



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 127 OF 2015**

**(Being an appeal arising from Kitale Chief Magistrate's court in Criminal Case No. 3065 of 2013 delivered by C.N. Mugo – Resident Magistrate on 10/12/2015)**

**WILSON SIMIYU PETER.....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) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 18<sup>th</sup> day of November 2013 at [particulars withheld] farm within Trans Nzoia County intentionally and unlawfully caused his penis to penetrate the vagina of W C T a child aged 3 years.**

2. He was convicted and sentenced to Life imprisonment hence this appeal. The grounds raised in the petition of appeal include the fact that the evidence as presented by the prosecution was inconsistent and exaggerated and that the trial court failed to appreciate that there was mistaken identity.

3. The brief summary of the evidence as presented was as hereunder.

**PW1 M C** is the mother to the minor. She said that the minor was born on 22/4/2010 and that on the material day 18/10/2013 at 4.00 pm she had gone to sale clothes from door to door. When she came back the child was not at home but at the neighbour's home. The neighbour was called L K. She wanted to wash her and she said she was feeling pain in her private parts. She told her what the appellant had done to her at the nappier grass shamba. She saw blood in her pant and wound on her private parts. She was taken to the hospital the following day. The appellant was later arrested and taken to Kachibora police station. The child pointed the appellant in court.

4. **PW2 N C** is a sister to PW1. The complainant is her niece. The complainant had been left in her custody when PW1 left. The child went to their neighbour's place to play. The appellant was at the farm. PW1 came and went to L's place to pick the child. When she wanted to bath her she noticed that she had blood on her private parts child said that it was the appellant who had defiled her. She said that it was the appellant who was at the farm alone that day. The child identified the appellant on 20/11/2013 which led to his arrest.

5. **PW2 L K** said that the complainant is her grandchild and the appellant was a casual labourer weeding nappier grass. She said that when the child was picked by PW1 and wanted to bath her she had blood discharge from her private parts. She said that she had been defiled by the person who was weeding Napier grass.

6. **PW4 Richard Ruto** attached to Cherengany police station re-arrested the appellant on 20/11/2013 when he was brought by the members of public. He carried out the investigations, recorded witness statements and preferred charges against the appellant. He equally issued her with P3 form. He did produce the child's birth certificate.

7. **PW5 John Koima** from Kitale District hospital produced the P3 form which he filled and found fresh bruises and labia walls which was swollen on the labia majora. The hymen was freshly torn and there was pus cells and epidermal cells indicative of infection.

8. When placed on his defence the appellant gave sworn evidence. He said that he was weeding Nappier grass at Ruto Cherotich's place when he was arrested by the public and accused of defiling the minor. He said that he had worked in the place for 2 months and was owed Kshs 3000 for harvesting maize and weeding nappier grass. He also stated that there was another man who herds cattle but he did not know his name.

**Analysis and Determination**

9. The court's duty at this stage is to reevaluate the evidence afresh with a view of coming up with a fresh and independent findings.

**(See Ekeno V Republic (1972) E.A. 32).**

10. The three ingredients of this nature of the offence are proof of the age of the complainant, that she was defiled and the identity of the perpetrator.

11. The age of the complainant was not in dispute as the certificate of birth produced was not contested at all.

12. Equally as to whether she was defiled, I find the evidence of the witnesses and the clinical officer sufficiently established the same.

13. Was the appellant the perpetrator? Clearly, there was no eye witness. The only evidence is that of the witness, who apparently were all related. The appellant's ground in his appeal was that they were from the same lineage hence there was doubt as to whether there was no collusion.

14. I have examined the same as well as cumulatively the entire proceedings and the submissions by the parties. The learned State counsel submitted in support of the lower court's judgment arguing that the case had been proved beyond any reasonable doubt and that all the ingredients of defilement had been established.

15. There is no doubt that the appellant worked as a casual labourer at the home of PW3 who were very close neighbours to PW1. Further the nature of the work that he did was weeding the nappier grass as well as maize harvesting. On that material day and based on his own evidence, the appellant met M as well as the minor. The nappier grass is at the home of the complainant's mother.

16. The big question is whether in light of her age was the child mistaken as to who defiled her? Why would she say that “**mtu mwingine anachapa watu kwa shamba.**”

Would she accused the appellant falsely?

17. There was suggestion that there were other male children playing with the complainant at the time. PW2 stated that they were almost the same age with the complainant. Clearly, I do not find any suggestion even from the appellant who had worked there for a while that the said children may have defiled the minor.

18. On the other hand the appellant seems to implicate a herdsman. Apparently he did not even mention the name of the said herdsman despite working at that home for about 2 months.

19. In my view therefore I find that the closest male person who was at the area where the minor was, was the appellant. Although PW2 could see him from the shamba, that nevertheless did not mean that he could not commit the offence.

20. There was nothing to suggest that the minor was malicious or was mistaken. Even at the police station as well as the court, the minor was able to pin point the appellant.

21. In the premises, and upon evaluating the circumstances obtaining on the ground at that moment I find that the appellant was well with the reach of the minor. Infact there was nothing to suggest that the minor's parents had differed with the appellant so as to “fix” him using the child. The debt of kshs 3000 was understood well and infact he had been promised payment upon sale of the maize.

22. This appeal is unmeritorious. The appellant defence was not convincing in my view. The same is hereby dismissed.

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

**H.K. CHEMITEI**

**JUDGE**

**1/11/18**

**In the presence of:**

**Appellant – present**

**Kakoi for State**

**Kirong – Court Assistant**

**Judgment read in open**