



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 83 OF 2017**

**STANLEY KAMAU....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal against the conviction and sentence by Hon. H.O. Barasa (PM) delivered on 1<sup>st</sup> August, 2017 in Eldoret Chief Magistrates' Court Criminal Case No. 16 of 2017)**

**JUDGEMENT**

1. The appellant was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2016 and sentenced to serve 20 years imprisonment. He appeals against the same on grounds that:

- a. That the learned magistrate erred in law and in fact in convicting the appellant when the evidence on record was manifestly insufficient, inconsistent and had glaring gaps hence incapable of sustaining a conviction.**
- b. That the learned magistrate erred in law and fact by convicting him on medical examination which did not support the charges for defilement.**
- c. That the learned magistrate convicted the appellant whereas he failed to apply the principle of circumstantial case.**
- d. That the trial court disregarded the appellant's testimony in his defence without giving reasons for disregarding it.**

2. This is a first appeal and this court has warned itself of its duties to reconsider and re-evaluate the evidence afresh with a view to arriving at its own independent conclusion bearing in mind that it did not have the benefit of seeing the witnesses' demeanor.

3. The prosecution case was that GIB (PW1) who is the complainant (MN's) grandmother sent MN to the house on 23<sup>rd</sup> January, 2017 to get jericans to fetch water. MN came back after a few hours and told her that someone had defiled her. She stated that MN was walking with her legs apart. She inquired if she knew the assailant and MN answered in the affirmative. That MN told her that she had been defiled by the man who used to do casual jobs for a certain woman. That he was light skinned and sometimes used to wear goggles. That the person described was known to PW1. That she sent a young man to go and bring him and he was brought and MN confirmed that the appellant was the one. She escorted MN and the appellant to Baharini Police Post and made a report. MN was issued with a p3 form and taken to Moi Teaching and Referral Hospital (MT & RH) for examination. She stated that she was 13 years of age. That she was born on 7<sup>th</sup> March, 2004. She stated that she knew the appellant before the incident. MN (PW2) stated that she had been sent for jericans by her grandmother on the material day when the appellant knocked the door. She went to open and the appellant asked her where her grandmother was and she informed him that she was not home. The appellant then entered into the house, grabbed her neck and told her to allow him to kiss her. He told her not to scream or else he would kill her. He removed her pant and put it under the sofa cushion, made her lie on the chair, unzipped his trouser and inserted his penis into her vagina. She stated that the act was painful and she told him so. When he was done he left her and told her that he loved her. She screamed when he left. She stated that there was a man washing clothes nearby to whom she reported what had happened. That the appellant had told her that he was going to fetch milk and the man informed her to let him know once the appellant was back. She proceeded to the well where PW1 was waiting and informed her of what had happened. That PW1 instructed a certain man who had a motor cycle to go for the appellant. The appellant was brought and members of the public wanted to lynch him but PW1 restrained them and the appellant was taken to the police. She stated that she was taken to MT & RH. She identified the appellant as the person who defiled her. Dr. Temet (PW3) produced the p3 form (P. Exhibit 1) in respect to MN on behalf of Dr. Rono who examined MN on 24<sup>th</sup> January, 2017. PW3 stated that upon examination, MN was found to have hymenal tear at position 8 o'clock and had erythema (redness) on the labia minora and that the fresh tears indicated that she had been freshly penetrated. On cross examination. PW3 stated that he did not have the appellant's p3 form and that DNA test cannot be done after 4 months have lapsed. Police Constable Priscah Chepkoech (PW4) stated that on 23<sup>rd</sup> January, 2017 at 12.30 pm she found a crowd at Baharini Police Post. She made an inquiry and was told that a defilement suspect had been brought to the station. She proceeded to the report office where she found MN and PW1. That she interviewed MN who informed her that the appellant on the material day went to their house grabbed her and defiled her. She recorded statements and issued her with a p3 form. That the p3 form

confirmed that she had been defiled and charged the appellant. She stated that she had an age assessment report which confirmed that MN was 13 years of age. She produced the age assessment report as P. Exhibit 3 and baptismal card as P. Exhibit 4.

4. The appellant was put on his defence and gave unsworn statement as follows. That he was on 21<sup>st</sup> January, 2017 at Tyre Mbili where his mother's aunt lived. That she had two parcels of land and he used to cultivate one of the said parcels. That a woman by the name GIB who was a tenant was allowed to grow vegetable on the land. Her mother's aunt instructed him to till the land and when GIB saw him till the land she asked him where she would till and he told her that he was informed to till the entire plot, GIB told him that they would see if he would till the land. He left and proceeded to board a vehicle. He was then followed by people on a motor cycle who told him that there was a woman who wanted to talk to him. He did not know which woman they referred to and he accompanied them and the men told him that they were escorting him to the police station. He inquired what the problem was and they told him he would find out once they got there. He was taken to Baharini Police Station and after 30 minutes the men came back with GIB. She recorded her statement to the effect that he had defiled her daughter. The appellant denied that he defiled MN and that she was known to him.

5. This court has given due consideration to the appeal herein factoring in its duty as a first appellate court to re-consider and re-evaluate the evidence afresh to arrive at its independent conclusion. The issues for determination is whether or not defilement was proved beyond reasonable doubt and whether or not the defence was considered. The ingredients forming the offence of defilement are age of complainant, proof of penetration and positive identification of the assailant. Applying the test, MN's age assessment was produced by PW4 which revealed that she was 13 years of age thereby it was proved that she was a child. It emerged from the evidence of PW3 who stated that MN had hymenal tear at position 8 o'clock and had erythema (redness) on the labia minora and that the fresh tears indicated that she had been freshly penetrated. This corroborated MN's evidence that she had been defiled. MN stated in her evidence that the appellant who was a casual labourer is the one who defiled her. It emerged from PW1 and PW4's evidence that M.N. stated at the time of reporting the incident that it was the appellant who defiled her. MN's said evidence was firm and unshaken by the appellant's. The appellant's evidence did not cast any doubt to MN's. MN in fact while reporting to PW1 gave a description of the appellant. Considering the time the incident took place, I find that the appellant was positively identified. I am further fortified by the holding in **Maitanyi v. Republic [1986] KLR 198** thus:

**“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his assailants, to those who came to the complainant's aid or to the police...”**

6. As has been stated earlier in this judgment, although the appellant tried to give alibi evidence weighing the same with that of the prosecution, it did not shake the prosecution case's probative value. In the circumstances I find the charge had been proved against the appellant beyond any reasonable doubt. The sentence imposed was the minimum possible in law. The appeal lacks merit and is hereby dismissed. The conviction and sentence is upheld.

Orders accordingly.

**D. K. KEMEI**

**JUDGE**

**Delivered at Eldoret this 22<sup>nd</sup> day of November, 2018.**

**O. SEWE**

**JUDGE**