



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 91 OF 2018**

**(BEING AN APPEAL FROM THE DECISION OF HON.P C BIWOT (SPM)**

**IN CRIMINAL CASE NO.72 OF 2017)**

**DENNIS MWANGI MUGUNA.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant was charged with the offence of **defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the 24<sup>th</sup> day of June, 2017 at [particulars withheld] within Transnzoia County intentionally caused your penis to penetrate into the vagina of PN 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 No 3 of 2006**. The particulars of the charge were that **on the 24<sup>th</sup> day of June, 2017 at [particulars withheld] within Trans-Nzoia County intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of PN a child aged 15 years.**
3. The Appellant after full trial was convicted and sentence to 20 years' imprisonment hence this appeal. The summary of the evidence as presented during trial is worth reproducing here before looking at the merits or otherwise of the appeal.
4. **PW 1** the minor Complainant told the trial court that she was aged 15 years old and a class 7 pupil at [particulars withheld] primary school. She said that on the 24/6/2017 at around 2.00 pm she was at home and her mother had gone on a journey. The appellant went to her home and told her that he wanted to see her. At 7.00 pm she left home and went to the Appellant's place and he gave her his shoes. They then went to 5 GB bar at Kitale town.
5. She went on to state that at the said bar she was not allowed in because of her age. She left the Appellant there and went to Kipsongo on foot where her aunty was. She did not know the exact place and she came back to the bar where the Appellant was. They left at midnight and went to his place where they engaged themselves in sexual intercourse.
6. She stayed there till Monday when she went home where she found her mother and her sister J and she informed them where she had been. They then took her to Wamuni Police Post and the following day she was taken to Kitale District hospital. A P3 form was filled and her age assessment done.
7. **PW2 JOHN KOIMA** from Kitale County Hospital examined the Complainant and found that her genitalia were okay and the hymen was torn and fresh and there were bruises on her labia walls.
8. **PW3 JN**, the mother to the Complainant testified that she came home at around 6.00 pm on 24 /6/2017 and did not get the complainant. She searched her among the relatives to no avail and she booked the report at the police station. She however came home on the 26/6/2017 at 4pm and said that she had been at the home of the Appellant. She said that the police took up the matter and arrested the Appellant.
9. **PW4 P.C SOLOMON MBOSIA** from Kitale Police station carried out the investigation. He said that he referred the Complainant to the hospital where her age was assessed and the P3 form filled which indicated that she had been defiled. He said that the Complainant took him to the Appellant's house where the defilement had taken place. The Appellant was arrested from his house.

10 . PW 5 SAMMY OSORE a Dentist from Kitale County hospital examined the Complainant and found her age to be about 15 years old. He produced the dental Age Assessment Report.

11 . When placed on his defence the Appellant gave sworn evidence denying the charge. He said that he did not recall where he was on the 24<sup>th</sup> June, 2017 but on the 26<sup>th</sup> June, 2017 at around 8.00 pm he got a report that he was required at Wamuini Police post. He went there and he met two men and a lady who wanted their phone. He said that he runs a kinyozi (Barber shop) and he charges phones.

12 . He said that the phone had gotten lost. They were told to come the following day and the boys came as well. When they were through with the issue of the phone he was arrested by the investigating officer and placed in the cells and accused of rape. He was later arraigned in court for the said offence.

### **ANALYSIS AND DETERMINATION**

13 . The court has perused the proceedings herein as well as the written submissions by the Appellant which ideally contained his grounds of appeal. The substance of the appeal centres on the question of the integrity of the witnesses. According to him the evidence as presented was insufficient to have had him convicted. There were no submissions on the part of the respondent despite the court ordering that the same be disposed by way of written submissions.

14 . The duty of the court is to re-evaluate the evidence afresh and come up with an independent finding. (SEE, OKENO V, REP. (1972) E A. 32.)

15 . The three ingredients of the offence of defilement are now clear namely, the age of the victim, the identity of the perpetrator and penetration.

16 . The age of the Complainant herein was proved to be 15 years as per the dental age assessment produced.

17 . As to the question of defilement the production of the P3 form and the evidence of the minor conclusively proved that she was defiled.

18 . Was the Appellant the perpetrator? In the absence of an eye witness this court shall rely on the evidence of the minor and in particular the provisions of Section 124 of the Evidence Act which states 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.”***

19 . The court has carefully read the minors evidence and there are interesting issues which lead to question the minors character. This will in effect prove that the minor may not have been truthful and therefore not believable despite the fact that she was defiled.

20 . First of all she said that she left home at 7.00 pm before her mother PW2 arrived. This goes contrary to the evidence by PW 3 her mother who said that she arrived home at 6pm and did not find the complainant.

21 . Secondly she said that she came back on Monday at 7.00 pm yet on the other hand she said that she came back at 4.00 pm on 26<sup>th</sup> June 2017. The timings in my view are contradictory and goes to question the integrity of the complainant. The two timings are different yet there is nothing to suggest that the complainant may have forgotten.

22 . In fact the investigating officer said that PW1 was at the shopping centre when the appellant spoke to her. The Complainant on the other hand said that she was at home.

23 . More importantly is the character of the Complainant in the whole incident and the manner in which she conducted herself all through the event. Why for instant did she accept to go all the way to 5 GB bar at those hours of the night? Even if she was denied entry because of her age why did she chose not to seek any intervention?

24 . Why did she decide to stay with the appellant for 3 days or thereabouts? Why did she not decide to leave for home the following day and or seek assistance? It appears that the whole incident may have taken place within her locality and there was no reason why she decided not to seek help.

25 . The above conclusion is premised on the fact that in the absence of any eye witness it is necessary as envisaged by Section 124 of the Evidence Act above especially the proviso thereof to interrogate the circumstances as well as the reliability of the complainant’s evidence. Is it possible that she was elsewhere other than the appellants place?

26 . There was no evidence that she was a class 7 pupil at [particulars withheld] primary school or at all. There was no production of any documentary evidence.

27 . In the premises and based on the above the Appellant ought to have been given the benefit of doubt which I hereby do and order that this appeal is allowed, the Appellant be and is hereby realised unless lawfully held.

**Dated, signed and delivered via Zoom at Kitale this 12<sup>th</sup> day of May, 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**12/5/2020**