



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NUMBER 45 OF 2018**

**EVANS OTIENO OKELLO.....APPELLANT**

**VERSUS**

**REPUBLIC.....ACCUSED**

*(Being and appeal against conviction and sentence in Nakuru Chief Magistrate's Adult Criminal Case Number 151 of 2016 by Hon. N. Makau (Resident Magistrate on 6<sup>th</sup> April, 2018)*

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

1. The appellant Evans Otieno Okello is charged with;

***DEFILEMENT CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006***

*That in the month of March 2016 at [Particulars Withheld] Estate within Nakuru County, intentionally and unlawfully inserted his male genital organ namely penis into the female genital organ namely vagina of FW a child aged 11 years which cause penetration.*

In the alternative he was charged with:

***INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006***

*That in the month of March 2016 at [Particulars Withheld] Estate within Nakuru County, intentionally and unlawfully committed an indecent act with a child by touching the private part namely vagina of FW a child aged 11 years old.*

2. After hearing four (4) witnesses the trial court on 5<sup>th</sup> April 2018 found the appellant guilty of the offence of defilement and sentenced him to imprisonment for life.

3. The appellant aggrieved by the conviction and sentence filed this appeal, and later Amended Grounds of Appeal and Submissions.

4. The case for the prosecution was that sometime in 2016, on a Sunday MW, the mother to the complainant was going to church. She told her daughter FW, aged eleven (11) then to wear a certain dress which she would find under the bed. That when FW lifted the mattress, to pick the dress, she MW saw a panty with blood. She asked FW what the problem was, and FW told her that the panty was not hers but belonged to her cousin (whose name was not given). Since the said cousin was just outside MW called her and asked her about the panty. The unnamed cousin denied that the panty was hers saying that it was FW who kept her pants in that place. MW, knowing that FW had not started her periods told her she would tell her what had happened. From the record FW did not tell her anything.

5. The following day, a Monday she went with FW to her school and reported the matter to Madam Perpetua. The record states;

*“After reporting at school I was told the child PW1 had a mandazi yet I had not given the money. I asked her and she did not tell me. PW1 later told her teacher she was given money by Evans. The teacher told me Evans had defiled the child PW1 and given her money. I then called a counsellor who spoke to her. He told me to report the case.”*

6. It is then that the matter was reported at Central Police Station and they were referred to hospital where the complainant was examined and treated. Both Post Rape Care (PRC) and P3 were completed.

MW further testified that;

*“I asked Evans why he gave my daughter money he said he loved kids/children and that is why I gave her money.”*

On the basis of that admission that he had given the child money, she went back to report to the police.

7. On her part FW, after the voire dire examination was found to understand the nature of an oath and gave evidence on oath. She testified that;

*“On Sunday I was from church. I was going home... alone. It was the month of March...around 12. I fell down and someone came and helped me get up... A person came from nowhere and helped me get up. I had seen the person and my mother could take knives for him to sharpen. He worked and Chomelia. His house was near his working place. So he came and helped me get up... He took me to his house and when we reached I tried to scream and he shut my mouth with a handkerchief. He did not speak to me. He closed the door, came back and undressed me my trouser, panty and biker... he then defiled me 2 times. He used his penis to insert to my vagina (Sehemu ya kukojoa aliingiza in my vagina). He inserted the same inside me. I tried to fight... and then he pitched my thighs and defiled me. I was in pain and I was bleeding from my vagina and after he finished he opened the doors and he looked outside and I climbed down the bed and untied my legs. He then told me to go home and never tell anyone or I would know what he would do to me... I went home. I removed my pant and put it under the bed. I went to shower. I did not tell anyone. Two weeks later while preparing to go to church I felled my panty on the process of picking the dress. The panty fell, my mother saw same and asked me what happened. I did not tell her what happened. There was a day I was passing. Evans gave me Kshs. 10 and my mother asked me why accused Evans was giving me money and he was not a family member. At that point I told my mother the truth. I was then taken to the police station... I did not tell my mother because I had been threatened...”*

On cross examination she said the appellant gagged her with a piece of cloth and tied her legs with a rope.

