sexual act be completed. As the doctor **PW6** stated under cross examination at page 35 line 21

***"There is a likelihood that someone can penetrate a woman without ejaculating"***

For these reasons the submissions of the appellant on this point have no basis. From the evidence I am satisfied that there exists sufficient proof including eyewitnesses' testimony, of the fact that the complainant was defiled.

The final ingredient requiring proof beyond reasonable doubt is the identity of the perpetrator. The complainant herself identified the appellant as the man who defiled her. Her evidence regarding identification was corroborated by **PW2** and **PW3**, the two school mates who were with the child on the material day.

The incident occurred at about 1.00pm – as the children were going home from school to take their lunch. It was broad daylight and visibility was good. The witnesses all testified that when they met the accused he began to chase them. **PW1** and **PW2** managed to escape but the complainant who was slower was caught by the appellant.

The complainant spent an ample amount of time in close proximity with the appellant. He pulled her into a nearby thicket and lay on top of her. She was able to see her attacker very well.

**PW2** and **PW3** both identified the accused by his given name 'Gilbert'. The appellant was well known to both children. They knew him to be the son of 'Leah'. **PW2** (the brother to complainant) under cross examination stated at Page 13 line 12 that

***"I told my mother that Leah's son had done bad things to S....."***

On his part **PW3** stated under cross examination by accused at page 14 line 26

***"Your name is Gilbert Kibet Rutto. I know you before the incidence took place....."***

**PW4** and **PW5** the parents to the complainant confirmed that when the children reported the incident to them they all named the appellant as the man who had defiled the complainant. The parents confirm that the appellant was a fellow villager.

Therefore it is clear that the perpetrator was a man well known to all the three children. Their evidence was therefore evidence of recognition. In the case of **ANJONONI Vs REPUBLIC [1980]KLR 59** the court held that

***"..... recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other....."***

The complainant who was new in the area admitted that she had not known the appellant before but she was nonetheless able to identify him by his physical features as the man who attacked and defiled her.

All three children gave clear and consistent evidence. They all remained unshaken under cross examination by the appellant. The appellant even applied to have the three children recalled to the stand for further cross examination. This application was allowed and the complainant **PW2** and **PW3** were all re-called after they had initially testified. They all remained firm and still did not waiver in their evidence. I am convinced that the children were all telling the truth.

In his defence the accused issued a blanket denial to the charge. I am not inclined to accept this defence. There is no reason why the prosecution witnesses would seek to frame the appellant. There is no evidence of a pre-existing disagreement or grudge between any of the prosecution witnesses and the appellant.

From the evidence on record, I am satisfied that there was a clear positive and reliable identification of the appellant as the man who defiled the complainant. His conviction was sound in law and I uphold that conviction.

Section 8(2) of the Sexual Offences Act provides for a mandatory minimum sentence of life imprisonment for any person found guilty of defiling a child aged 11 years and below. In this case the complainant was aged 8 years at the time she was defiled. As such the sentence of life imprisonment imposed by the trial court was the lawful sentence for this offence. I do confirm that sentence.

Finally this appeal fails in its entirety and is hereby dismissed.

**Dated and delivered in Nakuru this 13<sup>th</sup> day of October, 2017.**

Appellant in person

Mr. Chigiti for DPP

**Maureen A. Odera**

**Judge**