



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 105 OF 2014**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court criminal case No. 1815 of 2013 delivered by J.A. Owiti Principal Magistrate on 3/10/2014)**

**RICHARD OMONDI .....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 (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge was that **on the 28th day of July 2013 at [particulars withheld] village within Trans Nzoia County, intentionally caused his penis to penetrate the vagina of A C B a child aged 5 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 of the charge are that **on the 28th day of July 2013 at [particulars withheld] village within Trans Nzoia County, intentionally caused the contact between his penis and the vagina of A C B, a child aged 5 years.**

3. The appellant has appealed against both conviction and sentencing. He was sentenced to life imprisonment. Before looking at the appeal, its appropriate to summarise the proceedings at the trial court.

4. **PW1 W A B** the father of the complainant testified that he had gone to look for food for his family on 28<sup>th</sup> July 2013. He left behind his children including the complainant who was the youngest. When he came back in the evening he was informed by one of his children P C concerning the incident. He reported the matter to the village elder. The female neighbours were called to examine the child. The appellant was a shepherd at Msambai's home who was his neighbour.

They traced the appellant and had him arrested. He took the child for medical examination where she was treated and given drugs. He said that the child was born around 2008.

5. **PW2 S C** was 14 years old and a standard 7 pupil at [particulars withheld] primary school. She said that on the material day at 3.00 pm she had gone to fetch firewood and left her siblings back at home including the complainant. As she came back and approached home she saw the appellant walking out of their home. Both the complainant and her brother M were crying. The complainant told her that the appellant had done bad things to her. He knew the appellant who was working for their neighbour. When her father came home she told him what had transpired and the appellant was then arrested.

6. **PW3 the complainant** testified that she was in baby class. That on the material day her brother and herself were washing their feet at home. The appellant came and told M to go and call their father. Immediately M left the appellant defiled her. She told PW2 as soon as she arrived. She was then taken to hospital she said that in the process of defiling her she promised her money.

7. **PW4 M B** testified that he was a standard 1 pupil and that on the material day they were washing their feet near their gate with the complainant. The appellant came and told him to go and call their father at Mr Sambai's place. He obliged and went with his other brother A. They did not find their father except Mr Sambai who told them that their father was not there.

8. While he came back he found the appellant behind their house lying on top of the complainant. When their father came back C told him what had transpired while he was away. He did report the incident to his mother as well when she came back.

9. **PW5 Rodgers Masai** a Police Reservist arrested the appellant when the matter was reported by the complainant's father.

10. **PW6 John Koima** the clinical officer from Kitale District hospital produced the P3 form which he had filled in respect to the

complainant on 2/9/2013. He found that the hymen was torn and fresh looking. There were no other injuries. There were no blood stains.

11. **PW7 Faris Silali** the community oral officer from Kitale District hospital produced the dental age assessment report on behalf of Dr. Kiprop who opined that the complainant was aged 5 years.

12. When put on his defence the appellant gave sworn evidence and stated that he was engaged in casual duties. He said that he was arrested at the home of his employer one Bwana Gorofa. He generally denied the officer.

### **Analysis and Determination**

13. The court in line with *Ekeno Vs Republic (1972) E.A. 32* is required to arrive at a new independent finding with a caution that it did not have the benefit of handling the matter during trial.

14. The court has perused the proceedings herein as well as the submissions by the appellant. Apparently there were no submissions from the Respondent.

15. What is acceptable now is that for the offence of defilement, three ingredients are necessary namely, the age of the victim, the identity of the perpetrator and penetration.

16. In the case at hand the minor was aged 5 years as was established by the production of the dental age assessment report. The father equally though he was not sure of the date of birth stated that she was born sometimes in the year 2008.

17. The question of penetration in my view was well explained by the findings of the clinical officer. The examination was done the following day and he found the injuries to be fresh. The hymen was torn. There was however no other injuries noticed. There was therefore proof of penetration.

18. The identity of the perpetrator was well corroborated by the complainant as well as her two siblings who were minors. Although they were young, the two were categorical that they saw the appellant in their home.

19. I have carefully read their evidence and nothing suggest to me that there was any discrepancy. The appellant was a neighbour's herder or Shepherd. He did not deny this. Moreover they said that he would occasionally come to their home. The incident took place at around 3.00 pm or thereabouts. It was during the day.

20. PW2 saw the appelalnt leaving their compound and immediately found the two children crying especially the complainant.

21. PW3 was sent by the appellant to go to the appellant's employer's home to call their father only to find that he was not there. This in my view was a decoy.

22. In the premises I do not find any merit in this appeal. There is not any remote possibility that the children conspired to frame the appellant. Although the female neighbours who examined the complainant were not called, I do not think that watered down the prosecution case.

23. The appellant defence did not elicit much as the same was a general denial.

24. The appeal is hereby dismissed.

**Delivered, signed and dated at Kitale this 9<sup>th</sup> day of November, 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**9/11/18**

**In the presence of:**

**Mr Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**