



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 32 OF 2017**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal Case No. 2853 of 2013 delivered by C.C. Kipkorir Resident Magistrate on 01/9/2016)**

**YASIN KIPTOO KIMUTAI.....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) (4) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the 5<sup>th</sup> day of August 2013 within Trans Nzoia County, intentionally caused his penis to penetrate the vagina of TCK a child aged 16 years.
2. The alternative count was **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the 5<sup>th</sup> day of August 2013 within Trans Nzoia County, intentionally touched the vagina of TCK a child aged 16 years with his penis.
3. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal. The amended handwritten Memorandum of appeal filed simultaneously with the submissions aver inter alia that penetration was not proved and that the complainant did not recognise the perpetrator.
4. Before looking at the above grounds, suffice to summarise the proceedings as they were at the trial court. **PW1 the complainant** stated that she was 17 years at the time of testifying though at the time of the incident she was 16 years. She was a student at [particulars withheld] Girls High school. On the material day she was from school and on her way she met the appellant who took her by force to his house, locked the door, removed her clothes and defiled her. She threatened to kill her if she raises any alarm. He reminded her that he had killed someone older and that it would not been difficult to kill her.
5. After defiling her he allowed her to leave for home. That evening she did not inform anybody but in the morning she informed her mother. She was taken to Suwerwa dispensary and the matter reported to the chief.
6. She was later referred to Kitale District hospital where a P3 form was filled. She identified her birth certificate.
7. **PW2 MEK** the mother to the complainant stated that the complainant told her concerning the incident the following day at 6.00 am. They then took her to Suwerwa health Centre where she was treated and the doctor referred them to Kitale District hospital. She was also given a P3 form at Suwerwa police base.
8. **PW3 John Koima** a clinical officer from Kitale District hospital produced the P3 form on behalf of one Kobonei who filled the same after examining the complainant. The findings were bruises on both labia, bruises on the vaginal wall and the hymen was broken and fresh looking. Epithelial cells and pus cells could be seen s well.
9. **PW4 P.C. Simon Kimutai** from Suwerwa police patrol base received the complaint on 6<sup>th</sup> August 2013 at 8.00 am through the complainant's mother. He issued them with a P3 form. He carried out the investigations and he was unable to arrest the appellant in his home as he had run away. He was however later arrested at Eldoret and brought to Cherengany police station. He produced the birth certificate for the complainant.
10. When put on his defence the appellant gave unsworn evidence denying the charge. He narrated how he was with the complainant's father on 5<sup>th</sup> August 2013 as they went to buy cows. He stated that he had bad relationship with PW2 and that is why they fixed him.

11. The state thereafter made an application to call witnesses to rebutt the appellant's alibi.

12. **PW6 BKB** the father of the complainant stated that he was at home on 8<sup>th</sup> May 2015 and at no time was he with the appellant on 5<sup>th</sup> August 2016 to buy a cow. He said that he does not deal with buying and selling of cows.

13. **PW7 Simon Cheruiyot Ruto** the Chief Suwerwa location stated that he knew both the complainant and the appellant. He denied even speaking to the appellant regarding the rape issue and that the appellant did not visit his office.

14. The appellant has filed written submissions. The respondent did not though it was ordered that this appeal be settled by way of written submissions.

### **Analysis and Determination**

15. The authority of ***Okeno Vs Republic (1972) E.A. 32*** states that the duty of this court is to dissect afresh the evidence on record and come up with a new and independent findings with a rider that it did not have the benefit of conducting the trial thus experiencing the demeanour of the witnesses.

16. The court has carefully perused the proceedings herein as well as the submissions by the appellant. The twin attack on the respondent case by the appellant is on identification and penetration. These two together with the age of the victim are the salient ingredients of the offence of defilement.

17. Looking at the matter at hand, the age of the complainant is not debatable as the production of certificate of birth was not contested. She was almost 17 years (Actually 20 days shy).

18. As to whether she was defiled, the evidence of the complainant, the clinical officer and the P3 form as well as the initial treatment chit from Suwerwa health Centre attested to this. The evidence was fresh. She had not taken birth. The wounds inflicted were fresh. In a nutshell she was defiled.

19. Did the appellant defile the appellant? The incident occurred at 4.00 pm when she was heading home from school. The complainant narrated how the appellant forcefully took her to his house and threatened to kill her if she raised any alarm. He reminded her of how he had killed an adult and that being young, he could not hesitate to do so.

20. The threats of having killed someone was not disputed. By then the appellant was facing murder charges. It was therefore understandable for the minor to be apprehensive.

21. More importantly, the appellant did not dispute that they were known to each other. They were actually village mates. The incident occurred during the day.

22. The complainant did not inform her mother that evening but waited till the following morning. According to her she feared the threat from the appellant.

23. The defence alibi by the appellant was counteracted by the evidence of the complainant's father as well as the area chief. The defence was needless to say, unsworn and thus he did not afford the prosecution the chance of being cross-examined. In view of what PW5 and PW6 stated, I find the appellant unsworn defence not of much probative value.

24. Consequently, I hold that the findings of the trial court cannot be disturbed. The appellant defiled the complainant that afternoon as she came home from school. The incident took place in his house. I do not find any reason to suggest that the complainant lied though there was no eye witness. She generally remained consistent in her evidence even during cross-examination. She spoke the truth as provided under the Proviso to Section 124 of the Evidence Act, Cap 80.

25. The appeal is hereby dismissed.

**Delivered, signed and dated at Kitale this 17<sup>th</sup> day of December, 2018.**

---

**H.K. CHEMITEI**

**JUDGE**

**17/12/18**

**In the presence of:**

**Mr Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**