



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 10 OF 2009**

**(Being an appeal arising from Kitale Chief Magistrate's court Criminal case No. 3799 pf 2006 delivered by P.N. Gichohi Principal Magistrate on 12/3/2009)**

**JOHN BARASA MANGUYA.....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 of the charge were that **on the 19<sup>th</sup> day of November, 2006 at Uasin Gishu District within Rift Valley province intentionally and unlawfully caused penetration with his genital organ into to the genital organ of ENW a girl of 3 ½ years of age**.
2. The alternative count was **indecent assault contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the 19<sup>th</sup> day of November, 2006 at Uasin Gishu District within Rift Valley province unlawfully and indecently assaulted ENW a girl of the age of 3 ½ years by touching her private parts**.
3. The appellant was convicted and sentenced to 30 years imprisonment hence this appeal. The summary of the evidence as presented during the trial court was that **PW1**, testified that she was 3 years old and a pupil at [Particulars Withheld] Academy. She said that she was playing at her grandmother's place when the appellant did "tabia mbaya" to her. She cried and she told her mother.
4. **PW2 MK** her mother testified that she came back from work on 17/11/2006 at around 2.00 pm. When she wanted to bath PW1 she noted injuries on her private parts. She told her that the appellant had defiled her and promised to buy Kaimati (cake) and tea for her. She called her mother in-law who was shocked. They confronted the appellant who took off. She then took the child to Mogoony dispensary where she was treated. She was later issued with a P3 form which was filled. They reported the matter at Moi's Bridge police station. She said that she knew the appellant for along time.
5. **PW5 Linus Ligare** produced the P3 form after examining the child. He found that according to the treatment documents the labia was broken and the bruises healed. The hymen was ruptured on unknown date. He said that the hymen could have been ruptured by something else.
6. **PW4 PC (W) Batula Abdulahi** from Moi's Bridge police station carried out the investigations and preferred charges against the appellant.
7. Placed on his defence, the appellant gave unsworn evidence denying the charge. He explained how on a date he could not recall, he came home and prepared food for his siblings. Suddenly G S a neighbour came and started screaming alleging that he had defiled a child. He told her that he was not present on the material day. He admitted knowing the complainant's mother and that he had refused to lend her Kshs 2580. He was later arrested that evening.
8. I have perused through the evidence as presented as well as the submissions by the appellant. Essentially the appellant submissions is a game of chance. On one hand he is alleging that he did not commit the offence while on the other hand he is remorseful and praying that he be released from prison or the term of 30 years imposed against him be reduced.
9. On the first limb, it is not in dispute that the child was defiled. Her evidence, her mother's as well as the clinical officer's production of the P3 form attest to this. Though the clinical officer stated that the cause of the broken hymen could as well be something else, he was however clear that there was sexual assault against the complainant.

10. Though there was no production of certificate of birth or such other document to indicate the complainant's age I am however persuaded that she was a child within the meaning of the Children's Act.

11. As to the identity of the perpetrator, though the child was of tender age I did not find anything to suggest that the child was unable to recognise the assailant. The incident took place at daytime and the appellant was well known to the child.

12. I think the only thing that merits consideration is the prayer that the period served by the appellant in prison as imposed by the trial court be considered. I note that he was jailed for 30 years. Essentially he ought to have served life imprisonment. The State did not cross-appeal and on that note I shall deliberately hesitate to reconsider.

13. Considering that the appellant was 19 years of age at the time of arrest and that he has served substantial part of the prison term, and taking into account that he was not out on bond while the matter proceeded I do order as follows;-

**1. The appeal is hereby dismissed.**

**2. The appellant set free unless lawfully held.**

**3. The appellant shall serve 2 years probation period after the release.**

Orders accordingly.

**Delivered, signed and dated at Kitale this 1st day of November, 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**1/11/18**

**In the presence of:**

**Appellant – present**

**Kakoi for State**

**Kirong – Court Assistant**

**Court – Judgment read in open court.**