



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL APPEAL NO. 86 OF 2013**

**JAPHETH MWAMBIRE MBITHA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

(From the Original Conviction and sentence in Criminal Case No. 862 of 2012 of the Chief Magistrate's Court

at Malindi – L. Gicheha, SPM)

**JUDGEMENT**

The appellant was charged with the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that the appellant on the 18<sup>th</sup> November, 2012 in Magarini District within Kilifi County, intentionally caused his penis to penetrate the vagina of F A a child aged 13 years.

The appellant also faced an alternative count of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The trial court convicted the appellant on the main count of defilement and sentenced him to serve twenty years imprisonment. The grounds of appeal are: -

- 1. That the trial court erred in law by admitting the evidence of minors yet the same was insufficient.***
- 2. That the trial court failed to consider that the medical evidence was unreliable.***
- 3. That crucial witnesses were not summoned to testify as it was a made up case.***
- 4. That the prosecution failed to prove its case beyond reasonable doubt.***
- 5. That the appellant's defence was reliable and could accord him the benefit of doubt.***

The appellant submitted that there was no sufficient evidence to support the charge. It was alleged that the incident took place inside a house occupied by many men but no other neighbor was called to testify. None of the many men was able to come to the complainant's rescue. It was alleged that an uncle to the complainant arrested the appellant but he was not called as a witness. Further, the two minors alleged that they were staying with the grandmother but she was not also called to testify. It is his submission

that the evidence of the minors was not corroborated.

The appellant also submit that the medical evidence of PW1 was not helpfull to the prosecution case. The only relevant part of the evidence is that the complainant's hymen was broken. The complainant was taken to hospital 27 days after the alledged offence. Further, there was the evidence that PW2's clothes had blood stains but she was advised by the doctor to burn the clothes. PW2 testified that the clothes were taken by the police. The investigating officer Inspector Daniel Kailu testified that the offence took place on 18<sup>th</sup> November, 2011 yet the charge sheet give the date of 10<sup>th</sup> November, 2012. The person who arrested the appellant was not called to testify as the investigating officer informed the court that he found the appellant already in the cells.

The investigating officer released the appellant on bond since the P3 form took too long to be filled. It is his submissions that how could the police release the complainant with the P3 form without escorting her to the hospital yet the offence is serious. The complainant testified that the appellant used a condom which remained inside her private parts. On the other hand the P3 form indicate that the appellant was defiled without a condom. The fact that her hymen was broken does not prove that she was defiled. The burden of proof was not discharged as required by sections 107 and 109 of the Evidence Act. The trial court only made assumption that the offence was committed but this being a criminal case required to be proved beyond reasonable doubt. Finally the appellant contends that his defence was reliable and was capable of raising doubt on the prosecution case.

Mr. Alenga, prosecution counsel, opposed the appeal. Counsel submitted that the elements of defilement were clearly brought out. The complainant's age was assessed to be 13 years. The complainant testified that she was defiled forcefully in the appellant's house. Her sister who is a minor corroborated her evidence. She found the complainant with blood on her clothes. The complainant told her sister that she had been defiled. Medical evidence proved that the complainant was defiled. The trial court believed the evidence of the two witnesses. The sentence is the minimum under the law.

Being a first appeal, it is the duty of this court to re-evaluate the evidence adduced before the trial court and come up with its own conclusion. Four witnesses testified before the trial court. PW1 IBRAHIM ABDULAHI is a clinical officer who was based at the Malindi District hospital. On the 14<sup>th</sup> December, 2012 he examined the complainant and filled her P3 form. It was his evidence that the complainant was defiled without the use of a condom. He classified the injuries as harm. The hymen was broken. Her age was assessed to be 13 years. Pregnancy and HIV tests were negative. He concluded that the complainant was penetrated.

PW2 F O was the complainant. She told the court that she was a class six pupil and was 12 years old. She did not know when she was born. She was living with her grandmother and her sister at Marereni. On the 18<sup>th</sup> November, 2012 at about 3.30 pm she went to buy vegetables. While running back home her right foot shoe came off and the appellant took it and put it behind his door. The appellant was their neighbor. They had just moved in the neighbourhood. The appellant was living with another man. She went back and asked the appellant to give her shoe but the appellant held her by the neck. Her sister had gone to church. She started screaming and the appellant pulled her inside the house and put her on the bed. She had a trouser, a panty and a blouse. The appellant had a short and a shirt. The appellant removed her clothes and pushed her on the bed. He put a condom on his penis and then defiled her. She had not had sex with anyone before. She felt a lot of pain. The appellant continued until he ejaculated. She started bleeding. Her sister knocked at the door and the complainant opened it. She found her sister and neighbours. She told them what had happened. The police took her clothes but she was advised by the doctor to burn them. The appellant was arrested by her uncle and he was taken to Marereni police station. When the door was opened she went with her sister to look for their uncle.

PW3 J A is a sister to the complainant. She was 8 years old and in class 3. They were living with their grandmother at Marereni. Their uncle was a security officer at a salt making company at Marereni. On 18<sup>th</sup> November, 2012 her sister went to get vegetables. She then heard screams inside a house which was a short distance from their home. The house where the screams came from used to be occupied by many men. The appellant was one of the occupants of that house. Her sister was making noise saying open the

door. She went there and pushed the door and it opened. The appellant came out wearing a panty and holding a stick (fimbo). The appellant wanted to hit her with the stick. She found her sister crying and wearing her clothes. PW2 informed her that the appellant had raped her. They went to inform their uncle and they found him on the way. Their uncle wanted to beat the appellant but he was told to take him to the police station. Her sister's clothes had blood. The appellant had no shirt when he came out of the house.

