



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BOMET**

**CRIMINAL APPEAL NO. 17 OF 2018**

**RONALD KIPKURUI NGENO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the original Conviction and Sentence in Cr Case no 11 of 2017**

**Bomet PM's court Hon. P Achieng – PM)**

**JUDGMENT**

The appellant was convicted and sentenced to life imprisonment for 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 being that on the 8<sup>th</sup> day of March 2017 within Bomet County intentionally and unlawfully caused his penis to penetrate the vagina of J.C a child aged seven years.

The appellant has lodged this appeal on the following grounds.

1. Evidence adduced by the prosecution witnesses was not water tight.
2. Evidence by the prosecution witnesses was inconsistent and incredible and untrustworthy
3. Reliance on evidence of PW4 which was inconsistent
4. Failure to consider defence evidence

This being the first appellate court, it has a duty to re-evaluate and consider afresh the evidence on record so as to arrive at its own conclusion **Okeno V.R 1972 EKL.R.**

The complainant testified of having been send to collect onions in the neighbourhood. After collecting them and while on her way home she met the accused who is a neighbour. He gave her Ksh.10/= and told her to accompany him to his house.

While there he removed his clothes and her underpant and told her to lie on the bed. He proceeded to insert his penis into her vagina and had sexual intercourse with her. He later let her go and warned her not to report the matter to anyone but she went and reported to her mother of what the accused did to her. The matter was reported to police and accused was later arrested and charged.

The area administrator (PW2) testified to have been called by phone by one Rose Langat who informed her that she go to her place. She went there and found the complainant who told them that she had spent the night at the house of the accused and they had sexual intercourse together. The matter was reported to police. The complainant was taken to Hospital for treatment and examination. It was alleged that the complainant used to spent the night with the accused at night. The accused was sought for and arrested. The mother of the complainant is said to be retarded.

DR Ronald Kibet (PW4) of Longisa Hospital testified that upon examining the complainant's genitalia there were lacerations and bruises on the vaginal walls. There was whitish discharge and the hymen was penetrated and appeared old. Urine test showed presence of pus cells.

The investigating officer produced a birth certificate of the complainant.

The accused in his defence denied ever committing the offence of defilement.

The ingredients of defilement are (1) Age assessment

(2) Penetration

(3) Identification

#### **Age assessment**

The prosecution produced a birth certificate No [Particulars Withheld] for one J C shown to have been born on 1<sup>st</sup> February 2009. This birth certificate is shown to have been issued on 3<sup>rd</sup> April 2017 whereas the defilement is said to have occurred on 8/3/2017. By deduction the age of the complainant at the time of the defilement was eight years but not seven as indicated in the charge sheet.

#### **Penetration**

The complainant testified to have spend the night in the house of the accused and had inserted his male organ into hers. The Doctor who examined her found lacerations and bruises on her vaginal walls. The hymen was missing though not recently

He formed the opinion that there was penetration.

#### **Identification**

The accused was well known to the complainant as a neighbour.

#### **Corroboration**

The evidence of the complainant was corroborated by that of the Doctor (PW4).

The evidence of the appellant was one of mere denial. There is no evidence of the existence of a grudge between him and the complainant's family.

The mother of the complainant is said to be mentally retarded. He could have taken advantage of that fact.

The appeal has no merit and its dismissed.

The conviction and sentence are upheld.

Judgment delivered dated and signed this 13<sup>th</sup> day of November 2018 in the presence of learned counsel for the defence Mr. Wawire. Appellant in person. Court assistant Rotich

**M. MUYA**

**JUDGE**

**13/11/2018**