



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 17 OF 2017**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's court in Sexual Offence case No. 93 of 2016 delivered on 14/9/2017 by P. Biwott Senior Principal Magistrate)**

**ERICK OCHIENG OKUKU.....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 contrary to section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006.**

The particulars of the offence were that **on the diverse dates between 28<sup>th</sup> June 2016 and 4<sup>th</sup> day of July 2016 at [particulars withheld] village within Trans Nzoia County, intentionally caused his penis to penetrate into the vagina of N.W.W., a child aged 16 years.**

2. The alternative charge was **committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.** The particulars was that **on the diverse dates between 28<sup>th</sup> June 2016 and 4<sup>th</sup> day of July 2016 at [particulars withheld] village within Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of N.W.W., a child aged 16 years.**

3. He was convicted and sentenced to 15 years imprisonment hence this appeal which has raised several grounds. The brief facts and evidence as presented were as follows.

**PW1, the complainant** testified that she was 16 years old pupil at [particulars withheld] primary school. That on 28<sup>th</sup> June 2016 at 6.00 pm she was sent by her mother to buy charcoal. She met the appellant whom she knew having done some welding for her mother. He seduced her twice but she refused. He forcefully removed her clothes and proceeded to defile her. She went home and did not inform anyone.

4. On 4/7/2016 she met him again on the road as she came from school where he defiled her by force and gave her Kshs 50. when she reached home she was punished by her mother for coming late and in the process she revealed to her what the appellant had done. Her mother then went looking for the appellant whom with his employer they arrested him and took him to the police station. The complainant was taken to Kitale District hospital. The appellant was handed back Kshs 50 he had given to the complainant for her not to report him.

5. **PW2 J N** is the complainant's mother. She testified that she closed her stall at 7.30 pm and went home only to find that the complainant had not arrived and her vegetables were burning. When she arrived she told her that she had been with the appellant who had defiled her. She then went to the appellant's employer and they called him but he denied. They arrested and took him to Kitale police station. She took the complainant to Kitale district hospital where she was treated and the P3 form filled and age assessment done.

6. **PW3 PC Esther Nolari** from Kitale police station gender desk carried out the investigation, when the accused was brought by members of the public on 5<sup>th</sup> July 2016 as well as the complainant. She issued her with a P3 form which was duly filled. She recorded statements from the witnesses and preferred the charges. She equally produced the P3 form and the age assessment report.

7. In his unsworn evidence the appellant denied knowing the complainant. He said that he was in his place of work on 2/7/2016 doing welding and after finishing his work he went home in the evening. As he was feeding his children he was called by his employer. He went to the workshop where he usually worked and was interrogated concerning the incident. He denied and was taken to the police station. He said that the complainant kept changing the story but he was about to be assaulted and his boss said that the matter be taken to the police. He generally denied the charge.

**Analysis and Determination**

8. Having perused the proceedings herein as well as the appellant's submissions, and this being the first appeal the court is enjoined to re-evaluate the evidence afresh.

9. There are 3 ingredients that ought always to be established for the offence to be proved, namely the age of the victim, the identity of the perpetrator and whether defilement really occurred.

10. On the question of the age of the complainant, although the dental age assessment report was produced by the investigating officer, there was no objection on the part of the appellant. The said report indicates the age of the minor to be 16 years a fact attested by the complainant as well as her mother PW2.

11. As regards the identity of the perpetrator, I have no doubt that the minor clearly identified the appellant. This was a person well known to her as she said that he was a welder and had even done some welding work for her grandmother. The appellant did not dispute that he earned his income from welding business.

12. On the question of identity, the incident according to the complainant happened twice and it was early in the evening. I do not find any suggestion that it was too dark for the complainant not to have identified the appellant. In any event the incident happened twice.

13. I have perused the P3 form and the treatment report produced by the investigating officer. Although ordinarily, it ought to have been produced by the maker, there seemed to have been no objection by the appellant as clearly indicated in the proceedings. The same concluded that the *“external genitalia is erythmous, blood stain and the hymen was not intact.”*

14. The medical examination was undertaken on the same day and thus the examination was still fresh. I do not see any prejudice suffered by the appellant by virtue of the fact that the report was produced by the investigating officer.

15. Consequently I find this appeal unmeritorious and the same is hereby dismissed.

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

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**H.K. CHEMITEI**

**JUDGE**

**10/5/2018**

**In the presence of:**

**M/S Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**