PW4 Inspector DANIEL KAILU was the OCS Marereni police station. On the 18<sup>th</sup> November, 2012 at about 4.00 pm he received a phone call from one of his officers and was informed that the complainant was at the station with her father and had reported a defilement case. He asked the officer to book the report and issue a P3 form. The following day he found that the appellant had been arrested. He later learnt that the complainant had been taken to her grandmother so that she could be taken to hospital. The P3 form was filled and the appellant was later charged with the offence. Since it took some time to fill in the P3 form he released the appellant on bond.

In his unsworn evidence the appellant testified that he lives at Marereni and works at [Particulars withheld]. On 20<sup>th</sup> November, 2013 he was with his colleague Nauzi Oluoch. They went to drink with his friend's girlfriend. They later had a dispute and started fighting. He managed to beat his friend. His friend told him that he would revenge. On the 30<sup>th</sup> while working he was called to the office by the company guards. He found police officers and was taken to Marereni police station. He was later charged with offence.

The main issues to be determined by this court is whether the complainant was defiled and whether the prosecution did prove beyond reasonable doubt that it is the appellant who defiled the complainant. It is the complainant's evidence that she was defiled. She was 13 years old and a class six pupil. Her sister went to the scene and found her crying while putting on her clothes. PW1, the clinical officer, confirmed that PW2 was penetrated. The appellant contends that the complainant was taken to hospital 27 days later. The offence took place on 18<sup>th</sup> November, 2012. Part of the exhibits produced before the trial court is the treatment card from Malindi District hospital. Treatment started on 20<sup>th</sup> November, 2012. She went back to the hospital on 23<sup>rd</sup> November, 2012. It is true the P3 form was filled on 14<sup>th</sup> December, 2014 but that was not the date of treatment.

Given the evidence on record, I do find that the prosecution did prove that PW2 was defiled. Although PW2's evidence does not need corroboration, the medical evidence and the evidence of PW3 corroborates that of PW2.

The next issue is whether it is the appellant who defiled PW2. This calls for the evaluation of the entire evidence. The appellant has raised several issues. One such issue is that none of the neighbours testified or the complainant's grandmother and the uncle who arrested him. I do observe that the investigations were not done with a sense of seriousness. PW4 did not bother to tell the court how the appellant was arrested. All that information is normally available on the occurrence book. It is not also clear as to why the police did not bother to take the statements of the relative who was living with the minors or their uncle. However, the above anomalies does not lead to a conclusion that PW2 was not defiled.

The evidence on record shows that the incident took place during the day. There is the issue of the condom. The PW3 form indicate that no condom was used while PW2 testified that the appellant used a condom. The medical treatment notes indicate that PW2 had gone to fetch firewood when the man pulled her to his house and defiled her. Despite the anomalies, the medical evidence shows that there was defilement. Whether a condom is used or not, what is important is whether the complainant was defiled. Although such anomalies calls for the credibility of the evidence, I do find that the evidence does prove that PW2 was defiled.

According to PW2, it was around 3.30 pm. She had gone to buy vegetables. She lost her shoe and the appellant took it. She was pulled inside the appellant's house. She was defiled inside the house. The evidence shows that other men used to occupy the house. That cannot be taken to conclude that the other

men were present in the house. PW3 heard screams coming from the home. She went there and pushed the door. It is her evidence that the appellant emerged from the house wearing a panty and without a shirt. The appellant was holding a *'fimbo'*. This cannot be made up evidence. Although PW2 and PW3 are minors, they are children aged 13 and 8 years old. They were able to narrate what had happened. It is unfortunate that the police did not take up the case seriously but the evidence of PW2 and PW3 is quite consistent. There is no evidence that the two minors were making false allegations so as to assist the alleged Nauzi Oluoch who was beaten by the appellant.

PW2 testified that she had not had sex with another man. She found herself bleeding. PW3 also saw her sister's trouser had blood. The medical notes of 20<sup>th</sup> November, 2012 indicate that PW2's trouser was torn. According to PW2, she was advised to burn the clothes. The picture given is that the police did not bother to take the blood stained clothes as evidence. However, it is confirmed that the matter was reported to the police on the same day and booked as O.B No. [Particulars withheld]. The case was reported at 3.35 pm at the police station. PW2 testified that she was defiled at around 3.30 pm. This gives a picture of the sequence of events. PW2 and PW3 went to look for their uncle. They found him on the way. Their uncle took the appellant to Marereni police station.

From the evidence on record, I am satisfied that PW2 was defiled. The defence evidence does not raise any doubt on the prosecution evidence. PW2's age was assessed on 30<sup>th</sup> November, 2012 by Dr. Ariba and found to be about 13 years. The prosecution did prove its case beyond reasonable doubt that indeed it is the appellant who defiled PW2. The evidence of PW4 on the date of the offence as 2011 is a simple slip in evidence which does not change the sequence of evidence. I do find that the conviction is proper.

The upshot is that the appeal lacks merit and is hereby disallowed.

**Dated and delivered in Malindi this 22<sup>nd</sup> day of September, 2016.**

**S.J. CHITEMBWE**

**JUDGE**