



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL CASE NO. 112 OF 2016**

**JAMES KINOTI MBAABU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The appellant was charged with the offence of defilement contrary to section 8(1) (2) of the sexual offences Act no 3 of 2006. The particulars of the offence were that the appellant on the 3<sup>rd</sup> day of April, 2016 in Buuri District within Meru County, unlawfully and intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of C K a girl aged 7 years.

The trial court convicted the appellant and sentenced him to life imprisonment. The grounds of appeal are that:-

1. The prosecution did not prove its case beyond reasonable doubt.
2. The undergarments worn by the complainant prior and after the incident were not produced as exhibits.
3. The investigations were shoddy.
4. The medical examination report tendered by PW2 was inconclusive.
5. The appellant's defence was rejected without cogent reasons.

The appellant submitted that the prosecution did not prove its case beyond reasonable doubt. None of the witnesses testified on how the incident occurred. None of the witnesses stated how or when the complainant went to the appellant's home. The appellant was with his brother. The complainant's mother found the children asleep; She did not tell the court whether the complainant and the appellant used to sleep in the same house. PW4 who claimed to have been with the complainant did not see the appellant commit the crime.

The appellant further submit that the complainant's clothes were not produced as exhibits. It was alleged that the clothes were blood stained and muddy. None of the witness testified that the alleged blood stain was due to defilement. PW2, the medical officer did not tell the court whether the broken hymen was freshly penetrated or if perforation was old. The witness did not prove if it was the appellant who caused the forceful penetration. Hymen can be broken due to other activities such as games. The appellant's defence was rejected without any good reasons. The case was framed due to malice and grudge.

Mr. WAMITI opposed the appeal Counsel submitted that the complainant's evidence is corroborated by the evidence of PW2, a doctor. The medical evidence proves that there was penetration. It is the appellant who committed the offence

This is a first appeal. The court has to re-evaluate and assess the prosecution evidence and make its own decision. PW1 S.K was the complainant. She testified that on 3/4/2016 she was defiled by the appellant in his house. The appellant removed her dress and defiled her. She felt a lot of pain. She did not scream as the appellant threatened her. She was later washed with salt water. Blood started flowing from her private parts. She went home and told her mother. The appellant is her cousin. She was taken for medical examination. When she went home, her parents were not at home. She informed her mother when she returned home.

PW2 Dr. MICHAEL ONYANGO was stationed at the Meru level 5 hospital. He examined PW1 on 4/4/2016 at 7:00pm. PW1 was escorted by her mother. PW1 was about 7 years. Physically her genitalia had a tear. There was minimal whitish vaginal discharge. Red blood cells were noted. PW1 had pain in her vagina. The hymen was torn.

PW3 JN is PW3's mother. On 3/4/2016 she arrived home at about 10:00pm and found her children asleep. The following day she realized PW1 was not okay. She was feeling pain when she went to the toilet. She observed PW1's Private Parts. Her clothes were dirty and there was blood stains on her petticoat. PW1 told her that she had been defiled by the appellant. PW3 reported the matter at Kiirua police station. PW1 was treated at Meru level 5 hospital. The appellant is PW3'S sister in law's son.

PW4, E.M was a minor. He testified that on 3/4/2016, a Sunday, he was with PW1. It started raining. PW1 left and when she came back she had been defiled. PW1 was given food but she refused. He did not know the appellant.

PW5, Inspector PAMELA OTIENO was stationed at Kiirua Police Station. The case was reported on 4/4/2016. She investigated the case. PW1 was referred to Meru level 5 hospital. PW1's birth certificate indicates that she was born on 20/5/2008. The incident took place at night. The appellant was arrested and charged with the offence.

In his sworn defence, the appellant testified that he repairs tyres. He was born in 1994. He was herding his uncle's cattle. He did not go to school because his uncle burnt his clothes. His uncle had a grudge with him because he thought his grandmother would give the appellant some property. That is why the case was framed and the appellant was beaten up.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The appellant contends that there is no eye witness to the alleged incident. The alleged blood stained clothes were not produced. The complainant testified that it is the appellant who defiled her. The incident occurred in the appellant's house. A birth certificate was produced. The date of birth of PW1 is 20/5/2008. By 3/4/2016 she was 7 years old approaching 8 years. She knew the appellant as her relative. The medical evidence is to the effect that PW1's hymen was broken. PW3 observed PW1 having difficulties when she went to the toilet. PW2 examined PW1 and concluded that PW1 was sexually assaulted. I do find that the evidence on record does sufficiently prove that PW1 was defiled. It was not a framed up case. According to PW2, there was sexual assault.

The evidence shows that the appellant was living near PW3's home. He is a relative. PW1 knew the appellant even if the incident occurred at night. It is established by the evidence that PW1 knew the appellant as well as his house. PW1 gave the appellant's name to her mother. PW1 did not mention any other person other than the appellant.

The defence evidence is to the effect that the appellant was framed. It is the appellant's uncle who framed the appellant. The evidence on record show that PW1 was defiled. There is no relationship between the defilement and the property owned by the appellant's grandmother. The issue of grudge is an afterthought. The appellant's defence does not raise any doubt on the prosecution case. I do find that all the ingredients of defilement were proved. The complainant's age was established through the production of a birth certificate. The medical evidence proves that PW1 was penetrated. PW1 identified the appellant as the person who defiled her. She knew PW1. The defence evidence does not raise any doubt on the prosecution evidence. The appellant stated that he was born in 1994. He was therefore an adult in 2016 when the offence occurred. He is not a minor. The conviction by the trial Court is proper. It is the appellant who defiled PW1.

I hold that the appeal lacks merit and is hereby disallowed.

**Dated and signed at Marsabit this...day of November, 2017**

**S. CHITEMBWE**

**JUDGE**

**Dated, Signed and Delivered at Meru this 29<sup>th</sup> Day of November, 2017**

**A. MABEYA**

**JUDGE**