



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**CRIMINAL APPEAL NO. 104 OF 2017**

**JAMES NACHATAN**

**NANYANGATEN ALIAS NJIRAINI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[An appeal from the original conviction and sentence of the Principal***

***Magistrate's Court at Eldama Ravine Cr. Case no. 1084 of 2014***

***delivered on the 16<sup>th</sup> day of January, 2017 by Hon. J. L. Tamar, PM]***

**JUDGMENT**

**Introduction**

1. The appellant was convicted and sentenced to imprisonment for life for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act No. 3 of 2016 with particulars that he had on 16<sup>th</sup> day of November 2014 at [particulars withheld] village in Nakuru Sub-County within Nakuru County caused his penis to penetrate the vagina of VC, a child of aged 3 years contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act. On the same facts the appellant faced an alternative charge of indecent act contrary to section 11 (1) of the Sexual Offences Act.

**Judgment of trial Court**

2. Upon full trial, the Court found the appellant guilty, ruling as follows:

*The necessary ingredients to constitute the offence of defilement are the age of the complainant and proof of penetration.*

*PW1 testified that the child was born in 2011 which means that at the time of the offence she was three years of age. No documents of birth were produced. However, the Court observed that the child was unable to communicate due to her age and the prosecution invoked section 31 (2) (a) and (b). I am satisfied even in the absence of any documentary proof that the victim was three years of age and certainly below the age of eleven years to bring the offence under the provisions of **section 8 (2)** of the Sexual Offences Act.*

*The prosecution witnesses testified that the accused person was well known to them being a neighbor. PW2 in her evidence stated that when she came back from work she didn't find the minor in the house. She took the child to her house and it was then that she noticed that the child had difficulty walking. She checked the child physically and notice that her private parts were swollen. He was also not eating well.*

*The child was subsequently taken to the hospital the following day by her mother PW1. PW3 WK examined the child and found as shown in P3 form exh 2 that she had bruises on the labia majora, had mucoid discharge oozing form the vagina and that her thighs were tender with bruises. Penetration is defined in section 2 of the Sexual Offences Act as **"Partial or complete insertion of the genital organs of a person into the genital organs of another person"**. It is clear from the evidence of the prosecution witnesses that and especially the medical examination of the clinical officer W K that the injuries sustained by the minor are consistent with penetration.*

*The minor's vagina had clear mucous discharge oozing, bruised labia majora though, the hymen was intact. I am satisfied that the minor was defiled.*

*In **Gorge Owita Naya –vs- R.** the Court held that it is possible to have penetration without going past the hymen membrane.*

*There is also evidence that the child was found in the accused house. This fact is admitted by the accused who stated in his defence that the child came to his house and stayed with him from 7:00 pm to 10:00 pm when PW2 came for her. There was, therefore, opportunity for the accused to commit the offence as the evidence places him squarely at the locus in quo.*

*In his defence the accused stated that he heard the child called VC crying and running into his house. She told the child to remain in his house until M PW4 comes. He stayed with the child until 10:00 pm when PW2 went to his house to pick the child. He confirmed to PW2 that the child was with him sleeping.*

*The accused in his defence also attacks the prosecution case on the basis that the DNA sample taken from him and the discharge found on the minor were never availed to Court to confirm his involvement in the offence or not.*

*True at the time the prosecution closed the case the report had not been submitted and this was after the Court had variously indulged the prosecution.*

*The issue of medical evidence was considered by the Court of Appeal in **Geoffrey Kionyi Vs CR. Appeal No. 270/010** in which the Court observed that while available medical evidence arising from examination of accused and linking him to defilement would be welcome, such evidence is not mandatory and not the only evidence upon which an accused person can properly be convicted for defilement. That the Court can convict if it is satisfied that defilement was perpetuated by accused person.*

*Such is the situation facing the accused person that though the DNA results are not available to link the accused with the commission of the offence, there is nonetheless enough evidence to connect the accused with the offence. The child was found in accused house, there is solid medical evidence to confirm that the minor was defiled. There was opportunity for the accused to commit the offence as observed earlier.*

*From the totality of the evidence tendered I find that all the necessary ingredients of the offence of defilement have been proved beyond reasonable doubt. The evidence points only to the accused person. I therefore, find that the offence of defilement section 8 (2) of the Sexual Offences Act proved and convict the accused accordingly.”*

### **Appeal**

3. In the appeal, the appellant raised several grounds of appeal relating to sufficiency of evidence to prove the charge and insufficiency of particulars of the offence.

