



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 79 OF 2014**

**(Appeal arising from original conviction and sentence in criminal case No. 3189 of 2007 delivered by J.A. Owiti Senior Resident Magistrate on 12/6/2013)**

**BEN SIFUNA LUSWETI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

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

1. The appellant was charged with the offence of **Defilement of a child with mental disability contrary to Section 7 of the Sexual Offences Act No. 3/2006**. The particulars of the charge were that **on the 21<sup>st</sup> day of October 2007 at [particulars withheld] in Trans-Nzoia District within Rift Valley province, by use of his genital organ namely penis caused penetration into genital organ namely vagina of M.N. a child aged 14 years with mental disability.**

2. He was equally charged with the offence of **Indecent assault to a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on the 21<sup>st</sup> day of October 2007 at [particulars withheld] in Trans-Nzoia District within Rift Valley province, indecently assaulted M.N. a girl aged 14 years old by touching her vagina.**

3. The appellant was convicted and sentenced to 10 years imprisonment. He has however in his appeal mitigated arguing that he has served one third of his term and he prays that the remaining term he be allowed to serve under probation.

4. The brief facts as per the proceedings at the trial court that **PW1 the minor** who has some mental challenges was left home on the material day when her parents had gone to church.

The appellant who was a neighbour took advantage and defiled her. Later when her mother **PW2** arrived she informed her. She took her to Kitale District hospital where P3 form was filled and the child treated. She also reported the matter to the police.

5. **PW3** from Kitale police station gender desk carried out the investigations on behalf of PC(W) Lilian Wekesa who had recorded statements from the witnesses and preferred charges against the appellant.

6. **PW4 Chrisantus Masinde** the clinical officer from Kitale District hospital produced the P3 form which showed that the complainant's hymen was broken and there was spermatozoa in her vagina. He also produced the P3 form for the appellant.

7. **PW5 Dr Paul Nyangwe** produced the mental report on behalf of Dr Ng'ang'a which showed the complainant to be suffering from some mental retardation.

8. Both **the appellant** and his witness **Edwin Lusweti** gave some alibi in their defence. According to them the appellant was not at the scene that particular day.

9. Having stated so however, I find the evidence by the complainant clearly corroborated by her mother and the medical reports produced. She was Sexually assaulted and the identity of the perpetrator despite her mental status clearly established.

10. This appeal stood no chance. However considering the history of this matter, and the period already served in custody, it is my view that the appellant has learned his lessons. Beside I find that he spent considerable time in custody during trial.

11. Consequently, the appeal is hereby dismissed. The appellant is hereby set free unless lawfully held. He shall however serve the rest of the term under probation within the appropriate jurisdiction as shall be determined by the probation officer.

Orders accordingly.

**Delivered, signed and dated at Kitale this 10<sup>th</sup> day of May 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**10/5/18**

**In the presence of:**

**M/S Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**