8. MW on cross examination told the court she did not know how long the blood stained pant had stayed under the bed. That her child bought mandazi yet she had not given her any money. That she knew her daughter was defiled because the doctors said so.

9. **PW3 Dr. Njoroje Kanjohi** testified on behalf of Dr. Chemutai who was said to have been away. At the time of examination, the complainant was eleven (11) years old, had no injuries on the rest of the body, had an old torn hymen, no bruises on vaginal or anal openings. The P3 was filled and signed on 29<sup>th</sup> August 2016. The Post Rape Care was filled on 17<sup>th</sup> August, 2016. The broken hymen was found to be evidence of defilement. On cross examination he said the doctor who examined complainant found blood on her panty and no sperms. That virginity could be broken by climbing trees, cycling. That from the documents in court it could said who broke the virginity. That the blood stained panty was not examined to determine where the blood had come from.

10. **PW4 No. 86392 PC Nyatete Nyakundi** received the case from investigation on 15<sup>th</sup> August 2016 where it was alleged defilement has occurred in March 2016. According to him, the defilement was discovered when the complainant's mother saw her with cash which the mother had not given her, and when she was asked where she got it from, she did not respond, but later told the mother that it was Evans Otieno who had given her the money because they were friends. Later on the incident of the blood stained underpants happened. That the complainant feared telling her mother, but later gained courage and told her, and that is when the matter was reported to the police.

11. After the P3 was completed, the complainant took him to the welding place and pointed out the appellant. The place had a bed at the back. He arrested the appellant and charged him with this offence. He collected the blood stained pant which he produced as evidence together with the certificate of birth showing that the complainant was born on 16<sup>th</sup> December 2005.

12. On cross examination he said the complainant pointed out the appellant as the defiler, and the location where the defilement took place. That the complainant's mother linked the issue of money and defilement. That the appellant was establishing trust with the complainant by giving her money. He denied that the appellant had any romantic relationship with complainant's mother.

13. The investigating officer mentioned that there was a text message that the appellant had sent complainant's mother. The court allowed the same to be read in court but did not record what the investigating officer read. The court further directed the request of the appellant evidence be availed from Safaricom to prove that he had sent the text as alleged. The order was made on 3<sup>rd</sup> August, 2017. After several mentions, on 12<sup>th</sup> October, 2017, the appellant gave up on this evidence being availed as the prosecution failed to produce it. The prosecution then closed its case, and appellant was placed on the defence.

14. In his defence he made a sworn statement. He testified that the complainant's mother held a grudge against him because, he had declined a sexual relationship with her. That when he was arrested, it is she who brought the police to his place of work. He denied the offence. He denied sending MW any text messages. He denied knowing the complainant. That he knew MW as his customer.

15. The issue for determination is whether the appeal has merit, on the grounds set out by the appellant.

16. In his submissions the appellant pointed out that he was aware that prosecution was required to prove age of the complainant, which they did, penetration, which they did not, and ultimately if the alleged penetration was by way of “masculine activity”.

17. The appeal was opposed by the state through the submissions of Ms. Chelang'at, whose argument was that the state had proved all the ingredients of the offence, and the appellant was rightly convicted and sentence.

18. The appellant submitted that although the complainant's hymen was broken and healed, no evidence was placed before the court to prove that it was caused by penetration of the male genital organ. He cited **Michael Odhiambo v Republic HCRA 280 of 2004**. Though this case is cited in several authorities, I searched for it in vain at *kenyalaw* reports. It was the appellant's submissions that the court in that case

stated;

*“the rapture of the hymen per se was not conclusive proof of defilement.”*

19. I have carefully analysed the evidence on the issue of the torn hymen. It is not in doubt that the medical examination was six months after the alleged offence and only established that there was an old torn hymen.

20. The question is whether the fact of a torn hymen was sufficient proof that the same was torn by a male genital organ.

21. The complainant however, clearly described how the defilement happened including details of the circumstances around the defilement. She stated that the perpetrator inserted his penis into her vagina and she bled. There was a blood stained panty that triggered this case that was found in circumstances that show that the complainant was concealing what had happened to her.

