



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO.196 OF 2013**

S.A .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(Being an appeal from the original conviction and sentence of Kakamega CMC.CR. Case no. 1954 of 2011 delivered by Hon. P. Achieng AG.RM on 12<sup>th</sup> September 2013.)**

**Introduction**

1. The appellant herein S.A.L was arraigned before the Chief Magistrate’s Court at Kakamega on charges of defilement 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 23<sup>rd</sup> day of September 2011 in Kakamega South District within Western province, he intentionally and unlawfully caused penetration with his genital organ namely penis into the genital organ namely vagina of S.K.I, a child aged 13 years.

2. The appellant was charged in the alternative with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2015. The allegations were that on the same date and time and in the same place, he committed the said offence by letting his penis to come into contact with the genital organ namely vagina of the child named S.K.I.

3. The appellant denied committing the said offences and the case went to full trial. After carefully analyzing the evidence placed before her the learned trial Magistrate was satisfied that the Prosecution had proved its case against the appellant on the main count. She found the appellant guilty as charged and convicted him of the same. The appellant was sentenced to 20 years imprisonment as provided by the law.

**The Appeal**

4. The appellant was aggrieved by both conviction and sentence and thereafter exercised his right of appeal on the following 7 grounds:-

1. THAT the trial Magistrate erred in both law and facts in convicting the appellant yet the evidence on record was uncorroborated, fabricated and malicious and meant to implicate the appellant with this offence.

2. THAT the trial Court did not consider, that the trial was based on an illegality as the appellant was detained by Police for a period of 6 days before being produced in Court thereby infringing on the appellant’s right to liberty as enshrined in Chapter 4 of the Constitution.

3. THAT the appellant was not scientifically tested to ascertain if indeed it was the appellant who committed the alleged offence.

4. THAT the trial Court relied on shoddy investigations by the Prosecution who never even bothered to visit the scene of crime to ascertain the truth from the ground but relied on hearsay and rumours to convict the appellant.

5. THAT the trial Court did not consider that there was malice in this case as the same was pre-planned to implicate the appellant in the offence.

6. THAT the charge sheet was defective.

7. THAT the trial Court did not consider the appellant's defence which was sufficient to exonerate the appellant from any wrong doing.

5. The appellant prays that the appeal be allowed, the conviction quashed and the sentence set aside so that he is set at liberty.

### **Duty of this Court**

6. This is a first appeal, and as the first appellate Court, this Court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. The appellant in this case expects this Court to rehear his case, and to satisfy itself that the conclusions reached by the learned trial magistrate were legally sound and supported by evidence. In doing so however this Court is reminded that it did not see or hear the witnesses who testified before the trial Court. It is only that Court that had that privilege, so that if an issue on this appeal turns on the demeanour of any particular witness, this Court would be hard pressed to confirm the finding of the trial Court. Generally see **Okeno -vs- Republic [1972] EA 32.**

### **The Prosecution Case**

7. The Prosecution called 5 witnesses. PW1, was S.K.I the complainant who testified that she was 15 years old and a pupil at [particulars withheld] Primary School in class 7. Her home is in [particulars withheld]. She recalled how on 23/09/2011 at about 6.00am she woke up and went to the toilet. The appellant followed her and attached her inside the toilet by removing her clothes and defiling her. She testified that she was wearing a trouser and a skirt; and that during the appeal the appellant covered her mouth with one hand and defiled her as she stood against the wall of the toilet.

8. PW1 also stated that the appellant's wife found the appellant in the act of defiling S.K.I and that it was only after that the appellant went to his home. S.K.I then proceeded to and while at school, she learnt that the appellant had beaten his wife and burnt her clothes in the hope that his wife would not reveal what he had done to S.K.I. S.K.I reported the matter to the head teacher of her school who in turn called S.K.I's mother to the school. S.K.I's mother first took her to the DO's office and later to Shibuye Health Centre for treatment. A P3 form was issued to her at Isulu. S.K.I was able to identify the P3 form – MFI – 1 and the treatment notes from Shibuye Health Centre – MFI – 2. S.K.I further stated that the appellant was later arrested and taken to Kakamega Police Station before he was arraigned in Court on the present charges.

9. Though PW1 testified on 19/04/2012, she was not cross-examined until 16/10/2012. During cross examination, PW1 stated that the appellant is her cousin and that he used to work for their uncle. PW1 stated that she was not aware of any disagreement between the appellant and the uncle, but she confirmed that all that she was telling the Court was the whole truth. PW1 could also not say whether the appellant was examined by the doctor after the incident.

