



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL NO 15 OF 2020**

**ELIJAH MIRERA ORENGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the conviction and sentence in Criminal Case No. 2 of 2017)*

*at Ogembo Law Courts before Hon. M.M. NAFULA SRM delivered on the 19<sup>th</sup> October 2017)*

**JUDGMENT**

1. The appellant Elijah Mirera Orenge was charged with the offence of defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are, on the 1<sup>st</sup> day of January 2017 in Gucha South Sub-county within Kisii county, intentionally caused his penis to penetrate the vagina of HMM a child aged 16 years old. The alternative charge was committing an indecent act with a child contrary to section 11 (A) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are, on the 1<sup>st</sup> day of January 2017 in Gucha Sub-county within the Kisii County intentionally touched the vagina of HMM with his penis against her will.

2. He pleaded not guilty and the case was heard. He was convicted of the said offence and sentenced to 15 years' imprisonment. On the 18<sup>th</sup> February 2020 the appellant filed a petition of appeal.

3. His grounds of appeal summarised as follows:

- i. That the prosecution failed to establish their case beyond reasonable doubt
- ii. That the punishment meted on him was very harsh, that his conviction should be quashed and the sentence set aside.

4. As a first appellate court, this court will first analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions bearing in mind that it did not see or hear the witnesses. (See **Okeno vs. Republic [1972] EA 32.**)

5. The prosecution called 4 witnesses. Pw1 HMM testified that she is 16 years. That on the 1/1/2017 she had gone to Ekona to visit a friend. On her way back home she boarded a motor cycle that she being driven by the appellant. Whilst on the way the appellant told her there were witches in the direction she was going and that they would throw stones at them. The appellant took her back to Ekona. They went to pentagon bar and slept there. The appellant asked her to have sex with her she refused and he forced her to have sex with him. The next day he asked her to wait for him as he went to Kilgoris to get a customer. Before he returned she called her father using someone's phone. The appellant returned and he told him that her father had told her to go back home. When she got home she found that her father had gone to reported. She went to the police station and later to the hospital for a medical examination. Pw2 and Pw3 recalled that on the 1/1/2017 their daughter did not return home. Pw3 looked for her but did not find her. He went to report at the police station and whilst there Pw1 called her using a different number. He advised her to go home. Later he took her to the police station and after she told him what happened and he took her to hospital. She was examined and treated. Pw1 told him that she taken by Elijah Mirere who rides a motor cycle. The accused was arrested the 3<sup>rd</sup> day. The accused was identified by the chairman of the boda boda riders.

6. Pw4 Corp. Juma attached to Nyamaiya police station testified that on the 2/1/2017 Pw3 reported that his daughter had gone missing from the 1/1/2017. He booked his report and advised him to look for his daughter. Pw3 returned and reported that his daughter had been taken by Elijah Mirere. Pw3 told him that he had given the name of the appellant to the boda boda operators at Nyamaiya and the appellant was arrested. They took the appellant and Pw1 to Etago sub-county hospital for examination and the PRC forms was filed. The appellant was thereafter charges.

7. Pw5 produced Pw1's p3 for. He testified that Pw1 was examined and epithelial cells and sperms were noted. She had fresh bruises and she was put on treatment.

8. The appellant gave a sworn statement. He testified that he repairs motorbikes. That on the 4/1/2017 at 7am he was in the garage. Daniel took a motorbike for repairs and he repaired it. Daniel refused to pay him and they fought. He was taken to Nyamiya police station. He was booked in the cells and was told to wait for the complainant to come and record his statement. His wife visited him at the police station. The police demanded money from him. His finger prints were taken on 31/1/2017. He was brought to court where the charges were read over to him. He was taken to hospital where he was examined. He was brought to court where the charges were read to him. He did not defile Pw1.

### **ANALYSIS AND DETERMINATION**

9. I have considered the appellant's submissions and that of the Respondent. In a case of defilement, the prosecution is required to prove the following; the age of the victim, the act of defilement of the victim and identification of the perpetrator. In this case the age was the complainant was said to be 16 years old. The mother testified that HMM was born on the 26/12 /2000. The p3 form produced by Pw5 noted HMM had epithelial cells and sperm were noted and that she had fresh bruises. Defilement was established.

10. The next issue is the identity of the appellant as the person who defiled HMM. At the hearing of this appeal the prosecutor conceded to the appeal on grounds that the identification of the appellant as the one who defiled HMM was in doubt. That it was on record that HMM did not know the person who defiled her and that there was no link on how the appellant was identified and arrested.

11. Identification is key in this case. According to Pw1 she did not know the appellant. It is not clear how the appellant was arrested. When HMM testified she was not asked whether there was light in the room where she was with the appellant or how he was subsequently arrested. She identified the appellant in court as the person her defiled her. Dock identification has been termed as Worthless. In **Gabriel Kamau Njage vs R.C.A 189 of 1986 the Court of Appeal held that, "Dock identification is worthless the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade."** I agree with the prosecution that the evidence on the how the appellant was identified is in doubt. A lot could have been done to find out if indeed it is the appellant who defiled HMM e.g. an identification parade could have been held, a witness from the bar where Pw1 was and made the call and lastly further examination of the sperm cells found in HMM to establish if it was from the appellant. Indeed, there is a doubt created that it is the appellant who defiled Pw1. When there is a doubt the benefit goes to the appellant. In my view the conviction was unsafe and I therefore quash the conviction and set aside the sentence imposed by the trial court, the appellant is free to go unless lawful held.

**Dated, Signed and Delivered at KISII this 13<sup>th</sup> of July 2021.**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**Appellant In Person**

**Mrs Kiptoo Senior State Counsel ODPP**

**Mr. Orwasa Court Assistant**