



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**(CORAM: MAJANJA J.)**

**CRIMINAL APPEAL NO. 113 OF 2013**

**BETWEEN**

**JOEL ASHIKOL.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of*

*Hon. L.M. Nafula, SPM dated 31<sup>st</sup> May 2013 at the*

*Mumias Senior Principal Magistrates Court)*

**JUDGMENT**

1. The appellant, **JOEL ASHIKOL**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (3)** of the **Sexual Offences Act**. It was alleged that on 11<sup>th</sup> October, 2011 at about 9.00 am in Mumias District within Kakamega County in Mumias District within Kakamega County he intentionally and unlawfully had carnal knowledge with W A, a girl aged 4 years. He was sentenced to life imprisonment and now appeals against conviction and sentence.
2. The thrust of the appellant's case is that the prosecution did not prove its case beyond reasonable doubt. In order to determine this appeal, I am required to evaluate the entire evidence afresh and reach an independent decision whether or not to uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify.
3. On 11<sup>th</sup> October, 2011 at 9.00am, PW1 a businessman was at the shop with his brother, PW 2, when a young boy PW 5 came and told them that the appellant was sleeping with her sister, WA. PW 5 recalled that they had been left alone at home by their mother PW 4 when the appellant called WA to his rented house. He narrated how WA went there and when he went to check what was happening, found the appellant on top of the bed with WA. He alerted PW 1 and PW 2 who came.
4. PW 1 and PW 2 both recalled that when they went to the house they found the appellant lying on the bed with WA. His penis was exposed. They told the court that they locked the house and in a brief moment, police officers from Shianda Administration Police Post arrived and according to the Investigating Officer (PW 6) they arrested him and brought him to the police station on the same day.
5. PW 6 recalled that she examined the child's vagina and noted that she had bruises. PW 4. The child's mother was alerted and she took WA to the hospital. The clinical Officer who filled the P3 form, PW 3, confirmed that WA had been seen on the date of the incident and he noted that she had a broken hymen, a tear between the perineum and the anus and tenderness on the labia. Laboratory examination revealed that she had vaginal trichomonas.
6. In his sworn defence the appellant denied the charges. He testified that he was arrested while at a *chang'aa* den and was charged as he refused to bribe the arresting officer.
7. Learned counsel for the respondent conceded the appeal as the complainant, WA was not called as a witness and no reason was preferred for calling her. I have looked at the record and it is correct that WA was not called as a witness and no reasons were advanced for failing to call her. However, this is not to say that a case of defilement cannot be proved without calling the complainant.

8. What is clear in this case is that PW 1, PW 2, and PW 5 found the appellant with WA lying on bed, with his penis exposed. PW 1 and PW 2 locked him in the room until the AP's arrived and arrested him. Since he was found at the *locus in quo* with WA, his defence is weak tea.

9. Unfortunately, from the judgement, the trial magistrate did not consider the evidence and only stated that, "*I do find that the prosecution has proved its case against the accused person beyond a reasonable doubt*". This violates the provisions of **section 169** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** but I find that this is not fatal.

10. I have re-evaluated the evidence as the first appellate court and I give the appellant the benefit of doubt. I allow the appeal quash the conviction and sentence but I find him guilty of the alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. He is therefore sentenced to **ten (10) years** imprisonment to run from the date of conviction by the trial court.

**DATED and DELIVERED at KAKAMEGA this 3<sup>rd</sup> day of April 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Ng'etich, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.