



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 100 OF 2012**

**(Being an appeal arising from the Judgment of Kitale Senior Principal Magistrate J.M. Nang'ea delivered on 17/9/2012 in Criminal Case No. 2232 of 2011)**

**ISAAC MURUNGA BARASA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant was charged with the offence of Defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3/2006.

The particulars of the offence were that between 18<sup>th</sup> August and 18<sup>th</sup> September 2011 at [particulars withheld] in Trans Nzoia County by use of your genital organ namely penis caused penetration into the genital organ namely vagina of D W N a girl aged 14 years.

The alternative charge was indecent Act contrary to Section 11(1) of the Sexual Offence Act No. 3/2006.

The particulars were that between 1<sup>st</sup> August 2011 and 18<sup>th</sup> September 2011 at [particulars withheld] within Trans Nzoia County, intentionally and unlawfully caused contact between your genital organ namely penis and genital organ namely vagina of D W N a girl aged 14 years.

The appellant was convicted and sentenced to 20 years imprisonment hence this appeal. The appellant amended petition of appeal has about 7 grounds and before looking at them it is worthwhile to summarise the proceedings as presented at the trial court.

**PW1 the complainant** said that she was aged 18 years having been born in the year 1993. She said that on 1/8/2011 she had gone to visit her sister at [particulars withheld] after the school closed. In the process she met the appellant a person whom she knew and who had earlier in May 2011 seduced her. They then eloped and went to stay together at a rented house at Kapsara for a whole month. While they stayed together as a husband and wife they consistently had sexual intercourse where she became pregnant.

The appellant was later arrested and taken to Kabolet police post. According to her the appellant was her husband.

**PW2 R W N** is the complainant's mother. She said that her daughter was born on 2/7/1997 but the birth certificate and other documents were burned in her house. She said that she disappeared for a whole month but later rescued by APs and her brother, one D M. She further said that her younger child M is

the one who helped in identifying the appellant as the culprit.

**PW3 D M N** is the uncle to the complainant. He testified that he received information on 12/9/2011 concerning the disappearance of the complainant from home. He said that in the process of conducting the search, one M told him that they had spotted the complainant somewhere and that she led them to where the appellant was. The appellant denied but after reporting the matter to the Aps camp at Kahuho the appellant did take them to where the complainant was and she was rescued and brought to the police post. She was thereafter examined at Kapsara and found to be pregnant.

**PW5 Lawrence Korir** produced the P3 form he filled in respect to the complainant. He found her to be pregnant but could determine the age of the said pregnancy and that the hymen was torn and old looking.

**PW6 Kennedy Ndege** a dentist produced an age assessment report she did on the complainant where he concluded that she was aged between 14-17 years. She estimated her age to be 15 years.

**PW7 P.C. Ali Mohamed Adan** who is attached to Kabolet police post testified that the complainant went to the police post at 3.30 pm on 18/9/11 together with her mother. The appellant was equally brought by one APC Manyala. He recorded statements from the witnesses and gave her the P3 form to be filled. He thereafter preferred charges against the appellant.

When put on his defence the appellant give sworn evidence denying the charge. He argued that it was the complainants mother who instigated the whole scheme as she owed him some money after selling milk to her on credit.

### **Analysis and Determination**

As earlier stated the appellant has mounted several grounds of appeal. He has equally prepared long and elaborate submissions.

The learned state counsel has equally filed written submissions which I have had the benefit of perusing all of them.

The first grounds of Appeal is that there were glaring inconsistent evidence by the prosecution which the court failed to observe and had it done so the court would have arrived at a different findings.

The appellant has equally argued that several key witnesses were not called and in particular those whom he had mentioned were deliberately deleted.

The offence of defilement is usually premised on the question of age, actual defilement and identity. The age of the minor seemed to have been settled by the evidence of Pw5 the dentist. He estimated the same to be about 15 years.

Although this could be the proper mode of determining ones age scientifically it must be noted that the same is not essentially definite as it is based on estimate. In this case the estimated age was between 14 and 17 years and the doctor estimated it to be 15 years.

