



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 3 OF 2019**

**HASSAN OBERE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From original conviction and sentence in Criminal Case No. 6 of 2018 by the Senior Resident Magistrate – Hon. J.M. Wekesa delivered on 7<sup>th</sup> February, 2019 at Lodwar)***

**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 which were on the 20<sup>th</sup> day of March 2018 at Kalobeyei Settlement Camp in Turkana west Sub-county within Turkana County intentionally caused his penis to penetrate the vagina of **S.A.** a child aged eight (8) years.

2. He faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were on the 20<sup>th</sup> day of March 2018 at Kalobeyei Settlement Camp in Turkana west Sub-county within Turkana County intentionally touched the vagina of **S.A.** a child aged eight (8) years with his penis.

3. He pleaded not guilty to the said charges, was tried, convicted and sentenced to serve life imprisonment on the main charge. Being dissatisfied with the said conviction and sentence he filed this appeal and raised the following homemade grounds of appeal:-

***1) Vital prosecution witnesses were not called.***

***2) The prosecution case was full of fabrication, contradiction and was unreliable.***

***3) The Appellant did not understand the language of proceedings.***

4. When the appeal came up for hearing before me, the Appellant who was unrepresented filed amended grounds of appeal on 18/06/2019 together with written submissions which he relied upon. It was submitted that there was material contradiction in the evidence of **PW4** the Doctor and **PW3** the Investigating Officer as regards the P3 form and as to whether the victim was examined at Kakuma Mission Hospital or Kalobeyei Red Cross Hospital as per the testimony of **PW1** the mother. It was further submitted that there was contradictory evidence on the number of times the victim was defiled.

5. It was submitted that the age of the complainant which is an essential element of the offence was not proved by any documentary evidence. It was submitted that the age assessment conducted by **PW3** the investigating officer was unreliable. It was contended that vital exhibits such as the underpants the complainant was wearing were not produced in court and further that vital prosecution witnesses such as the children the complainant was playing with were never called to testify for which the case of **BUKENYA v REPUBLIC 1972 EA 49** was submitted in support.

6. On behalf of the prosecution, it was submitted by Mr. Kahuthu that the complainant **PW2** identified the Appellant as "**Babu**". It was submitted that there was no contradiction in the prosecution case and those that were noted were of minor nature for which the case of **ERICK ONYANGO ONDENG' v REPUBLIC, Cr. Appeal No. 5 of 2013 [2014] eKLR** was submitted in support. It was submitted that the prosecution case was corroborated and even if it was not, under **Section 124** of the **Evidence Act** the court can convict on the basis of uncorroborated evidence of the complainant in a Sexual Offence Act cases for which the case of **ANDREW MULIKA KITHUSI v REPUBLIC [2014] eKLR** was relied upon.

7. It was finally submitted that the age of the complainant was in line with that on the charge sheet. **PW4** indicated that she was eight (8) years old as was corroborated with the evidence of **PW1** her mother. Reference was made to the case of **RICHARD WAHOME CHEGE v REPUBLIC, Nyeri Cr. Appeal No. 61 of 2014 [2014] eKLR**.

8. In reply to the prosecution submissions the Appellant stated that the complainant had reported that she was defiled by an uncle while in court. She stated that it was “*Babu*”. He submitted that the allegation were false and were used at the refugee camp so that they may be relocated to America.

9. This being a first appeal the court on the basis of the authority of **OKENO v REPUBLIC [1972] EA 32** is under a legal duty to re-evaluate the evidence tendered before the trial court to come to its own conclusion though giving allowance to the fact that unlike the trial court it did not have the advantage of seeing and hearing witnesses.

10. The prosecution’s case was that **PW1 M.M.** the mother of the complainant had gone to church in the morning of 20/03/2018 and when she came back at 1.00 p.m. she found the complainant **PW2** unwell. When she asked her the problem she said that she had malaria. She was taken to the hospital at Kalobeyei Red Cross Hospital where she was put on drugs but her fever did not go down. On 23/03/2018 when she was threatened with beating, the complainant opened up and said that Hassan had called her inside his house while playing with other children whom he sent to go buy ball gum. He then grabbed her and defiled her. She reported to the security and police who arrested the Appellant. The complainant was later on referred to Kakuma Red Cross hospital for examination and P3 form issued.

11. **PW2 S.A.** a minor aged eight (8) years stated that while playing with fellow children, the Appellant called her to his house and asked the other children, to go buy ball gum promising to give her her share once the other children brought them to him. He then carried her to his bed, removed her pants to her knees and came on top of her and inserted his penis inside her ‘*susu*’. She felt pain and started crying. The other children came back and the Appellant gave each gum and asked her to go home. It was her evidence that she did not report to her mother because she feared being beaten. She identified the accused as “*Babu*”. In cross-examination she stated that blood came out of her vagina when the Appellant defiled her and her mother advised her to go remove and wash her pants.

