



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 137 OF 2011**

G C ..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

**(Appeal from the original Criminal Case No. 283 of 2009 in the Senior Resident Magistrate's Court at Hamisi – the judgment of {P.A. OLENGO, SRM} dated 21.6.2011)**

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

The appellant was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act No. 3 of 2006. He was also charged with an alternative charge of indecent act contrary to **section 11(1)** of the Sexual Offences Act No. 3 of 2006. The particulars of the offence for the main count was that the appellant *on the 17.7.2009 at [particulars withheld] within Hamisi District of Western Province, unlawfully and intentionally had canal knowledge of D M a child aged 7 years old.*

The appellant was convicted and sentenced to life imprisonment. The grounds of appeal are that the charge sheet was defective, the age of the complainant was not ascertained, the medical evidence did not incriminate him, that the trial court did not consider the fact that there was a grudge between him and the complainant's mother, the investigations were below the required standard and that the prosecution case was not proved beyond reasonable doubt.

The appellant filed written submissions. He contends that the charge sheet did not indicate that the appellant's genital organs penetrated the genital organs of the complainant and therefore it was defective. There was no Birth certificate or age assessment report that was produced. PW5 testified that he examined the complainant two days after the offence was committed and no treatment notes were produced. The conviction is based on the evidence of a single eye witness and this is a child of tender age. It is on record that the complainant's mother had a grudge with him. Further there was evidence that there were five other people in the house and one was milking and they ought to have been called to shed more light. The investigations were poor, the complainant's age was given as 7 years and when she came to court she said she was 10 years. The case was therefore not proved beyond reasonable doubt.

Miss Ngovi, State Counsel, opposed the appeal. Counsel submitted that the complainant's evidence was consistent and credible. PW3 a clinical officer testified that the girl was defiled and his evidence corroborates that of the complainant. There was no need to have had the appellant examined. The complainant was below the age of 11 years and the charge sheet was proper. The issue of the grudge is an afterthought as it was not part of the defence.

Before the trial court six witnesses testified for the prosecution. **PW1, D M**, testified that she was a

pupil at [particulars withheld] Primary School. She told the court that she was 10 years old. She knew the appellant as they are related. She gave sworn evidence after the trial court established that she was capable of testifying under oath. She informed the court that the appellant did bad manners to her. He blocked her mouth using a lesso and removed her pants and did bad manners to her. She was injured and her pant got blood stains. The appellant gave her 20 shillings. It was her evidence that she used to sleep in the kitchen with her grandmother and on that date her grandmother was sleeping as she was sick. She later informed her grandmother (PW2). She was walking abnormally and at school the teachers and students looked at her. Initially her grandmother asked her but she kept quiet. It is her evidence that the appellant defiled her when she woken up in the morning and was preparing to go to school. She had woken up at 7.00 a.m. and the appellant defiled her at 8.00 a.m.

**PW2, S L**, is a sister to the appellant. She testified that on the 17.6.2009 she was at home sleeping as she was sick. PW1 woke up from the kitchen where the two were sleeping and went to the living room to put on clothes and go to school. At about 9.00 a.m. she went out to sweep and found the child's pants on a sofa set with blood stains. She waited for the child and when she came back home she asked her and she was informed that her grandfather who is the appellant had done bad manners on the child. PW2 notified the assistant chief and the village elder. The appellant and PW2 lived together in the same home. PW2 looked at the child and she was walking with pain and her private part was swollen. PW2 identified the blood stained pant to be that of PW1. It is her further evidence that sometime in March 2009 there was a quarrel between PW1's mother and the appellant. PW2 is the mother to PW1's mother.

**PW3, SETH GIVEDI**, is the assistant chief Makuchi sub-location. On the 18.7.2009 he was informed about the incident by the village elder. He called the police and went to arrest the appellant on 19.7.2009. **PW4, JOSEPHINE AMWOGA** is a clinical officer who was based at Kaimosi Friends Hospital. Her evidence is that the child was taken to the hospital with a case of defilement. Her pants had blood stains and she was bleeding from her private parts. The hymen was broken and the age of the injuries was two days. The complainant was still bleeding. She was treated and her P3 form was filled. The complainant was not walking properly.

