



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 137 OF 2016**

**(Being an appeal arising from conviction and sentence in Eldoret Chief Magistrate's Court in Criminal Case No. 7 of 2016 delivered by E. Kigen Resident Magistrate on 2/12/2016)**

DAVID WAFULA WAMALWA ALIAS KEVIN.....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) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on the 30<sup>th</sup> day of December 2015 in Eldoret West district within Uasin Gishu County, unlawfully and intentionally caused his genital organ namely (penis) to penetrate the genital organ namely (vagina) of SO a girl aged 8 (eight) years old.**
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 were that **on the 30<sup>th</sup> day of December 2015 in Eldoret West district within Uasin Gishu County, indecently caused his genital organ (penis) to come into contact with the genital organ of SO a child aged 8 years old.**
3. The appellant was convicted and sentenced to life imprisonment hence this appeal.
4. The summary of the evidence as presented during trial were that PW1 the complainant who is a class 2 pupil and aged 8 years was at the farm on 30/12/2015 watering their tomatoes when the appellate who used to work for her uncle came and defiled her. She screamed but nobody came to her aid. Her mother noted some green discharge on her underpant and upon inquiry, she told her what had transpired. She was then taken to hospital.
5. **PW2 EM** the complainant's mother testified that the complainant was 8 years old. She produced the clinic card as well as the certificate of birth. She said that on 31/12/2015 she told the complainant to shower when she noticed green and smelling discharge on her pant. She inquired from her and she told her what the appellant had done. She took her to Likuyani District hospital. The matter was later reported at the Soy police station where a P3 form was issued to her.
6. **PW3 Timothy Wanyonyi** was told by PW2 her sister concerning the ordeal. They took the child to the hospital the following day.
7. **PW4 Charles Simiyu** from Likuyani sub – District hospital examined the child and produced the P3 form. He found that she had bruises on the labia minora and hymen was intact. There was greenish discharge and red blood cells and spermatozoa in the urine. He concluded that she had been defiled.
8. When put on his defence the appellant gave sworn evidence denying the charge. He simply explained how he was arrested on 1/1/2016 by 2 people who were police officers. He generally denied the charge.

**Analysis and Determination**

9. The court has perused the proceedings herein. What is evidently clear is that the age of the minor was clearly proved by the production of the birth certificate as well as the clinic card. She was born on 20/12/2007 and so at the time of the incident she was 8 years old.
10. As to whether she was defiled or not, the answer is on the affirmative. Although the hymen was intact, it appears that there were visible injuries on the labia and minora. There was equally foul smelling discharge from her private parts. The clinical officer found that there was spermatozoa. There was equally STI infection. It has been held that even partial penetration is still considered penetration.

11. Did the appellant defile the minor. The answer is yes. Although there was no eye witness I find the complainant's evidence to be clear and without any effort to lie. I find that she spoke the truth. The smelly green discharge found by the mother in the complainant's pant and confirmed by the clinical officer was in tandem with her testimony.

12. I do not find any reason why the child would lie and or be malicious against the appellant. The appellant was a person known to her. He worked for her uncle (PW2). The incident took place during the day and thus there was no possibility of Mistaken identity.

13. In the premises I do not find any merit in this appeal and I shall proceed to dismiss the same.

**Delivered, signed and dated at Eldoret on this 12<sup>th</sup> day of October, 2018.**

---

**H.K. CHEMITEI**

**JUDGE**

**12/10/18**

**In the presence of:**

**Mr. R. Karanja for the Respondent**

**Appellant – present**

**Court Assistant – Christine**

**Judgment read in open court.**