



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 87 OF 2017**

**(Being an appeal from the decision of Hon. M. I.G. Moranga in criminal case No. 88 of 2016)**

**MARK OMOTI WASIKE.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

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

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 24<sup>th</sup> day of June, 2016 within Trans-Nzoia County intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of EN a child aged 15 years**.

2. The alternative charge was **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act**. The particulars of the charge were that **on the 24<sup>th</sup> day of June 2016 within Trans-Nzoia County caused the contact between his genital organ namely penis and the genital organ namely vagina of EN a child aged 15 years**.

3. The accused denied the charge and after a full trial was convicted and sentenced to 20 years' imprisonment hence this appeal. Before looking at the appeal it is necessary to summarise the evidence as presented during trial.

4. **PW1** the complainant stated that she was aged 13 years old and a class three pupil at [Particulars withheld] primary school. She testified that on the 24/6/2016 at around 1.00 pm she was going home for lunch when he met the Appellant on the way. He proceeded to get hold of her hand and took her to a maize plantation and forcefully removed her underpants and defiled her. She could not resist or raise alarm as he was armed with a knife and had threaten to cut her.

5. She testified that she thereafter went to school though with alot of pain. It was only after 5 days that she told her parents what had transpired. She was taken to the hospital for treatment. She said that she had washed her under pant which was bloodstained as well as her petticoat. She identified the P3 form issued by the police and filled at Endebbes hospital.

6. **PW2 TWS** the Complainant's father testified that he was a Security Officer at ADC. He received a phone call on 29/6/2016 concerning the incident and he came back home where he found the Complainant being attended to by some women. He was told that she had been defiled 5 days ago by the Appellant whom he knew very well. He then reported the matter at Kimondo Police Post.

7. **PW3 P.C SAMUEL MUKOLWE** was attached to Kimondo Patrol Base during the incident. He said that he received the report from the Complainant and he issued her with a P3 form. He also rearrested the appellant after he was brought by some 2 Kenya Police Reservist and he placed him at the cells.

8. **PW4 DR. CHARLES MACHARIA** from Endebbes Sub-District hospital examined and treated the complainant. He found that her hymen was torn and fresh looking although she was not bleeding neither was there any discharge. He produced the P3 form as an exhibit.

9. When placed on his defence the Appellant gave unsworn evidence denying the charge and he gave an explanation of what he was doing on that particular period namely baking bricks as well as looking for the buyers. He was later summoned to the police post and he thought that he was going to supply bricks but was instead arrested and charged with the offence which he continued to deny.

**ANALYSIS AND DETERMINATION.**

10. The grounds of appeal by the Appellant are essentially those contained in his submissions which the court has perused together with those of the learned State Counsel. The same generally attacks the totality of the evidence as presented by the respondent which according to him were contradictory in nature and could not have met the threshold of convicting him.

11. The duty of this court was spelled out in the famous case of **OKENO V. REP. (1972) EA 32**, where the court stated that the Appellate Court is supposed to re-evaluate the evidence afresh and come up with a fresh finding noting that it did not have the chance to see the witnesses and their demeanour.

12. The three main grounds necessary to establish the offence of defilement are now clear, namely, the age of the victim, penetration and the identity of the perpetrator. In this matter the age of the minor is not in dispute as the same was proved by the production of the immunization card. The same was not contested.

13. As to the question of penetration, the evidence of the minor in my view was believable. Although she took some time to reveal what was ailing her, it was clear that she was unwell as explained by her father who said that at some point he gave her some pain killer tablets.

14. More importantly PW4 examined her and filled the P3 form. He concluded that there was penetration as the hymen was torn and fresh looking.

15. Although her bloodstained panty and petticoat were not produced, the same did not water down the fact that she was defiled.

16. Was the Appellant the perpetrator? The incident happened at around 1pm as she was going home for lunch. That being the case it cannot be said that she may have failed to identify the perpetrator whom she knew. There was nothing to suggest that the Appellant was not known to the Complainant. There was no evidence that the Appellant tried to conceal his identity.

17. The Appellant's defence did not elicit much for the twin reasons that the same was unsworn and thus merely persuasive and secondly did not offer much explanation concerning his whereabouts on that day.

18. It is true as submitted by the Appellant that the Complainant mother did not testify as she was among the first people to examine the Complainant. But in my view, her evidence would not have elicited much as she was not an eye witness to the incident and at any rate the defilement had taken place some few days earlier and what was important was the medical prove that she had been defiled.

19. The Appellant too submitted that the Complainant contradicted herself when she said that she was defiled while heading to school after her lunch at home yet on the same breath she said that she was defiled while heading to school after lunch. This was clarified during cross examination and in any even whether she was defiled in either situation the position remains the same, namely that an offence was committed.

20. The provisions of Section 124 of the Evidence Act are applicable in this case, namely, that the court will convict in sexual offences if it finds that the minor was truthful and believable. Although she was a single witness, her testimony was consistent. I do not find any reason to suggest that she was "fixing" the appellant for whatever reasons. She may be accused of overstaying with the information, but the explanation that she feared for her life after being threatened by the appellant was sufficient to have her not to disclose.

21. In the premises, I do not find merit in this appeal and the same is hereby dismissed.

22. On the sentencing, it is noted that the Appellant though granted bond was unable to secure his release and therefore this court reckons that the period which he was in custody ought to be taken into account. Consequently, the 20 years' period which the Appellant was sentenced to be computed from 4/7/2016.

23 . Orders accordingly.

**Dated, signed and delivered in open court at Kitale this 17<sup>th</sup> day of February 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**17/02/2020**

**In the presence of:-**

**Mr. Omooria for Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgement read in open court.**