What is interesting though is that the complainant was categorical that she was 18 years having been born in 1993 whereas the mother suggested that she was 12 years having been born on 2/7/1997. The difference of 5 years in my opinion is quite telling. The birth records according to her were burned when a fire gutted her house. Nonetheless for purpose of this proceedings the victim was a minor and I doubt whether she was actually 18 years. She was nonetheless a child as per the children Act Section 2.

The next ground by the appellant is the question of whether the complainant was defiled. It was the complainants own evidence that she eloped with the appellant and that they stayed with him for one month and infact she conceived. The conception as proved by the clinical officer essentially established that she engaged herself in sexual activity. The issue though is whether it was the appellant who was

responsible.

On this question it was the complainants on words against that of the appellant. The appellant stated that the incident occurred at a rented house at Kapsara where they stayed with the appellant for a period of one month. None of the prosecution witness was categorical on where the complainant was found. The complainant's mother PW3 said that she went with her brother PW3 to the Aps camp where they found the appellant already arrested. She then said that the appellant led the village elder and his brother to where the girl was and they came back after 2 hours.

On the other hand PW2 stated as follows in her evidence in chief

**“The Aps called for a motorcycle after the accused gave further information as to where he had confined her unlawfully. The AP went with the motorcycle rider who was also the village elder and returned after 1 hour without her. They returned to Kapsara with the accused and after 20 minutes returned with the girl”**

On cross-examination he said

**“ I cannot tell where he had hidden the girl but in Kapsara area”**

Clearly PW3 did not participate in the rescue mission. Neither did Pw2 . Infact none of the witnesses testified that they found the complainant inside the appellants rented house.

Even more disturbing is the fact that the appellants landlord or even the neighbour did not record any statement and worse still the complainant sister, the village elder and one Gacheru failed to testify. The complainant sister ought to have come and shed light on whether indeed the complainants had visited her after closing the school . Further the village elder ought to have testified on whether or not as they went to the rescue mission she was found at the appellant house.

The whereabouts of the complainant seemed to have been traced through a 10 year old girl called M whom she had seen her with the complainant. That **“somewhere”** was not disclosed. The accused did not deny that he had seen the appellant one week ago.

PW1 in her evidence stated that

**“The village elder and my brother escorted him on a motorbike. They returned after 2 hours with the girl. I did not interview her on her whereabouts and left it to her uncle to interview her.”**

This materially contradicts what PW2 stated that its the AP and the village elder who went to the rescue and not him. This point of

rescue is critical and material to this case as the appellant in his defence clearly denied the offence and stated that it is the complainant's mother who owed her some money and that this was purely a hatched scheme. Secondly and fundamentally if the complainant had been detained by the appellant then the *locus in quo* is very critical.

In view of the above contradictions I do not think that it would be safe to sustain the charge against the appellant. Although section 124 of the Evidence Act provides that this court in such sexual offences ought to convict if it is satisfied that the victim is telling the truth, I find that the essential key witness earlier stated and whom I believe were available were left behind. The victim on the other hand did not demonstrate in any way that she took any self help action to run away from the appellant if indeed she was forcefully confined in his place. Worse still the complainant sister ought to have been called to explain how the complainant disappeared and if she took any steps.

This court is alive to the case of *Martin Charo v. Republic Malindi High Court Criminal Application*

**No. 32 of 2015** but this court is of the opinion that at times each case ought to be treated on its own merit, and I do not find it applicable herein.

For the foregoing reasons I find that it was unsafe for the trial court to have convicted the appellant. He ought to have been granted the benefits of doubt. Under Article 50 of the Constitution the appellant need not even have explained himself as the burden always rests on the prosecution.

The appeal is allowed appellant is set free unless lawfully held.

Delivered this 25<sup>th</sup> day of January 2017.

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**H.K. CHEMITEI**

**JUDGE**

**In the presence of:**

**Kakoi for state**

**Appellant – present**

**Kirong – Court Assistant**