



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 69 OF 2016**

**(Being an appeal from the decision of Hon. P.W. Wasike in Criminal Case No.1805 of 2013)**

**PETER WAFULA BARASA.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**BETWEEN**

**REPUBLIC.....PROSECUTOR**

**VERSES**

**PETER WAFULA BARASA.....ACCUSED.**

**JUDGEMENT.**

1. The Appellant was charged with the offence of **Defilement of a child contrary to Section 8(1) as read with 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 July, 2013 within Trans-Nzoia County caused his penis to penetrate the vagina of DNM a child aged 12 years.**
2. The alternative charge was **Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that on the 24<sup>th</sup> day of July, 2013 within Transnzoia county intentionally caused his conduct between your genital organ namely penis and genital organ namely vagina of DNM a child aged 12 years.**
3. The Appellant was convicted and sentence to 15 years' imprisonment hence this appeal. The appeal as directed by the court was disposed by way of written submissions. The court has perused the same and before looking at the merits or otherwise its necessary to summarise the evidence as presented during trial.
4. **PW1 the Complainant** told the trial court that she was 12 years old and a class 5 pupil at [particulars withheld]. She said that on the 24/7/2013 at around 5 .00 pm she arrived home from school and as usual she removed her uniform and put on her home clothes and he began washing dishes in the kitchen. The Appellant who was her neighbour came to the house and asked for food. She told him that there was no food.
5. The Appellant according to her pushed her down and after removing his clothes (trouser) he began defiling her and she felt a lot of pain for it was her first time to do so. She screamed and one Emily her neighbour came and she told her what had happened. Nobody witnessed what the Appellant had done.
6. The landlord and his wife came and they confronted the appellant. The village elder and 2 vigilantes came and questioned the Appellant but was unable to answer and they arrested him and took him to the police station. Her parents were also called and they came and took the complainant to the hospital. A P3 form was issued by the police and the same was filled as well as age assessment was undertaken.
7. **PW2** the Complainant's mother gave a short testimony but was stood down but not recalled.
8. **PW3 PHARIS SILALI** from Kitale District Hospital Dental Department produced the Age Assessment Report which found that the Complainant was aged about 17 years as found by Dr. Ndege.

9. **PW4 KIRWA LABATT** a Clinical Officer from Kitale District hospital examined the Complainant and filled the P3 form. He concluded that there were no bruises seen on the outer part but the hymen was torn and fresh and there was discharge at the private part.

10 . **PW 5 P.C PETER KHWATENGE** from Kitale Police Station Gender Unit took over the investigation from one PC Michir who had also taken over from P.C YATOR. Both officers had since been transferred. He generally relied on what his colleagues had found.

11. When placed on his defence the appellant gave sworn evidence denying the charge. He said that he was a shop keeper and that on 24/7/13 he was in his shop attending to his customers when he was approached by two people. They told him to accompany him and some lady came, the mother to the complainant. He said that they inquired if she knew her and he answered in the affirmative. He was then arrested by Kenya Police Reservist and taken to the police station for an offence he did not know.

12 . On cross examination he admitted that they are neighbours and that he had not differed with PW1 save that he had problems with her mother PW2 who used to take goods from her shop but never paid. She owed him kshs. 3,000 from the goods she had taken.

### **ANALYSIS AND DETERMINATION**

13. The grounds raised by the Appellant are well captured in his submissions which essentially attacks the veracity of the witnesses' evidence as being unreliable and therefore the trial court should not have convicted him. He said that the Complainant alleged that she screamed yet no neighbours managed to come.

14 . He has equally submitted that the age of the Complainant was not well established as she alleges to be 12 years yet the report indicates that she was 17 years. He said that penetration a key ingredient of the offence was not proved at all. He therefore prayed for the appeal to be dismissed or a retrial to be ordered.

15. The three grounds required to prove the offence of defilement include the age of the Complainant, whether there was penetration and the identity of the perpetrator.

16. The production of the dental age assessment indicated that the complainant was aged 15 years. The Complainant stated that she was 12 years old although she did not know when she was born. It appears then that PW3, stated that the Complainant was aged 17 years. This may have created some discrepancy but the same was cured by the production of the report made by DR. CHEGE which indicated that she was aged 15 years. The trial court in my view captured this issue well and I do not see any ambiguity. In any even the age still falls within the bracket provided by Section 8 of the Sexual Offences Act.

17. On the issue of penetration, the evidence of the minor was well corroborated by the production of the P3 form as well as the treatment documents. Her hymen was found to have been torn and fresh looking and there was discharge from her private parts. This examination was done the following day after the incident.

18 . Although the appellant submitted that there was no penetration proven as there were no bruises on the outer part of her private parts, this was counteracted by the finding of the medical personnel who proved that there was penetration as exhibited by the fresh tearing of the hymen.

19. Who was the perpetrator? There was no eye witness to the incident. The other person mentioned by pw1 was one Emily who was not called to testify. Neither was their landlord nor his wife as well as the village elder called.

This calls therefore for this court to apply the provisions of **Section 124 of the Evidence Act** which provides that:

***“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act , where the evidence of the alleged victim is 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 proceed 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.”***

20 . Was the evidence of the minor true and believable? The incident occurred at 5.00 pm and the issue of identification cannot be in dispute. The minor graphically testified of what happened when the Appellant came asking for food and later defiling her in their kitchen. The Appellant in his defence admitted that he knew the Complainant who was his neighbour and that at that particular time he was in his shop which was not far from the scene.

21 . The court has examined the overall evidence by the complainant and reached an irresistible conclusion that it was believable. The Complainant raised alarm immediately and the adults who were there intervened. In fact, her parents were not at home and the only people who came to the matter was her landlord and the village elders and his vigilantes. Her parents came later into the scene.

22 . If at all the Complainant wanted to “fix’ the Appellant perhaps she would have done so in the presence of her mother whom the Appellant said that they had differed for she failed to pay for the goods she took from his shop. Needless to state that there was no evidence indicating that PW2 was indebted to the Appellant.

23. The medical evidence was fresh in my view. She was taken to the hospital the following day and clearly there was nothing to suggest that she may have been defiled elsewhere.

24. The upshot therefore is that this appeal must fail and it is hereby dismissed. There was sufficient prove of the three ingredients of the offence. The evidence by the minor was reliable and truthful in the circumstances.

**Dated, signed and delivered in open court at Kitale this 4<sup>th</sup> day of March, 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**4/3/2020**

**In the presence of:-**

**Ms Kagali for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgement read in open court.**