



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 30 OF 2016**

**BETWEEN**

**SAITOTI MOLEL.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of*

*Hon. D. Ogal, RM dated 4<sup>th</sup> January 2016 at the Senior Resident*

*Magistrate's Court at Hamisi in Criminal Case No. 438 of 2015)*

**JUDGMENT**

1. The appellant, **SAITOTI MOLEL**, was charged with one count of the offence of defilement contrary to **section 8(1) and (3)** of the **Sexual Offences Act**. He is alleged to have committed in Hamisi District within Vihiga County. According to Count I, he unlawfully and intentionally caused his penis to penetrate the vagina of PK, a child of 13 years on 26<sup>th</sup> April 2015. Based on the same facts, he also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the **Sexual Offences Act**. He pleaded not guilty. After trial, he was convicted on the principal charge and sentenced to 20 years' imprisonment. He now appeals against the conviction and sentence.

2. In his petition filed on 3<sup>rd</sup> March 2016, the appellant contended that penetration and the age of the complainant were not proved beyond reasonable doubt. He also contended that there was no medical evidence to link him to the offence. He complained that the prosecution evidence was full of contradictions and inconsistencies and that the witnesses were unreliable. He further complained that his defence was dismissed without proper consideration. The appellant pointed out that the charges against him were motivated by a grudge with the complainant's family. In support of his case, the appellant also relied on his written submissions in which he elaborated in his grounds of appeal.

3. Although counsel for the appellant conceded the appeal on the ground that the evidence was contradictory, I am obliged to review the evidence before the trial court and come to my own independent conclusion so as to determine whether I should uphold the conviction. In so doing, it is necessary to set out the salient facts of the case as they emerged before the trial court.

4. The complainant (PW 1), testified that she was 14 years old and in Class 8. She told the court that on

26<sup>th</sup> April 2015, while she was playing in the compound, she saw their chickens stray to the appellant's compound and in a bid to stop them, she walked over. As she was going there, the appellant called her and told her that he wanted to send her. When she entered the appellant's house to collect the money, the appellant held her, covered her mouth with his left hand. He removed his trousers and her inner clothes and proceeded to insert his penis in her vagina. When the appellant heard PW 1's mother calling, he let her leave through the back door.

5. The complainant's mother (PW 2), recalled that on the material day, as she was going back home, she was surprised to see the chickens outside. When she inquired from her younger child, who was playing outside, where PW 1 was, the child told her that PW 1 had been called by the appellant. She called out PW 1 but it is the appellant who appeared from his house. As she was walking towards the appellant's house, she met PW 1 coming from the direction of the appellant's house. She suspected something was amiss as PW 1 was crying. She took PW 1 into her house, removed her clothes and found semen on her vagina. PW 1 disclosed to her that the appellant had defiled her. She went and reported the matter to the police station and took the child to hospital for examination and treatment.

6. PW 1 was taken to Sabatia Health Centre on the same day where she was examined and treated. PW 3, a Clinical Officer at the Serem Health Centre, examined PW 1 on 27<sup>th</sup> April 2015. PW 1 told him that she had been defiled by a person known to her. According to the initial treatment notes issued at Sabatia, there was no injury on the vagina but the hymen was missing and a white discharge was noted. When PW 3 examined PW 1, the private parts were normal. There were no bruises or discharge.

7. The investigating officer, PW 4, recalled that PW 1 and PW 2 came to Cheptulu Patrol Base on 26<sup>th</sup> April 2013 to report that PW 1 had been defiled. He recorded their statements and asked to be directed to the perpetrator's house. He was directed to the appellant's house where he found, arrested and later took him to Serem Police Station.

8. When put on his defence, the appellant gave sworn testimony in which he denied committing the offence. He told the court that on the morning of 26<sup>th</sup> April 2015, he left for Kisumu at 6.00am to go and sell shoes. While in Kisumu, he received a call from a stranger who wanted to see him. When he returned to Cheptulu, the stranger called him and asked where he was. He told him he was near his house. As he reached his house, he was confronted by 3 police officers who told him that they wanted a Maasai translator. They took him to Cheptulu Police Station and arraigned in court.

9. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. "*Penetration*" under **section 2** of the **Sexual Offences Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

10. I have evaluated the evidence presented before the subordinate court and find that the prosecution proved the elements of defilement. PW 1 narrated how the appellant lured her to his place and proceeded to sexually assault her. Her testimony was straightforward and remained unshaken in cross-examination. The appellant was a person well known to her as he was a neighbour, a fact confirmed by PW 2 and PW 4. After her ordeal, she told her mother what had taken place and she was taken to hospital for examination. Her mother saw her immediately after the incident and noted her stated of distress. Under the proviso to **section 124** of the **Evidence Act**, the court may convict the accused even without corroborative evidence where it is satisfied that the child was telling the truth. In this case, the trial magistrate after hearing the evidence stated that, "*PW 1 testified before me and I was impressed with her demeanour. She seemed truthful. I believed her when she said that the accused defiled her.*" I therefore find and hold that there was sufficient evidence upon which the trial magistrate could find that PW 1 was defiled.

11. The appellant complained that the medical evidence did not connect him to the offence. Medical evidence in this case would be merely corroborative and the lack of it, in light of the evidence of the complainant, would not undermine the prosecution's case. In this case though, PW 3 testified that when PW 1 was initially seen on the day of the incident at Sabatia, there was a whitish discharge from the vagina and the hymen was broken which were indicative of penetration. PW 3 examined her a day later

when she had likely cleaned herself hence the negative results.

12. The appellant's defence was in the nature of an alibi. The law on this issue is that an accused who raises the defence of alibi does not assume the burden of proving it. It is sufficient if the alibi raises reasonable doubt as to whether or not the accused was at the scene of the crime (**see Kiarie v Republic [1984] KLR 739**). This means that the burden always remains with the prosecution to prove that the accused committed the crime under trial. Since the appellant did not give notice of the alibi defence or suggest the same to the prosecution witnesses, the court is left with the task of comparing the alibi defence with the prosecution evidence. In this case, evidence of PW 1 and PW 2 is that on the material day, he was at his home when they went to report to the police officer at Cheptulu Police Base. When the police officer returned to arrest him, he was at his home. This evidence negates his alibi defence. In light of the clear testimony of PW 1 and PW 2, I also reject the appellant's defence that he was charged as a result of a grudge.

13. The final ingredient of the offence of defilement is the age of the child. Proof of age is a question of fact. Although the charge sheet stated that the child was aged 13 years old, PW 2 produced the child's birth certificate and testified that PW 1 was 14 years old. The defect in the charge is not fatal to the case as it was not in dispute that PW 1 was a child for purposes of the offence of defilement. As regards the sentence, where the child is 14 years old, the applicable provision is **section 8(3) of the Sexual Offences Act**, which attracts a minimum sentence of 20 years' imprisonment.

14. I find that the prosecution proved its case beyond reasonable doubt. I also find that there is no basis for concession of this appeal by the respondent. The conviction is affirmed and so is the sentence.

15. The appeal is dismissed.

**SIGNED AT KISUMU**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KAKAMEGA this 13<sup>th</sup> day of October 2017.**

**R. N. SITATI**

**JUDGE**

Appellant in person.

Mr Ng'etich, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.