



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 73 OF 2018**

**(BEING AN APPEAL FROM THE DECISION OF HON. M OSORO (RM) IN CRIMINAL CASE NO. 1 OF 2018)**

**EDWIN WABULWA MAKOKHA.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant was charged with the offence of **defilement of a child contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 23<sup>rd</sup> day of December, 2017 at [particulars withheld] within Transzoia County intentionally caused your penis to penetrate into the vagina of B. A. a child aged 6 years old.**
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 23<sup>rd</sup> day of December, 2017 at [particulars withheld] within Transzoia County intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of B. A. a child aged 6 years.**
3. The Appellant was convicted and sentence to life imprisonment after a full trial. Dissatisfied with the findings of the trial court the Appellant has file this appeal citing several grounds. Before looking at the merits or otherwise of the same it is necessary to summaries the proceedings as they appeared during trial.
4. **PW1** the Complainant testified that she was a class one pupil at M school and that on the material day the Appellant defiled her in a rubbish pit behind their house. She said that she cried and her mother came and took her to the hospital where she was treated. She said that she knew the Appellant as Eddu.
5. **PW2 MSW** testified that she was the mother to the Complainant and on the 23<sup>rd</sup> December, 2017 she had gone to work and came back late. She said that she bathed the minor on the 25<sup>th</sup> December, 2017 when she noticed some discharge on her underwear. She told her that the appelland had taken her behind the house and defiled her. She noticed sperms on her and her vagina was reddish.
6. She then took her to the hospital for treatment. She said that previously she had been defiled but they did not get the culprit. The P3 form was filled and she identified the same as well as the other treatment notes and the child's underwear. The Appellant was arrested on 31<sup>st</sup> December, 2017. She said that they had been neighbours with the Appellant for the last 6 months.
7. **PW3 DR MUNYIRA RACHEL** produced the dental age assessment report of the minor which she concluded that her estimated age was 6 years.
8. **PW4 JOHN KOIMA** from Kitale County hospital produced the P3 form on behalf of his workmate Kirwa Labatt who found the minor to have been defiled as her vagina had bruises on both minor majora and there was whitish discharge and the hymen was broken.
9. **PW5 P.C UMAZI** from the Gender protection unit at Kitale police station carried out the investigation and preferred charges against the Appellant. She said that the minor identified the Appellant. She charged the appelland after the filling of the P3 form and age assessment had been done.
10. When placed on his defence, the Appellant gave sworn evidence denying the charge. He said that he had been given Kshs.1000 by PW2 to make akala shoes for which he did not deliver. She asked for a refund but he did not and thus according to him when he was arrested he knew that the charges were to do with the issues of the shoes.

**ANALYSIS AND DETERMINATION**

11 . The duty of this court is to re-evaluate afresh the evidence as presented and come out with afresh finding noting that it did not have the benefit of seeing the witnesses unlike the trial court. (See **OKENO V. REP.1973 E A 32**) where it was stated that;

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958]***

12 . The substratum of the Appellant’s appeal is on the weight of the evidence as presented by the Respondent. He submitted in his home-grown appeal that there was insufficient evidence by the Respondent and taking the totality what was presented the same could not have convicted him.

13 . The three grounds to be established in this kind of offence include the prove of age, penetration as well as the identity of the perpetrator.

14 . In this regard the age of the minor was not in question as the dental age assessment produced clearly indicate that she was 6 years old.

15 . On the issue of penetration, the evidence of the minor was corroborated by the production of the p3 form as well as the treatment notes.

16 . The big issue however is whether the appellant was the perpetrator. There was no other eye witness except the minor. This court will therefore admit her evidence as provided under Section 124 of the Evidence Act especially the proviso thereof, 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.”***

17 . Her evidence went straight to the point. She simply said that the appellant did tabia mbaya to her and ***“I cried out and my mum came. My mum found accused there, mum took me to hospital.”***

18 . There was nothing much to suggest that she did not know the appellant as they were neighbours.

19 . PW2 her mother on her part said that she got to know that the child had been defiled on 25<sup>th</sup> December, 2017 as she bathed her. As she produced the child’s underwear she said that previously she had been defiled and she did not know who had defiled her although they found the child crying at the loo.

20 . This first defilement story or evidence was by her mother. The same did not come from the child. She said in her cross examination that;

***“she had been previously defiled. I never reported but I took her for treatment. I did not report because I did not know the suspect.”***

21 . Why was she not led to testify about this incident which it appears to have followed each other shortly? If it took place and the matter reported why did she not produce the treatment notes from the hospital in regard to the same even though she did not get to know the culprit.

22 . More significantly, PW2 stated that she discovered that the child had been defiled on the 25<sup>th</sup> while bathing her. What happened in the last two days from 23<sup>rd</sup>? If indeed she was defiled as she claims why did it take her that long noting for instance that this was a six-year-old minor. Surely there must have been some pain in which the child experience.

23 . The child as quoted above stated that her mother arrived at the scene yet on the other hand PW2 said that she came late on that day. Is it foreseeable that pw1 would forget that her mother was not around that time yet she said that she cried and her mother came? Would it be possible also for her mother to forget that she arrived at the scene when she had the child crying?

24 . The minors evidence and that of her mother in my view do not add up. Essentially both should have indicated that pw2 as indicated by pw1 arrived at the scene when she cried.

25 . On the first incident of defilement, there was no mention of it by the minor. If the same occurred the investigation officer did not take into account and more importantly the minor as well. This came from her mother yet in my view was very serious.

26 . Taking into account the above line of reasoning I find that the minors evidence was not very convincing to have placed the Appellant at the scene. Her mother confirmed that they were neighbours and would visit each other and that occasionally he would send the minor. That being the case, it was perfect for the child to have known the Appellant.

27 . What was more relevant but did not come out of the investigation was the time the incidence occurred. This was very relevant for the reason that now that there seemed to have been two incidences. Could it have been possible that the child may have been defiled elsewhere and if so was it the appellant or someone else. The case was poorly investigated by the respondent. There were from the evidence of the child other children who were with her and who the appellant allegedly sent them away. They were not called. The scene was not well described by the parties and this casts doubt if the investigating officer visited the same.

28 . This court shall however grant the Appellant the benefit of doubt. The medical reported shows that she was defiled but it would be inappropriate to sustain the conviction based on the poorly investigated matter. The minor's evidence though it is from a single identifying witness and should be admitted in line with Section 124 of the Evidence Act cited above, is not sufficiently convincing.

29 . In the premises, the appeal is allowed, the Appellant set free unless lawfully held.

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

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**H. K. CHEMITEI**

**JUDGE.**

**12/5/2020**