10. When PW1 was taken to Shibuye Health Centre, she was examined by Abel Atola, a clinical officer at the said medical facility who testified as PW3. PW3 stated that on 03/10/2011, he received the P3 form

relating to the complainant herein. PW1 was 13 years old at the time. He filled the P3 form. On physical examination of PW1, he noted that her underpant had blood stains. He also stated that from the history contained in the treatment notes, PW1 had been defiled and that the doctor who saw her first had noticed some whitish discharge from the child's vagina with scratches on both sides of the labia minora. He also testified that PW1's hymen was broken. He concluded that because of the broken or missing hymen and the presence of scratches on the labia minora, PW1 had been defiled. PW3 filled the P3 form which he produced in evidence as PExhibit 1. PW3 also testified that the child's urine test showed that she had an infection, although the infection was not evidence of defilement.

11. When PW3 was cross-examined, he testified that he did not have the blood stained pant to avail to the Court and further that he had used the initial treatment notes (by a colleague to fill the P3 form.

12. PW1's mother, B.C testified as PW2. She testified that on 23/09/2011, about 6.30am, the appellant called her while she was making the morning tea and informed her that while he was in the toilet, PW1 went to the said toilet and stood at the door. That the appellant's wife had found the appellant together with PW1 in the toilet. PW2 confirmed that her daughter PW1 confirmed the appellant's wife's testimony.

13. PW2 also testified that 3 days later, she was summoned to PW1's school by the headteacher, H.O.M who testified as PW4. She complied and when she got to the school, she was informed that PW1 had reported that the appellant had defiled her. Together with the school headteacher, PW 2 went and reported the matter at Isulu Police Station and thereafter escorted by PW1 to the hospital for treatment. According to PW2, the doctor informed her that he did not notice any sign of defilement on PW1. PW2 also stated that the initial treatment notes had got lost. PW2 could also not recall PW1's date of birth though she said it was in the year 1996. PW2 also told the Court that the appellant was a son, he of her brother-in-law.

14. In cross examination, PW2 told the Court that the appellant told her he could not run away because he had not committed the offence.

15. The second last witness to testify for the Prosecution was H.O.M, PW4, who was headteacher of [particulars withheld] Primary school. He recalled that on 26/09/2011, he received a report from PW1's class teacher concerning this case. He summoned PW2 to the school and together they questioned PW1 who told them that she had been defiled by the appellant. PW4 then reported the matter to the Assistant chief of Malinya sub location who then arrested the appellant and took him to the AP cap before being taken to Isulu Police Post. PW4 told the Court that PW2 confirmed to him that she was aware of the incident.

16. During the ensuing cross examination, PW4 stated that PW2 had told him that it was the appellant who had defiled her. He denied a suggestion by the appellant that he bribed the area Assistant Chief with Kshs.1500/= in order to have the appellant arrested.

17. PW5 was No.33503 Police Constable Abdalla Dagana of Malaika Police Station and that on 27/09/2011 at about 12.55 pm while he was on duty an AP from Malinya took PW1 and PW2 to the Station with a history of defilement of PW1 which took place on 23/09/2011. PW5 issued PW1 with a P3 form and on receipt of the filled P3 form, he arrested the appellant and charged him with the present offences, although the appellant denied committing the offence. PW5 also produced PW1's birth certificate which showed that PW1 was 13 years old. The birth certificate was produced as PExhibit 3.

### **The Defence Case**

18. At the close of the Prosecution case, the appellant was found to have a case to answer and was put on his defence. The appellant gave unsworn testimony and told the Court that he was arrested on 18/09/2004 at about 1.00pm while he was coming from the shamba. He was arrested by 2 village elders who took him to the office of the sub chief without explaining to him why he was being arrested. On arrival at the Police Station, he was locked up. He was later told that if he had money to give the Police officers he

would secure his release. He was later arraigned in Court and charged. He denied the offences.

### **The Law**

19. Section 8(1) of the Sexual Offences Act No.3 of 2006 defines defilement as follows:-

“A person who commits on act which causes penetration with a child is guilty of an offence termed defilement”. If the offence is committed against a child aged between twelve and fifteen years as in the present case, the person found guilty of such an offence is liable to imprisonment for a term of not less than (20) twenty years. In the instant case, the appellant was sentenced to twelve years imprisonment as provided under Section 8(3) of the Act.