4. The appeal was opposed. The DPP urged that all the ingredients of the offence of defilement had been proved and the child's age at 3 years by the mother who testified pursuant to section 31 (3) (a) of the Sexual Offences Act, as the child could not talk. It was urged that PW2 took the child from the appellant's house “while she was still sleeping and the child did not go anywhere else and the appellant is the only one who could have defiled the child”, and that the appellant was the last person with the child.

### **Preliminary observations**

5. It is noteworthy that failure to call the 3 year old minor as a witness denied the Court of opportunity to see and assess the demeanour of the child as she testified to the alleged defilement. In PEX. 3 treatment note of 17/11/14 at Mogotio Health Centre it is shown that the child complained saying:

*“Complains of painful thighs and genitalia.”*

If the child could complain to the Clinical Officer at examination, she very well could have testified of the same before the Court.

6. With respect, there is evidence that the witness PW2 had taken the child while still sleeping but not that the appellant was the only person who could have defiled the child having been the last person with the child. The child could have been defiled before or after she came to the appellant.

7. First, according to PW4, the discoveries of the injuries were made after 10.00 am when the children came to her after she had come back home on 17/11/14. PW2 stated the time she took the child from the appellant's house at 7.00pm on 16/11/14 but the defence (DW1) said that D had come for the child at 10.00pm. The defilement could have occurred between the time when the child was taken from the appellant's house to 10.00 am when it was discovered by Pw4.

8. Second, PW2 admitted she had 2 children of her own, and one could be son D who the appellant said had chased the complainant when she came to his house. D's age was, however, not disclosed.

9. Third, as noted below, there was contradiction as to when the injuries were discovered and whether it was just by PW2 or PW4.

10. The particulars of the offence were within the purposes and ambit of section 134 of the Criminal Procedure Code, which provides as

follows:

**134. Offence to be specified in charge or information with necessary particulars.**

*Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused persons is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.*

**Evidence**

11. Evidence of defilement of the child was given by PW2, a neighbor to PW1, the complainant's mother, that she had allegedly been defiled by the accused. PW2 said she had come back from selling vegetables on 16/11/14 when she found one child of the 4 she had been taking care of, missing and upon going to the accused's house to ask if he had seen the child, the accused said she was in the house, and PW2 then took the child to her house only to discover the next morning that *"she could not walk. I checked the child. Her private part was swollen. The child was not eating well. I saw white things on the child. She was discharging white things. Mercy came, we checked the child. She called the neighbor PW1 came. She took her child to the hospital"*.

12. PW3 the clinical officer reported that on her examination of the child:

*"[The] clothing she wore there was wet liquid discharge in her trouser. Tender thighs with bruises. Genitalia bruised labia Majora, mucus discharge from her vagina. Samples were taken to Laboratory. It showed several epithelial cells with leucocytes"*.

13. PW4, Mercy, another neighbor and aunt to the complainant testified of the incident as follows:

*"[O]n 17<sup>th</sup> November 2014, I reached home at 10.00am. The children came to me. I saw complainant walking badly and holding her waist. I asked her why she was not walking well. I went home called Daisy Rutto a neighbor. I told her to help me check the child. We checked her outer vagina was wet and swollen. We called her mother SJ and other neighbours. She took her child to the hospital. I followed her to the hospital. I went to police station. Police took action. We went home with police who arrested accused herein. We said it was James who defiled the child as the child was taken from his house at 7.00pm"*.

14. PW5, the Investigation Officer testified that he took the complainant and her mother to Mogotio District Hospital where;

*"The child was examined. It was found there was interference with the child's private parts. P3 was filled. The pant for the child red black and white stripped had some spots of spermatozoa"*.

15. PW1, the child's mother who testified on her behalf on application by her prosecution and finding of the court that the child *"is not able to talk due to her age which is 3 years"*, testified as follows:

*"17<sup>th</sup> November 2014 at 11.00am I was on duty in Mogotio [at a supermarket] I was called on phone by Daisy (PW2) she is my neighbor. She told me my child was defiled by James. She said she took the child from James. There were sperms on the child's private parts. The child wore a trouser which was stripped. Her pubic area was swollen. The child could not talk as she is young. I took her for treatment at Mogotio Health Centre. I was then given a P3 form"*.