**PW5, was CPL SILVERUS KOGEI**. He was based at the Cheputulu police patrol base as the in charge. On the 19.7.2009 he was on patrol when he was called by PW3 and informed about the matter. They went to the scene and arrested the appellant. They took the complainant to hospital where she was treated. They also collected PW1's blood stained pant. PW1 informed them that she had been defiled several times but she used to hide.

The appellant was put on his defence and gave unsworn testimony. He stated that on the 17.7.2009 he was at his home at Soyi and wanted to go to Tiriki on 18.7.2009. PW1 and PW2 had visited him as PW1 wanted to be taken to the school where his children were learning. This is a private school. He told them that the school is too expensive and PW1 and PW2 were not happy. PW1 started crying stating that she knew she was being taken to school and not to the appellant's place. PW2 asked him to go and split timber for her and on 18.7.2009 he went to Tiriki to split the timber. He reached Cheputulu in the evening of 18<sup>th</sup> July 2009 and went to a petrol station where he bought petrol for the work of splitting timber. He then went to PW2's home. PW1 and PW2 were not at home but he got the husband of PW2 who was asleep. PW2's husband brought food and the two ate together. He slept at the sitting room on a sofa at 4.00 a.m. he heard people knocking the door saying they were police officers and he was arrested. He was later charged with the offence.

The main issue for determination is whether the appellant defiled the complainant. The evidence of PW4 who was indicated as PW5 in the lower court record is that the complainant was defiled. The P3 form was filled and the complainant was still bleeding. Her hymen was broken and there was swelling of labia majora. It is established by the prosecution evidence that the complainant was defiled. There is the issue of age. The P3 form indicates that the complainant was 7 years old. That is the age given by the police officers. PW1 herself testified that she was 10 years old. The date of birth was not given. The trial magistrate did an examination (voire dire) on the complainant before taking her evidence. The appellant contends that the age was not ascertained. Since the complainant indicated that she was 10 years old and the court was of the view that she was a young girl who had to be examined before

testifying, I will take it that the complainant was 10 years old. The essence of age assessment in sexual offences matters is because the sentence is pegged on the age of the complainant. However, the mere fact that the age was not clearly ascertained should not lead to automatic dismissal of the prosecution case especially if the evidence on record shows that the act complained of was committed.

The evidence of PW1 is that it is the appellant who defiled her. According to PW2 she saw the blood stained pant of PW1 and on inquiry from PW1 she was told that her grandfather who is the appellant had done bad manners to her. It is PW2's evidence that she has no husband. The defence evidence is to the effect that the appellant had supper with PW2's husband. PW2 is a sister to the appellant and they know each other. PW1 did not refer to any other person other than the appellant. From the evidence on record I am satisfied that it is the appellant who defiled PW1. The ground of appeal that other crucial witnesses like the one who was milking and the village elder were not called does not change the story. It is the evidence of PW1 that when the appellant heard people walking he gave her 20 shillings and told her to go to school. It is clear that no other person witnessed the incident.

Although the evidence of the prosecution is based on that of PW1 in relation to the act of defilement that evidence is corroborated by that of PW2 who saw the blood stained pant and noted that PW1 was not walking normally. It is also corroborated by that of PW4 the clinical officer who examined the complainant. Under section 124 of the Evidence Act the court can convict an accused person in a charge involving sexual offences on the basis of the evidence of the victim if the court is satisfied that the victim is telling the truth. From the evidence of PW1 I am convinced that she was telling the truth. The purported grudge between the appellant and PW1's mother did not arise in the proceedings. It was merely mentioned by PW2 and the appellant did not even mention it in his defence. There was no shifting of the burden of proof as all the witnesses informed the court on what they knew about the matter.

In the end, I do find that the appeal lacks merit and the same is disallowed.

**Delivered, dated and signed at Kakamega this 18<sup>th</sup> day of February 2014**

**SAID J. CHITEMBWE**

**J U D G E**