



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 88 OF 2017**

**GW.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in criminal case number 816 of 2015 in the Principal Magistrate's Court at Sirisia – L. Kiniale (SRM) on 8<sup>th</sup> December, 2016)***

**JUDGMENT**

1. The Appellant herein, **GW** was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(4)** of the **Sexual Offences Act**. The particulars of the charge were that on the 9<sup>th</sup> day of August, 2015 at [particulars withheld] Village central in Bungoma West Sub-County within Bungoma County unlawfully caused penetration by inserting your male genital organ namely penis into the female genital organ namely vagina of SN a girl aged 13 years. (Initials substituted to protect the identity of the minor).
2. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The particulars were that on the 9<sup>th</sup> day of August, 2015 at [particulars withheld] Village in Central Namwela sub-location, Toloso location in Bungoma West Sub-County, within Bungoma West Sub-County, within Bungoma County, the Appellant unlawfully caused his male genital organ namely penis to touch the female genital organ namely vagina of the said SN.
3. In a nut shell the prosecution's case was that the Complainant was at [particulars withheld] area visiting her grandmother when her grandfather, the Appellant herein, took her to his house in [particulars withheld]. At his home, the Appellant forcefully undressed her and defiled her. The police rescued the Complainant the following day and arrested the Appellant. The Complainant was examined and treated at Sirisia Sub-county Hospital and a P3 form filled on her behalf. The Appellant was subsequently arraigned in court and charged with the present offence.
4. In his defence the Appellant gave unsworn testimony in which he confirmed that the Complainant was his grandchild through his son. He stated that the Complainant stayed with him on the night in question because he had rescued her after being informed by two men that the Complainant had been found. He denied the offence.
5. Following a full trial, the Appellant was convicted on the main charge and sentenced to serve fifteen years imprisonment. Being dissatisfied with the decision of the trial court, the Appellant preferred the present appeal on both sentence and conviction. In the appeal, he alleged that: he was not afforded a fair trial; the prosecution case was not proved beyond reasonable doubt; there were no medical tests to establish the actual offender and his defence was rejected without cogent reasons. He filed written submissions in this regard.
6. The state opposed the appeal through learned state counsel Mr. Oimbo who submitted that the Appellant was afforded a fair trial and further that the prosecution proved all the ingredients required to sustain a charge of defilement. He urged the court to dismiss the appeal and uphold both the conviction and sentence.
7. I subjected the proceedings to a fresh and exhaustive scrutiny to which the Appellant is entitled on a first appeal. In doing so, I was cognizant of the fact that I neither saw nor heard the witnesses as they testified and gave due allowance therefor. – See **Odhiambo vs. Republic Criminal Appeal No. 280 of 2004 [2005] 1 KLR**.
8. In the first ground, the Appellant argued that he was not afforded a fair trial as provided under **Article 50(2)(j)** of the **Constitution**. Mr. Oimbo opposed this claim and submitted that the trial court on 15<sup>th</sup> September, 2015 directed that the Appellant be supplied with witness statements and this was done. This was following a complaint by the Appellant that he had not been furnished with witness statements. Under **Article 50(2)(j)** of the **Constitution** every accused person has the right to a fair trial, which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

9. The record demonstrates that on 15<sup>th</sup> September, 2015 the Appellant asked to be supplied with witness statements, whereupon the court directed the prosecution to supply him with copies of the witness statements. The matter did not proceed for hearing until 10<sup>th</sup> February, 2016 when the first prosecution witness testified. There is nothing on record to show that the statements were never supplied because the Appellant did not revisit his request and he went on to fully participate in the proceedings and cross-examine the prosecution witnesses fully. There is therefore no basis to hold that **Article 50(2)(j)** of the **Constitution** was not complied with.

10. On the second ground the Appellant complained that the prosecution failed to prove its case beyond reasonable doubt. In response to this, Mr. Oimbo submitted that the prosecution had proved all the ingredients of defilement under **section 8(1)** as read with **section 8(4)** of the **Sexual Offences Act**.

11. The critical ingredients forming the offence of defilement are: age of the complainant, proof of penetration and positive identification of the assailant.

12. In the present case, the age of the Complainant was proved by an age assessment report which was produced by PW4 Pamela Nyongesa, a clinical officer at Sirisia Sub-County Hospital. The report shows that the Complainant was aged approximately 13 years. The Complainant herself also gave her age as 13 years old and I also note that PW2 who went to the Appellant's house that evening said she found a very young girl. Besides the age assessment report therefore, there is the apparent age of the child.

