



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 164 OF 2010

GEOFFREY OWINO NDEDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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 Laws of Kenya.

The particulars were that on the 2nd day of May 2010 at [particulars withheld] Estate in Kisumu East District within Nyanza Province, unlawfully caused his penis to penetrate the vagina of C A a child aged 4 years.

He was equally charged with an alternative count of Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya .

The particulars were that on the 2nd day of May 2010 at [particulars withheld] Estate in Kisumu East District within Nyanza Province, committed an indecent act with C A by touching her private parts.

The prosecution in proving their case called six witnesses. The appellant gave his unsworn defence and called one witness. He was eventually convicted and sentenced to serve 20 years imprisonment, hence this appeal.

Briefly, the facts of this matter are that **PW1 M G M**, the mother to PW3, the complainant on the material day went to Bondo with her husband the complainant and her brother. They were called to come back the following morning since the complainant had been defiled. She went to the hospital with the child where the doctor carried out examination and determined that she had been defiled.

PW3 L A , the sister to the complainant told the court that on the material day, their parents had left them at home. It started raining and water filled their house. DW2, the appellant's wife took them to her house. She then left to buy paraffin and in the process the appellant defiled the complainant. She said that he undressed her and he had a condom. The appellant later took them back home. They went to their uncle's home PW4, where they explained to him the ordeal. PW4 then went to look for the appellant.

PW2 the complainant was aged 4 years. She told the court that when it rained water filled their house. The appellant then took them to his house. The appellant's wife then went to buy paraffin and that is the time the appellant took advantage and defiled the minor.

PW4 B M, found PW1 and PW2 crying at his door. They told him that PW2 had been defiled by

the appellant. He went to the appellant's house which was about 100 meters from his. He found the appellant who took off after PW4's inquiry.

PW5 Dr. Grace Atieno Midiko, produced both the P3 forms for the complainant and the appellant which had been filled by Dr. Kiyani. The same showed that the complainant's hymen was broken.

PW6, PC Haron Tuba, rearrested the appellant when he was brought by the members of the public.

In his defence the appellant denied the charge. He told the trial court that the two children went away making allegation that he had defiled one of them. Later the relative to the children came and had him arrested.

DW2 L A, the appellant's wife testified concerning the incident also. He denied that the appellant committed the offence.

This being the first appeal this court is enjoined to arrive at an independent finding. See **Ekeno - VS- Republic [1972] E.A 32**. This court is also alive to the fact that the star witnesses were PW2 and PW3 who were minors and that their evidence ought to be corroborated. Section 124 of the Evidence Act cap 80 provides as follows:

“Notwithstanding the provisions of section 19 of the Oath and Statutory Declaration Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceeded to convict the accused person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.

In this case it is the evidence of PW2 and PW3 that is critical. Both are children of tender years PW3 the complainant was aged 4 years whereas the sister was aged 7 years. The court appreciated this fact when it tested their character and concluded that they were able to testify. What runs across both prosecution as well as the defence case was that the appellant as well as the complainant were neighbours, meaning that they knew each other. Secondly, on the material day, there was rain which caused the complainant's house to be flooded. The complainant and her sister were taken in by the appellant, whether by himself or his wife. Equally, in the cause of time DW2 went to buy paraffin from the shop and this is when the appellant allegedly defiled the complainant.

The discrepancy which has been pointed out by the appellant is that there was contradiction by PW2 and PW3 as to whether his children were present during the ordeal or not. PW3 on cross examination said that the appellant's children were not there whereas PW3 the complainant suggested that they were there. She said on cross examination that:

“Your (2) two children and your sister were in the house”.

Even in the midst of the two contradictions did the offence occur? PW3 told the trial court that she saw the appellant do “tabia mbaya” to C. She said:

“Geoffrey took C to his bedroom. I followed. I saw Geoffrey (accused) doing “tabia mbaya” to C I cried. Geoffrey took a whip. I ran away. Accused had a condom. He inserted his penis into C's private part (demonstrating it). Accused had undressed C. Her trousers was down I dressed her up. Geoffrey took us back home carrying C....”.

PW2 said:

“Geoffrey did to me “tabia mbaya”. His wife saw it. He did it using a balloon. He removed my trousers and did it. I felt pain. It was bad. I cried. A was seated. He saw it. Geoffrey's wife had gone to buy paraffin”.

Both girls agree that the appellant used condoms although the complainant called it a “balloon”.

His defence however do not tally with that of the wife. The appellant's version suggest that it was the children who reported to his wife that he had defiled the complainant. He said:

“She brought two children into my house. She advised me to change clothes. In the process of changing clothes I heard my wife going out. The children followed her with noise before she reached gate. The children were saying they were being done bad things.....”.

This line of defence does not add up. Did the children escort the appellant's wife when she went for the paraffin? On cross examination DW2 said:
“I went out to buy paraffin. The children followed me”.

This does not agree with the appellant's argument. Nowhere does DW2 suggest that the children complained to her as suggested by the appellant.

Putting together the evidence of the prosecution witnesses and the appellant this court is inclined to believe the evidence of the minors. They were more consistent. Both graphically described how PW2 was defiled. The appellant took advantage of his wife going to buy paraffin then struck at that opportune time. His wife cannot claim to know what transpired during the period she went to buy paraffin.

Her evidence that she was followed by the children when she went for the paraffin is unsubstantiated. In any even why should they follow her? If they were sheltering from the rain why follow her?

Further, the evidence of the minors was well corroborated by the doctor's report. The doctor concluded that the hymen had been broken. Equally and of great significance I do not find any basis for the children to implicate the appellant. They were enjoying his hospitality in the absence of their parents. There house was being infiltrated by water consequences to the rains and they were naturally happy to have been taken to a better shelter. Why then would they implicate a good samaritan? Neither has it been suggested anywhere that there was any bad blood between the appellant and the complainant's parents.

In the premises and taking totality of the facts herein I do agree with the finding of the trial court. Moreover, it is that court which saw the demeanour of the witnesses. This appeal is otherwise dismissed.

Dated, signed and delivered at Kisumu this 17th day of November, 2014.

**H.K.
JUDGE**

CHEMITEI