16. The appellant when put on his defence gave sworn evidence of the events on material date as follows;

*"I recall on 15<sup>th</sup> November 2014, it was on a Sunday around 7.00pm, I was in my house. I heard a child calling and crying. She was crying saying Babu, Babu. She said had been chased by a neighbour's son. The child came running into my house, and I told her to wait for her aunt called M who is my neighbor. M testified in Court (PW4).*

*M did not turn up and I waited till 8.00pm. I decided to go to Daisy Rutto (PW2) where the child had come from. D is the son of Daisy Rutto. I found the door closed. I also went to Daisy house and found the door closed and checked outside. I went back to my house and slept till 10.00pm. at around that time 10.00 o'clock, I heard a knock on my door. It was Daisy knocking. She asked me where the child was and I told her the child is in my house sleeping. She took the child and I continued sleeping till morning. The following day I woke up and continued doing my work"*.

17. On cross examination, the appellant said:

*"I knew the child well. Children usually come and play in my house. The child has never slept in my house except that day. She slept on the floor in my house. The child has a brother and sisters. I had differences with Daisy once. I had no differences with the other witnesses. The child was fully dressed. The witnesses who testified lied"*.

**Analysis of evidence**

18. The medical examination P3 form presented by PW3 indicated that the state of the child's clothing was *"wet mucoid discharge on the trouser (inner pant)"* the child's lower limbs had *"tenderness thighs with bruises"* and as to genitalia *"bruises on the Labia Majora, hymen intact" and mucoid discharge oozing from the vagina"*.

19. Penetration, the central ingredient of defilement need not be complete. See definition of penetration under section 2 of the Sexual Offences Act to include partial penetration and, consequently, penetration may occur even where the hymen is intact.

20. However, in my respectful view, the presence of bruises on the Labia Majora is not conclusive indication of penetration. It is more consistent with offence of indecent assault causing the contact of the victim's genitalia. Perhaps bruises on both the Labia Majora and Minora which are deeper into the female genitalia may be proof of partial penetration, but penetration all the same within the meaning of the Sexual Offences Act.

21. The medical expert did not give any conclusion of her finding as required on part C (2) (a) of the medical examination P3 form. Neither was the presence of "*Mucoid discharge oozing from the vagina*" explained. It could well have been evidence of infections, not of any sexual activity.

22. There was glaring inconsistency in the evidence of the two eye witnesses of the victim's alleged injuries, PW3 and PW4. On one the hand, PW3 said that she had in the morning after taking the child from the appellant's house discovered that she could not walk and upon checking her, found her private part was swollen and she was discharging white things, and that "*M (PW4) came, we checked the child. She called the neighbor PW1 came she took her child to hospital*".

PW4, on the other hand, said the children had come to her upon her return at 10.00 am on 17/11/2014.

*"The children came to me. I saw complainant walking badly and holding her waist. I asked her why she was not walking well. I went home called Daisy Rutto a neighbor. I told her to help me check the child. We checked her outer vagina was wet and swollen. We called her mother....."*

23. Why is the description of the discovery of the complainant's "*defilement*" different between the two crucial witnesses? Could it have something to do with the assertion by the Defence that it was a frame up and that the witnesses had lied.

24. Could the injuries have occurred before the child went to the appellant's house on the evening of 15/11/14 when she said she had been chased by the neighbor's (PW2) son? Or could it have been after the child had been taken by the said neighbor PW2 from the appellant's house? Could the injuries have been caused by the PW2's son, who the Defence said had earlier been reported by the child to have been chasing her? He also had opportunity when the child was taken by the mother from the appellant's house to their house.

#### **Inconsistencies in Prosecution Evidence**

25. Who called the complainant's mother PW1? The complainant's mother said she "*was called on phone by Daisy who is my neighbor. She told me my child was defiled by James*". Daisy (PW2) herself said it was Mercy (PW4) who called PW1 the complainant's mother, after "*we checked the child*".

PW4 is ambivalent as to who called the complainant's mother saying only "*we called her mother SJ and other neighbours*".

Why the discrepancy as to who conveyed the information? And could it have anything to do with what the appellant called differences with Daisy that she is the one who told PW1 that "*my child was defiled by James*". How could Daisy have been certain that James is the one who had defiled the child if at all?

