



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**CRIMINAL APPEAL CASE NO. 130 OF 2012**

**(Being an appeal from the Judgment of Kitale Resident Magistrate S.K. NGETICH delivered on 23/11/2012 in Criminal Case No. 2920/2011)**

**EMANI BARASA WANYONYI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The appellant was charged with the offence of Defilement of a child contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on the 30<sup>th</sup> day of November 2011 *particulars withheld* within Trans Nzoia County intentionally caused his penis to penetrate the anus of G K K a child aged 6 years.

The appellant was convicted and sentenced to 10 years imprisonment hence this appeal.

The prosecution evidence can be summarised as hereunder.

**PW1 the complainant** gave unsworn evidence. He said that on the material day he and M his brother were assisting the appellant in herding cattle in a forest. The appellant then separated them, by having each one of them herd different cattle in different places. The appellant with the complainant were on the upper side while M was alone on the lower side.

In the process the appellant pushed the complainant down and removed his trousers. He then used soap to lubricate his anus as well as his penis. He inserted his penis into the complainant's anus but because of the pain he cried out and M rushed to the site. The appellant then dressed up.

Later as the children went home they informed their father J K who reported the matter and had the appellant arrested and taken to Saboti police station. He also organised for the minor to be treated at Kitale District hospital and later PW3 form filled. The soap and the P3 form were also identified by the complainant.

**PW2 M K** the complainant's brother told the court that as they were herding the cows together with the appellant and the complainant, the appellant separated them.

PW1 went to herd the cows elsewhere and in the process he heard the complainant crying and when he rushed to the scene he found the appellant wearing his trousers. He told him not to tell anybody what had happened and gave him Kshs 50 so as to keep quiet. Later that evening when their parents came back

from a funeral he told his mother who in turn told his father and the appellant was later arrested. He also identified the bar soap used by the appellant.

**PW3 J G K** the complainant father told this court that as he arrived home from a funeral at around 8 pm he found that his son was not in his usual mood as he would run and embrace him as soon as he arrived.

He was told by PW2 what had transpired that day. He then went and informed the appellants employer and had him arrested. He further testified that they went to the Scene where they recovered the bar soap. He was then escorted to Saboti police station and the minor taken to Kitale District Hospital for treatment.

**PW4 Linus Likare** the Clinical Officer produced the P3 form which he filled after physically examining the minor. He concluded that there was no obvious erosion at the anal opening. He concluded that the patient had been sodomised.

**PW5 PC Martin Murefu** from Kitale Police station was the investigating officer. He rearrested the appellant who had been brought by police Reservist at the station.

He also recorded statements from the witnesses and charged the appellant with the said offence.

**PW5 Dr. Ken Ndege** produced the dental examination report which showed the complainant to be aged 6 years.

When put on his defence the appellant gave sworn evidence denying the charge. He said that he worked for the complainant father and he asked for his dues but instead of being given on 30<sup>th</sup> November 2011 as promised he had him arrested and charged with the said offence. He further said that the soap produced was picked from his table during arrest and he used it for cleaning himself. He said that this was framed by PW3 for asking his dues.

The appellant grounds of appeal received in court on 6/12/12 essentially argues that there were no sufficient evidence so far presented to convict him. He argued that what was tendered by the prosecution was contradictory and the burden was shifted to him. He pursued the same argument by the handwritten submissions which I have perused.

The learned state counsel on his part supported the conviction and sentence arguing that there was strong evidence to show that the appellant took advantage of the complainant's age and trust. That the narrative by the complainant was clear and uncontroverted. He argued further that although the appellant ought to have been sentenced to life imprisonment, they were satisfied with the 10 years granted and they were not pressing for enhancement as they did not issue any notice as such.

### **Analysis And Determination**

Having perused the entire evidence on record. I would agree with the learned state counsel that the evidence of PW1 and by extension PW2 were graphic. Although the same was unsworn, due to their ages, the whole incident took place during daytime and there was no possibility of wrong identification.

Both the appellant and the complainant were known to each other. I do not find any sufficient reason why a child of such tender years together with his brother would lie. The bar soap which was used by the appellant was found at the scene.

More importantly the evidence by PW1 was corroborated by PW2 who when he rushed to the scene found the appellant hurriedly wearing his trouser. What was he doing with his undressed trouser at that moment apart from undertaking his mission of defiling the minor?

The medical evidence buttressed the evidence of PW1 and Pw2. Although there was no actual penetration, nevertheless there was an attempted penetration as found by the trial court which in my view

was the correct position.

The appellant defence was not convincing. There was nothing to suggest that he worked for PW4 the complainant's father.

Infact he did not suggest to the court how much he was owed.

In light of the above observation, I find that the appellant appeal is not meritorious. He took advantage of the minor who was literally under his duty and care. By carrying a bar soap it is crystal clear that he was well prepared for his mission.

In the premise I shall dismissed his appeal and uphold both the conviction and sentence. In computing the 10 years sentence I note that the appellant all through was in custody and there is nothing to show that despite being released on a bond of Kshs 200,000 he was able to do the case while outside prison. Consequently in computing the 10 year consideration has to be taken so as to factor in the period of about one year in which he was in custody. For avoidance of doubt the period between 2/12/2011 and 23/11/2012 be taken into consideration and subtracted from the 10 years.

Order accordingly.

Delivered this 31<sup>st</sup> day of October, 2016.

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**H.K. CHEMITEI**

**JUDGE**

**In the presence of:**

**Kakoi for State**

**Appellant - present**

**Kirong – Court Assistant**