



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 30 OF 2016**

**(Being an appeal arising from the Judgment of *Kitale Resident Magistrate C.C. Kipkorir delivered on 21/3/2016 in Criminal case NO. 4899 of 2014*)**

**JOAKIM WANJALA CHESINGARA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged with the offence of **Defilement of a Child Contrary to Section 8(1) as read with Section 8(3) of the Sexual offences Act No. 3 of 2006**. The particulars of the offence were that on the **9<sup>th</sup> December 2014** at [particulars withheld] **village within Trans Nzoia County intentionally caused your penis to penetrate into the vagina of (S.C.N.) a girl aged 15 years.**

He was also charged with the alternative count of committing an **Indecent Act with a Child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**.

The particulars of the Offence were that on the **9<sup>th</sup> day of December 2014** at [particulars withheld] **village within Trans Nzoia County intentionally caused contact between your genital organ namely penis and the genital organ of (S.C.N) namely vagina of a girl aged 15 years.**

The appellant was convicted and sentenced to 15 years imprisonment hence this appeal. Both Mr Ngeiywa counsel for the appellant as well as Mr Kakoi the respondent counsel argued the appeal via written submissions which I have perused. It is suffice though at this juncture to summarise the facts or evidence as presented by the parties.

**PW1** stated that she was aged 15 years and at a funeral ceremony closer to her home. At around 10 pm she decided to go home and sleep. When she reached at her gate she was accosted by one Aloki and the appellant . She was then taken to Aloki's house where she was defiled overnight by the appellant. In the morning she was released and she went home and informed her brother. By then her skirt was stained with blood. She was taken by her aunt to Matisi police post and later taken to Kitale District Hospital where she was treated and a P3 form filled. She said that the assailant had a panga and she was threatened with it and thus she could not raise any alarm.

**PW2 D O O** is a cousin to the complainant. He testified that he had someone at the gate saying **“leave me and Wachana na mimi”** and she did not hear anything else. He knew it was the appellant. Its only the following morning that the complainant told her of what had transpired.

**PW3 Linus Ligare** produced the P3 form as well as other medical exhibits. The same showed that the complainant had been defiled as the hymen was broken and fresh looking. He also produced the age assessment form which showed that the complainant was aged 15 years.

**PW4 Daniel Luvonga** took over the investigation file from one P.C Yogo who had been transferred. He did not undertake anything else except to present the fact as they were.

When put on his defence the appellant simply denied defiling the complainant.

### **Analysis and Determination**

As earlier indicated the parties herein decided to file written submissions in arguing this appeal. I have also perused the 9 grounds which were presented on appeal. This being an appeal it is trite law that this court ought to evaluate the evidence afresh and come to an independent findings with a caution that it did not have the benefit of seeing or hearing the witness.

Before dealing with any of the grounds as presented one issue which I think I have to determine is whether the complainant who was a minor was in a position to give cogent and credible evidence. The record showed that she was aged 15 years. She said so and the same was corroborated by the dental age assessment report. The court records do not indicate whether she was sufficiently intelligent to speak the truth.

Under Section 19 of the Oaths and Statutory Declaration Act (Cap 15 Laws of Kenya,) it provides that

***“Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person understand the nature of an oath, his evidence may be received, though not on oath, if in the opinion of the court or such a person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath but otherwise taken and reduced in writing in accordance with Section 233 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that section.”***

This position was well captured in *Julius Kiunga M'rithia Vs Republic (2011) eKLR* where the court rendered itself as follows

***“ Under Section 19 of the oath and statutory Declaration Act (Cap 15 Laws of Kenya); where a child of tender years is called as a witness in a proceeding there are two things the trial court must be severally satisfied about***

***1) whether the child understands the nature of an oath, or***

***2) if the child in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.”***

It went further to state that;

***“----- the procedure for conducting voir dire examination was properly enunciated in *Fransio Matore Vs Regina (1961) E.A 260* and emphasised in subsequent decisions of the court of Appeal. The trial Magistrate should question the child to ascertain whether the child understands the nature of the oath and (2) if the court does not allow the child to be sworn, it should record whether or not, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth. Applying that procedure, the record of the trial shows that the magistrate clearly***

**recorded the voire dire examination of the child.”**

The proceedings herein does not indicate that the child was examined by the trial court. Although she was 15 years and therefore a minor there is nothing to indicate that she was possessed of sufficient intelligence to speak the truth as required.

In view of the above findings this appeal essentially ought to succeed. However I find that there are other grounds which were raised by the appellant. I would not venture into them. Yet at the same time the prosecution seemed to have presented strong evidence which convinced the court to convict the appellant.

The best option in my view is to order a retrial. I note that the case was determined on March 2016 which is hardly a year. I do not think that it would be difficult for the prosecution to obtain witnesses without difficulty. Yet at the same time it would be grave injustice for both the complainant and the appellant if the matter is not sufficiently concluded. The duty of the court is to ensure that justice is served both to the victim and the accused. The charge is grave and weighty and therefore it is necessary that all the loopholes are closed and the truth be found.

In conclusion the appeal is allowed. The conviction and sentence is set aside. The appellant shall be retried again before a different magistrate other than Honourable C.C. Kipkorir.

Orders accordingly.

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

**H.K. CHEMITEI**

**JUDGE**

**In the presence of:**

**Kakoi for state**

**Appellant – present**

**Ngeiywa for appellant present**

**Kirong – Court Assistant**