



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 2 OF 2017**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal case No. 3232 of 2016 delivered by P.W. Wasike Resident Magistrate on 22/12/2016.)**

**WILSON BARASA WEKESA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

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

1. The appellant was charged with the offence of **defilement contrary to Section 8(1) (4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 18<sup>th</sup> day of August 2014 at [particulars withheld] village within Trans Nzoia County intentionally caused his penis to penetrate into the vagina of N.C.B. a child aged 16 years.**

2. The alternative count was **Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 18<sup>th</sup> day of August 2014 at [particulars withheld] village within Trans Nzoia County intentionally touched the vagina of N.C.B. a child aged 16 years.**

3. He was convicted and sentenced to 15 years imprisonment hence this appeal. The brief summary of the evidence as presented during trial were that **PW1 the complainant** told the court that on 18<sup>th</sup> August 2014, she had been send by her grandmother to buy milk from the appellant's home. She went there and found another girl who was also purchasing milk.

4. The other girl after being given her portion left but the appellant was slow in giving her hers. Afterwards he pulled her inside one of the rooms in his house and proceeded to remove her panty and defiled her. She then released her and she informed one J R immediately. She was taken to the hospital for treatment by her mother and the said J.

5. **PW2 A C** the complainant's mother testified that the complainant was her second born child. That she was called by J who informed her what had happened. She then took her to Kitale District hospital where she was treated. They later made report at the police station. She said that the complainant was born on 10/10/1998.

6. **PW3 J K** testified that PW2 is her sister in law. She said that on 18/8/2014 she was at home when the complainant came crying and told her that she had been raped by the appellant when she had gone to collect milk from his house. She said that she saw the complainant's swollen leg. She then send her child to inform PW2. They took the child to the dispensary.

7. **PW4 Sergeant John Maelo** of Sibanga Patrol Base carried out the investigation after the complainant and her mother reported the incident. He visited the scene after the appellant had been brought by AP Officers. He issued the minor with a P3 form, recorded statements from the witnesses and preferred charges against the appellant.

8. **PW5 John Koima** the clinical officer from Kitale District hospital examined the minor and found that;

***“At her private part her virginity was lost and she was bleeding and bruises.”***

9. She had injuries on labia and thus he concluded that she had been penetrated.

10. When put on his defence the appellant gave sworn evidence denying the charge. He said that on 18/8/2016 many people had come to buy milk from his place including the complainant. That after he took tea he left for work. That his son gave tea to the complainant. He worked till 5.30 pm when he was called by 2 people who handed him over to AP officers. He was accused of defiling the child which he denied. He was arrested and later charged.

11. On cross-examination he said that there was a grudge between him and the complainant's father who was a village elder as he stopped her daughter from getting married to their family.

12. DW2 Janet Sikulu testified that on the material day he went working in the home of one Petro. That she knows the appellant to be a milk vendor. On the material day he went buying milk from the appellant's home where he met two girls taking tea. She also took tea given to her by one Deno the complainant's son. She later heard of the incident.

### **Analysis and Determination**

13. I have carefully read the lengthy submissions in favour of the appeal as well as in opposition. I have equally perused the entire proceedings together with the P3 form produced by the prosecution during trial.

14. The substance of the appellant's grounds of appeal are that the entire evidence by the prosecution was full of contradictions for want of proper investigations. He said that he was not medically examined and that he was not supplied with proceedings.

15. There are 3 essential ingredients necessary to establish the offence of defilement, namely, the age of the victim, the identity of the perpetrator and whether penetration occurred.

16. Although, there was no documentary evidence produced to indicate the age of the complainant, it appears that from her evidence and that of her mother, she was born on 10/10/1998 and thus at the time of the incident she was 16 years old. However at the time of testifying she said that she was 17 years. This age was equally given to the medical officer who filled the P3 form as well as the treatment documents.

17. Was the appellant prejudiced by lack of production of any documentary proof that she was 16 years of age? Ordinarily and specifically in such grievous suits, there is always need to go beyond the word of mouth or oral evidence for that matter. It would have been prudent to undertake age assessment or production of birth certificate or such other material evidence to support the fact that the complainant was indeed a minor.

18. Be it as it may, I do not find any prejudice suffered by the appellant. Infact during cross-examination of both the complainant and her mother, it seems that this question of the minor's actual age was not a big issue. Needless to say, I do not find any prejudice suffered by the appellant.

19. On the issue of identification, it is appreciated across the board that the appellant was a milk vendor. It is not infact disputed that the complainant went to the appellant's home that morning. Both the appellant and his witness confirmed that much.

20. The question however is whether the appellant defiled the minor. The only eye witness is the minor. Is it possible that the appellant left the scene immediately after selling the milk to her? Were the appellant's children present?

21. From the minors evidence, it appears that they were only the two of them. She described how the appellant pulled her inside the inner room and proceeded to defile her. PW4 who went to the scene saw the bed in that room despite the contention by the appellant that there was no bed in the room.

22. In my view and as also found by the trial court, the sequences of events following the incident leaves no doubt that the appellant defiled the complainant. I find so for the simple reason that immediately after the incident, the complainant went and told J PW3 who in turn looked for PW2 the complainant's mother. They then proceeded to seek medical treatment.

23. The production of the P3 form and the treatment documents which were obtained within 2 days and the conclusion thereof that indeed the complainant was defiled leaves one with an irresistible conclusion that it was the appellant who defiled the minor.

24. There was no other suggestion that the minor went elsewhere that morning apart from the appellant's home.

25. Even though the appellant stated that there was bad blood between him and the complainant's father, I do not find that line of argument sufficient to exonerate him from the offence.

26. I find the evidence of the complainant truthful and straightforward and believable in line with the provisions of Section 124 of the Evidence Act Cap 80 Laws of Kenya.

27. Contrary to the grounds that he was not examined by a doctor, there is no such a requirement in law. In any case as found above the incriminating evidence was watertight.

28. I do not equally find any sufficient reason to suggest that the appellant was not provided with the witness statements during trial. The proceedings shows that he fully participated in the proceedings without any hitch.

29. The upshot is that this appeal is unmeritorious. The same is hereby dismissed.

**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.**