22. The appellant submitted that the complainant was not a truthful witness because of what happened around the panty. He submitted that she lied to her mother about the blood stained pant. What emerges from the evidence is that she was afraid to tell her mother the truth, while at the same time sustaining a kind of friendship with the appellant whose house was on the way she passed regularly. That does not make her untruthful. Hence the evidence on record as to the defilement is believable, and I find no reason to fault the trial court on its finding.

23. Who did it? A look at her testimony, she says the person who assisted her to get up, came from nowhere and at that stage did not identify him by any name, except that her mother used to take their knives to him to sharpen, but by how she knew him. This was an identifying fact. That the defiler was known, and that he used to sharpen knives for her mother. The appellant confirmed that MW was his customer. He was known to both the complainant and her mother before this and it is not in doubt that his place of work was on the ‘route’ regularly used by the complainant and her mother.

24. The complainant pointed where she was defiled to PW4. This was a welding place where the appellant worked and which had a room at the back with a bed. The complainant’s description of the place where the defilement took place was confirmed at the time the appellant was arrested. According to the Investigating Officer the child pointed out the place where she fell and where the appellant took her. He also established that the appellant gave her money to maintain her trust, that and the fear made her not report to her mother.

25. It is important to point out here that the case for the prosecution is centered on the connection between money allegedly given by the appellant to the child and the discovery of the blood stained panty. The case for the prosecution is that it is when evidence emerged that the appellant had given the complainant money for *mandazi* that the complainant revealed that he is the person who had defiled her. After that the complainant went and pointed out the appellant as the person who had defiled her, and he was arrested.

26. The evidence of the money may appear shaky in that the complainant’s mother learnt from the teacher (*who was not called as a witness*) that the child had been given money by Evans. The complainant however testified that Evans had given her money and she had told her mother who confronted him. Although this is denied the testimony of the complainant and her mother is consistent and supported by that of the Investigating Officer.

27. Clearly therefore the complainant placed the appellant at the scene of crime, when the alleged defilement happened.

28. Does the fact that the date is not known prejudice the appellant? It is evident that the specific date when the offence is alleged to have been committed is not known. The medical evidence did not indicate what the average age of the injury could be, but it was clear from the complainant’s testimony as to what happened and how it happened and who did it. That evidence was not shaken and the fact that the specific date was not known was not prejudicial to the appellant.

29. What about the fact that the blood stained pant was not subjected to any forensics? This was grave failure on the part of the investigating officer. He had a clear duty to take the panty to the government analyst for analysis to ascertain whether or not that was blood, and whether there could be either DNA that could place the appellant with the complainant as alleged. The record will show that the evidence of the complainant as to how the incident happened was consistent, and sufficiently persuasive to overcome the failures of the Investigating Officer.

30. Regarding the appellant’s defence about an alleged affair with the complainant’s mother, the same did not discredit the complainant’s evidence which did not bear any elements of coaching.

31. I am therefore satisfied that the ingredients of defilement as supported by the surrounding circumstances were established to the required standard.

32. On sentence, the child was below the age of eleven (11) hence life imprisonment was the lawful sentence. However, applying the principles laid out in **Francis Muruatetu** and **Dismas Kilwake** it is reviewable, as it was given as the minimum sentence.

33. It is evident from the record that the appellant took advantage of this minor child’s situation on the material date, and continued to win her confidentiality by giving her money. She obviously suffered trauma as established by the fact of her hiding her panty and denying its existence. On the other hand, he was a first offender. Taking into consideration any period spent in custody, I consider a sentence of thirty (30) years’ imprisonment from the date of the sentence in the lower court appropriate.

34. To that extent only, the appeal succeeds.

35. Right of Appeal 14 days

**Dated, delivered and signed at Nakuru this 10<sup>th</sup> day of September, 2020.**

**Mumbua T. Matheka**

**Judge**

In the presence of: VIA ZOOM

Edna Court Assistant

For state Ms. Vena

Appellant Present