20. Because the offences under Section 8 carry mandatory and strict sentences, the following two ingredients must be proved:- (a) the age of the child and (b) penetration. There are a number of persuasive authorities on the critical question of the age of the victim. Generally see **John Otieno Obwar –vs- Republic Kisii High Court Criminal Appeal No.34 (B) of 2010. Rna Njao Mwatuma – vs- Republic [2014] e KLR** Proof of age can be either by document such as birth certificate or by the testimony of any person who attended the birth of the victim, such as the mother or birth attendant. Other documents such as baptismal cards, or school administration papers can also be used to prove age since they would normally contain information on the date of birth of the child concerned. See **William Odhiambo Siara –vs- Republic [2014] e KLR, High Court at Kisumu Criminal Appeal No.77 of 2012.** An age assessment report may also be used as proof of age.

### **Analysis and Findings**

21. Applying the law as stated above to the facts of this case, the success or failure of this appeal depends on whether:-

- a) The age of the complainant was proved by the Prosecution and
- b) Whether there was penetration.

22. Regarding the first issue, I am satisfied like the trial Court was that the age of PW1 was positively proved by the Prosecution. According to the charge sheet, the complainant was aged 13 years at the material time. According to the birth certificate of the complainant her date of birth was given as 16/03/1997, which means that as at 23/09/2011 she was about 14 years of age. She was therefore a minor falling in the age bracket of between twelve and fifteen years as provided under Section 8(3) of the Sexual Offences Act, No.3 of 2006.

23. The next issue for determination is whether there was penetration. According to the testimony of PW3, PW1 was found to have a broken hymen at the time of initial examination at the Shibuye Health Centre. The question to ask now is whether it was the appellant who caused the penetration that resulted in the broken hymen. According to PW1, she was in the toilet at about 6.00am when the appellant accosted her removed her clothes and pinned her against the wall as he defiled her while covering her mouth with the left hand. The appellant denied committing the offence.

24. Putting the whole scenario into perspective it is not clear to the Court how the penetration of PW1 occurred, while she was standing against the wall. It may be that PW1 and the appellant had had some relationship before, but that is only a maybe. What is clear to the Court however is that the appellant's penis must have got in contact with PW1's vagina during that time. I say the appellant must have had a previous relationship with the complainant, PW1, because of the way his wife responded to the situation on the material day. She seemed to sense that something amiss was happening between the appellant and PW1 and that is why she went to the toilet where she found the two. The appellant's wife ought to have been called as a witness for the Prosecution or the defence so as to shed some light on the actual happenings both outside and inside the toilet. See Section 127 (3) (b) of the Evidence Act, Cap 80 Laws of Kenya which reads: In criminal proceedings the wife or husband of the person charged shall be a

competent and compellable witness for the Prosecution or defence without the consent of such person, in any case where such person is charged.

(a) .....

(b) with offences under the Sexual Offences Act.”

25. Having said all the above, I am not satisfied that the offence of defilement was proved to the required standard. Infact, according to PW2, the doctor who examined the complainant, PW1 had apparently told her that there were no signs of defilement. It is also to be noted that the original treatment notes went missing, so there is doubt in my mind as to what exactly was seen or found when PW1 was first examined. I give the benefit of that doubt to the appelland and accordingly acquit him of the man charge of defilement.

26. There is however sufficient evidence to support the alternative charge of committing an indecent act with a child. Section 2 of the Sexual Offences Act defines an indecent act as one which causes-

**a) “any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act. That causes penetration.**

**b) Exposure or display of any pornographic material to any person against his or her will.”**

27. In the instant case, I am satisfied that the appellants hands and/or penis touched PW1’s vagina. In the circumstances, I find the appelland guilty of committing an indecent act with a child under Section 11 (1) of the Sexual Offences Act No.3 of 2006 and convict him accordingly. I sentence him to ten (10) years imprisonment with effect from 12/09/2013.

Right of appeal within 14 days.

Orders accordingly.

Judgment delivered, dated and signed in open Court this 23rd day of July 2015.

**RUTH N. SITATI**

**JUDGE**

In the presence of:

Present in person.....for Appellant

Mr. Omwenga (present).....for Respondent

Mr. Lagat.....Court Assistant