13. Penetration was conclusively proved by the evidence of the Complainant which was corroborated by the medical evidence presented by PW4. The Complainant gave a vivid description of the events surrounding the defilement. In her own words, the Complainant stated thus:

*“When we arrived at his home he told me to remove clothes. I slept with him. I refused to remove the clothes but he undressed me by force and defiled me. He lied on me (sic) and inserted his penis in my vagina (witness demonstrates where the accused inserted his penis).”*

14. It is on the record that during cross-examination, the trial court noted the demeanor of the witness and concluded that she was candid in her testimony that the Appellant had defiled her.

15. The Complainant's evidence was corroborated by the medical evidence in the testimony of PW4 Pamela Nyongesa the clinical officer. PW4 testified on behalf of Amos Sagwe the clinical officer who examined the Complainant, stating that she was familiar with her colleague's handwriting having worked with him for a period of two years. PW4 testified that the Complainant was presented with abdominal pains, back pains and a history of defilement. Upon examination, the Complainant was found to have laceration in her private parts and discharge from her private parts. She produced a P3 form and treatment notes in this respect.

16. Part C of the P3 form indicates that the Complainant had lacerations on both the labia majora and minora. Her hymen was broken and had a whitish visible discharge that had a foul smell. There is therefore no doubt that the child had engaged in a sexual act in the recent past before her medical examination.

17. On whether the assailant was positively identified, I note that this is a case of recognition as opposed to identification. It is not in doubt that the Appellant is the Complainant's grandfather and was therefore well known to her. The evidence of PW2 lent support to the Complainant's testimony. She had this to say:

*“He welcomed me. He told his visitor to bring a mattress. I said I cannot sleep. He called the visitor who responded “kuka”. I asked him why he was sleeping with his grandchild. The accused however wanted me to remove my clothes. I had a torch I flashed him I saw he had discharge on his penis as he had removed his clothes. I decided to go to his room to find out who was in his house. I found it was a very young girl and had removed her green uniform, she had put on a pink petticoat torn. She was very very young...”*

The evidence of PW2 therefore also places the Appellant at the scene of the offence and in the company of the Complainant on the night in question.

18. On the third ground, the Appellant argued that the prosecution failed to conduct medical tests to establish the actual offender. It is however noteworthy that while **section 36** of the **Sexual Offences Act** grants the court power to order an accused person to undergo a DNA test, the provision is not couched in mandatory terms as it employs the word “may”. In the case of **AML vs. Republic [2012] eKLR** the Court of Appeal at Mombasa reiterated that the fact of rape or defilement is not proved by way of a DNA test but by way of evidence.

19. The Appellant further argued that the trial court rejected his defence without cogent reasons. In his defence, the Appellant merely stated that he had rescued the Complainant and denied PW2's allegations stating that PW2 had gone to his home to borrow money but on seeing the Complainant, called the police on claims that the Appellant was sleeping with her. The record clearly shows that the trial magistrate considered the Appellant's defence and discarded it as untenable, and unable to shake the prosecution's evidence.

20. On the last ground, the Appellant claimed that the charge sheet was defective. That the names of the prosecution witnesses who testified differed from those indicated in the charge sheet. Further, that the charge sheet indicates that the Complainant is Pius Mukwana Wanyonyi. On this ground, he urged that the trial court based its conviction on a defective charge sheet.

21. Mr. Oimbo in rebuttal submitted that even though the names listed in the charge sheet as witnesses are not the actual ones who testified, there was no prejudice suffered since the statements of the witnesses who actually testified were given to the Appellant in good time.

22. The record demonstrates that the Complainant cross-examined the prosecution witnesses when and as they testified. Further that the Complainant was supplied with the witness statements of the prosecution witnesses who testified before the hearing commenced. In any event, the defect is one curable under **section 382** of the **Criminal Procedure Code**, and the different names are not those that appeared in the charge but in the list below it.

23. I have anxiously considered and reassessed the evidence before me and the manner in which the learned trial magistrate evaluated it and find no reason to depart from the findings of the trial magistrate. I find that the offence of defilement was proved against the Appellant to the required standard. In the circumstances, I find the Appellant's appeal to be without merit and I accordingly dismiss it in its entirety.

It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF NOVEMBER 2018.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 14<sup>TH</sup> DAY OF DECEMBER 2018.**

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**H. K. CHEMITEI**

**HIGH COURT JUDGE**