12. **PW3 PC BENJAMIN EJOE** testified on behalf of the investigating officer and stated that on 20/03/2018 the complainant was defiled by the Appellant. She reported to her mother on 23<sup>rd</sup> and the same was arrested. **PW4 CHESULI MOSES** a medical doctor at Kalobeyei Kenya Red Cross examined the complainant on 23/03/2018 who confirmed to him having been defiled by her “uncle” and that he had defiled her twice. She had no visual bruises on her body save for pain around her waist. He examined her private parts and established that the external genitalia was normal. The internal was red and the hymen was broken. The inner labia minora was red in colour due to effect to trauma. She had infection. He confirmed that defilement had taken place though not for the first time. In cross-examination he confirmed that the victim had been defiled severally since her vagina was bigger than her age.

13. **PW3** produced age assessment from Kakuma Mission confirming that the complainant was eight (8) years.

14. When put on his defence the Appellant stated that he lived in Kalobeyie doing casual jobs. On 1/03/2018 he had a busy working day and did not go to his house. He then traveled to Kakuma to look for work. He returned back on 18/03/2018 when his wife told him that his boss had work for him. On 19/03/2018 he rested in his house and went to work until the evening when a certain person he had lent money decided to pass by his home and he asked for his money. While talking to him he saw two police officers who were looking for him. They then arrested him and took him to the police station where he later met the complainant. He stated that the complainant had once asked him to be her secret lover but he refused because his wife was her sister and she insisted that they should have a secret affair until they get settlement. He did not know that she had her own intentions.

15. In convicting the Appellant the trial court had this to say:-

***“I find the prosecution to have proved its case against the accused herein beyond reasonable doubt for the following reasons: -***

- The prosecution availed concrete evidence being the medical report in respect of the victim herein that indicated her hymen had been broken. This essentially proved that penetration had taken place or occurred.***
- The prosecution also tendered the age assessment report in respect of the victim herein that established she was of tender age. The said report established the victim herein was aged only eight (8) years old at the time of the commission of the offence by the accused herein.***
- The complainant or victim herein positively identified her assailant herein before the court, to the police and her mother who also testified as a witness.***
- The accused, though given opportunity to avail his witnesses chose not to for his own reasons, although he tried to raise an alibi and mentioned his wife and boss that he had worked for at Kalobeyei and purported to the court that he was not at the scene of crime and this was known by his wife and his boss at Kalobeyei.***
- The defence raised is a mere denial of the offence and has not cast any doubt on the prosecution case which I find unchallenged.”***

16. From the proceedings, Judgement and submissions herein, I have identified the following issues for determination:-

- 1) Whether the prosecution proved the offence of defilement.***
- 2) Whether the age of the complainant was proved.***
- 3) Whether the offence was committed by the Appellant.***

17. From the evidence tendered, it is clear that the prosecution proved beyond any reasonable doubt that the complainant had been defiled. **PW4 CHESULI MOSES** examined the same and confirmed that she had been defiled but several times as her vagina was bigger than the size for her age. This evidence is contradicted with the complainant's account under cross-examination in which she confirmed that the Appellant had not defiled her on any other days. It is also clear that the age of the complainant was established through the medical documents tendered in evidence.

18. The only issue in dispute is whether the complainant was defiled by the Appellant. The Appellant when put on his defence gave an account of what happened and raised an *alibi* defence. It was upon the prosecution to displace his defence and not for him to avail his witnesses as held by the trial court. The prosecution chose not to cross-examine him on his defence which at the close of the defence case stood unchallenged in material facts.

19. This being a criminal trial the prosecution was under an obligation to prove its case against the Appellant beyond reasonable doubt and the Appellant having raised an *alibi* defence which was not disapproved by the prosecution, there remains a doubt as to whether the offence herein was committed by the Appellant. I have taken into account the evidence of **PW4** which I have contrasted with that of the complainant and his mother and have come to the conclusion that whereas there is suspicion of the Appellant having defiled the complainant given his defence that the complainant had once asked him to be her lover, which he refused because his wife was her sister, which the prosecution did not displace, suspicion however strong cannot be a basis for a conviction in a criminal trial. See the case of **NEEMA MWANDORO NDURYA v REPUBLIC [2008] eKLR**.

20. Further I have noted that vital prosecution witnesses were never called to testify against the Appellant and there remains a gap at the end of the trial as to how the Appellant was arrested. Whereas there is no requirement of corroboration in sexual offences, where there are gaps in the prosecution case which raises doubt thereon, the Appellant is always entitled to the benefit of doubt which I hereby accord the same.

21. Having analyzed the evidence tendered before the trial court I have come to the sad conclusion that whereas a child of tender age lost her innocence, the prosecution case against the Appellant was not proved to the required degree and therefore his conviction was not safe. The upshot thereof is that the appeal herein has merit which I hereby allow, quash the conviction and set aside the sentence. The Appellant should be set free forthwith unless otherwise lawfully held.

22. The State has a right of appeal and it is so ordered.

23. A copy of this Judgment should be served upon the State Counsel who prosecuted the Appellant before the lower court.

**Dated, delivered and signed at Lodwar this 3<sup>rd</sup> day of October, 2019.**

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

\_\_\_\_\_ *for the Respondent*

\_\_\_\_\_ *for the Appellant*

*Accused -* \_\_\_\_\_

\_\_\_\_\_ *- Court assistant*