#### **Inconsistent Conduct of the Appellant**

26. The appellant's conduct during the alleged defilement is inconsistent with any wrong-doing. PW2 stated that when she asked the appellant whether he had seen the child, he said the child was sleeping in his house. According to PW2 this was at 7.00 pm in the evening while the appellant as DW1 testified that this was at 10.00pm, and he had gone to check on PW2 twice so that she could take the child. The appellant's conduct in letting the alleged child victim to sleep in his house, is, rather than providing opportunity to defile as held by the trial Court, in-consistent with the wrong-doing as he could have in ordinary course of things attempted to conceal his wrong-doing, if he had defiled the child, by sending the child away after the defilement, running away from the scene himself, or both, or in some other way tried to remove any connection between him and the child that day. Instead, he let the child sleep in his house until she was taken by her minder PW2 later in the night, and the court finds, and prefers, the appellant's version of events as truthful rather than the prosecution witness PW2's version implicating the appellant in defilement.

27. Although the lack of medical evidence to support a charge of defilement is not fatal as properly held by the trial Court, following **Geoffrey Kionji v. R** CA Cr. Appeal no. 270 of 2010, the charge of defilement should be capable of proof beyond reasonable doubt by the other available evidence. The Investigating Officer's testimony that the child's pant "*had some spots of spermatozoa*" was not supported by the medical evidence given by Pw3. The treatment chit for Pw1 clearly recorded "*no pus cells, no spermatozoa*".

28. Curiously, the Exhibit Memo form forwarding under escort the complainant's black and white stripped trouser and the appellant's fingernail to the Government Chemist although dated 18/11/14 is date stamped 15/5/2015 as received at the Government Chemist Department. Why the seven months delay in presenting the exhibit?

#### **Weighing the evidence**

29. That the complainant was found asleep in the appellant's house is not conclusive of the allegation of defilement leveled against him. The appellant explained by sworn testimony how the child happened to be in house, and he was not shaken by the prosecution's cross-examination. It is the prosecution's case that was supported by witness accounts of testimony that were not consistent and inconclusive

medical evidence. It is noted that the DNA testing results for determination “*whether semen stains in the complainant’s trousers matched the DNA characteristics of the fingernail belonging to the accused person*” were not produced in evidence and only the Exhibit Memo therefor referring the said specimen to the Government Chemist was produced. It was not safe to convict on the evidence.

### **Conclusion**

30. The prosecution’s case, therefore, relied on the circumstantial evidence of PW2, PW4 and the inconclusive medical evidence of PW3. The test of circumstantial evidence is that the same must be inconsistent with the innocence of the accused and incapable of explanation by any other hypothesis other than that of the guilt of the accused. See **Mwangi v. R** (1983) KLR 522, 523 that:

*In a case depending exclusively on circumstantial evidence, the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused’s guilt from the circumstantial evidence to be sure that there are no other co-existing circumstance which would weaken or destroy the inference.”*

31. No explanation was given as to why the child’s trousers were still wet the following morning at 10.00 am when PW4 checked her from the previous evening 10.00 pm when PW2 took the child from the appellant’s house according to the appellant or from 7.00 pm according to Pw2 herself. Could another person be responsible?

No explanation was also offered as to why the appellant who had ample opportunity to defile the minor in the privacy of his house and then put her to sleep in the same house until Pw2 came looking for her, did not fully penetrate the child and only interfered with her labia majora. There was no allegation of *coitus interruptus* or similar thing.

32. I do not find that the prosecution proved the charge of defilement contrary to section 8 (1) and 8 (2) of the Sexual Offences Act against the appellant, and I, consequently, acquit him of the said charge. For the same reason, I do not find him guilty of the alternative charge of indecent act contrary to section 11 (1) of the Sexual Offences Act. I am, therefore, unable to uphold the decision of the trial Court.

### **Orders**

33. Accordingly, for the reasons set out above, I quash the conviction of the appellant for the offence of defilement contrary to section 8(1) and 8 (2) of the Sexual Offences Act and set aside the sentence of life imprisonment imposed on him by the trial Court.

34. There shall, therefore, be an order for the release of the appellant from custody forthwith unless he is otherwise lawfully held.

*Order accordingly.*

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF FEBRUARY 2019**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent