



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 19 OF 2017**

**TOM LANDO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case Number 588 of 2014 in the Chief Magistrate's court at Eldoret – Hon. H. BARASA (PM))***

**JUDGMENT**

1. The Appellant herein, Tom Lando, was charged with the offence of defilement contrary to section 8 (I) of the SEXUAL OFFENCES ACT No.3 OF 2006. The particulars of the charge were that on the 1st day of February, 2014 in Lugari District within Kakamega County, the accused unlawfully and intentionally caused his genital organ (penis) to penetrate into the genital organ (vagina) of MA (*particulars withheld*) a girl aged 8 years. He also faced the alternative charge of committing an indecent act with a child contrary to section II(i) of the SEXUAL OFFENCES ACT. The appellant pleaded not guilty to both the main count and its alternative charge and in order to prove its case, the prosecution called five witnesses namely, CN (PW1) JL (PW2) MA (PW3) MN (PW5).

2. PW1, CN was the complainant's mother. She produced in evidence a child health card which showed that the complainant was born on 18th August, 2005. She testified that on 1st February, 2014 at around 1.00 p.m. she was in her house when her other daughter, one M, reported to her that she had seen the appellant lying on top of the complainant. She immediately proceeded to the appellant's house and on pushing the door open, she found the appellant on top of the complainant. She raised an alarm and members of the public gathered at the scene and apprehended the appellant who was then taken to Turbo Police Station. The complainant was escorted to Turbo Health Centre for treatment.

3. PW2, Jane Lemarkoko, was the senior clinical officer at Turbo Health Centre. She examined the complainant and filled the P3 form which was produced as P Exhibit 1. She testified that the complainant had lacerations on her vulva and labia majora, and that her hymen was torn. She concluded that the complainant had been defiled.

4. PW3, the complainant, testified that she was aged 10 years and that on the material day, the appellant called her and that on going to where the appellant was, he pulled her, laid her on a mattress, removed her clothes and defiled her. She screamed for help and her mother (PW1) came and found the appellant in the act. PW1 raised an alarm and members of the public gathered and apprehended the appellant as he was trying to escape from the scene.

5. PW4, was the complainant's sister. She testified that she was on 1<sup>st</sup> February 2014 on her way to the borehole when she heard the complainant crying in the appellant's house and on peeping through the window, she saw the appellant lying on top of the complainant. She rushed back home and informed her mother (PW1) who also came to the appellant's house where he found the appellant still in the act of defiling the complainant.

6. PW1 raised an alarm and neighbours came to the scene. The Accused was then arrested and taken to Turbo Police station. PW5, was the police officer attached to Turbo police station. He investigated the case and preferred the present charge against the appellant.

7. When placed on his defence, the appellant tendered an unsworn statement in which he denied any involvement in the alleged defilement and only explained the circumstances under which he was arrested and subsequently charged in court.

8. After considering the evidence tendered by both the prosecution and the appellant, the trial court found that the prosecution had established its case against the appellant beyond reasonable doubt and convicted the appellant who was then sentenced to life imprisonment thereby precipitating the instant appeal in which the appellant has faulted the trial court for convicting him while relying on the prosecution's case which was not proved beyond reasonable doubt.

9. At the hearing of the appeal, the appellant relied on the written submissions that he had filed on 30<sup>th</sup> August 2018 in which he stated that

the age of the complainant was not proved conclusively. He further submitted that the prosecution's evidence was marred with inconsistencies and contradictions while the medical evidence was also insufficient to establish the offence of defilement.

10. Miss Mumu, learned counsel for the state, on her part, submitted that the prosecution proved all the ingredients of the offence of defilement beyond reasonable doubt.

11. As the first appellate court, the duty of this court is to reconsider and re-evaluate the evidence tendered before the trial court while bearing in mind the fact that it neither heard nor saw the witnesses testify.

12. I have carefully considered the evidence on record as a whole section 8(i) of THE SEXUAL OFFENCES ACT under which the Accused was charged provides as follows:-

**A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

Under section 2 of the said Act penetration is defined as the partial or complete insertion of the genital organs of a person into the genital organs of another person. In this case, the two main issues for determination are as follows:

**(a) whether the complainant herein is a child.**

**(b) whether the Accused committed an act which caused penetration with the complainant.**

13. The complainant's mother, who testified as PW1, told the court that the complainant herein was born on 18th August, 2005. She produced, in evidence, a child health card which showed that indeed the complainant was born on the said date. This court had the opportunity to see and even examine the complainant and while conducting *voire dire* examination on the minor, and found her to be a child of tender age. I have no doubt in my mind that she was a child of tender years. She was barely eight years old at the time of the offence. As to whether she was defiled on 1st February, 2014, the prosecution produced in evidence a medical Examination Report (P3 form) which showed that the complainant was duly examined by PW who filled and signed the said report where she made the following findings-

**1. Lacerations noted on the vulva and labia majora.**

**2. Mixture of blood and whitish discharge noted.**

**3. Hymen not intact.**

**4. Whitish and bloody discharge noted from the vulva.**

**5. Haematuria noted.**

**6. Urinalysis — presence of pus cells with sperms noted.**

14. The above findings clearly indicate that the complainant was defiled. In her evidence, PW1 confirmed that, indeed, the complainant was defiled and further explained that her clothes had blood stains and that her inner clothes had a whitish discharge when she was taken to her for examination. She examined her on the same day she was defiled. I find that, in her evidence, the complainant explained with the innocence of a child, how on the material day the appellant who was well known to her called her to his house and defiled her. Her evidence was corroborated by the evidence of PW 1 and by PW4 who found the Appellant red-handed in the act of defiling the minor. The appellant was their neighbor and there is no doubt that he was well known to the complainant.

15. I have considered the appellant's unsworn testimony made in his defense and I find that it consisted of mere denial of the offence which did not shake the otherwise watertight evidence presented by the prosecution. As was held in the case of **Dominic Kibet Mwerang Vs Republic (2013) eKLR**, the critical ingredients forming the offence of defilement are:

i. the age of the complainant

ii. proof of penetration

iii. positive identification of the assailant.

16. I am satisfied that all the above ingredients have been established in this case.

17. On sentence, I find that the sentence of life imprisonment meted out by the trial court upon conviction is lawful as section 8(1) of the Sexual Offences Act under which the appellant was charged provides for the mandatory life sentence in defilement cases where the victim is below 11 years. In the instant case, the complainant's age, as I have already stated in this judgment, was established to be 8 years at the time she was defiled.

18. Having regard to the findings in this judgment, I find that the instant appeal is unmerited and I therefore dismiss and confirm the conviction and the sentence ordered by the trial court.

**Dated and signed at NAIROBI this 16<sup>th</sup> day of January 2019.**

**W. A. OKWANY**

**JUDGE**

**Dated, signed and delivered in open court at Eldoret this 30th day of January 2019**

**H. A. OMONDI**

**JUDGE**

**In the presence of:**

Mrs Mumo for state

Appellant present

Court Assistant – Ouma