



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

**CRIMINAL APPEAL NO. 12 OF 2013**

**(Being an appeal arising from the judgment of Kitale Ag Principal Magistrate J.A. Owiti delivered on 5/2/2013 in Criminal Case No. 453 of 2012)**

**SIMON WAFULA MABIONGA .....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(2) of the Sexual Offences Act No. 3 of 2006.**

The particulars of the offence were that on the **19<sup>th</sup> day of February 2012 at [particulars withheld] village within Trans Nzoia County intentionally caused his penis to penetrate into the vagina of R N K a child aged 11 years.**

The appellant was convicted and sentenced to 20 years imprisonment and being dissatisfied he filed this appeal.

The facts of the case as presented are that the complainant herein PW4 a standard III pupil at [particulars withheld] primary school was left behind by her mother as she went to church. The appellant who worked for the complainant's mother was also left behind to milk the cow. She testified that after milking the cow, he forcefully grabbed the complainant and took her to his house where he proceeded to defile her. The complainant aunt after coming back did not find the child and she decided to look for her. She forcefully opened the appellant's house who by then had attempted to escape through the window. She then called the area chief who came and arrested him. Meanwhile the complainant was still sitting on the appellants bed. The complaint was then taken to Kitale District hospital for treatment.

**PW1 Dr Kiprop Jonathan** did dental age assessment upon the complainant and concluded that she was about 11 years old.

**PW2 Kirwa Labat** filled the P3 form on behalf of the complainant based on the other clinical documents done on her at Kolongolo Health Centre. He concluded that the hymen was torn and the vaginal wall bruised.

**PW3 V N** is the complainant's aunt. She testified that she had left her at home when she went to church. When she came back at around 2 pm the child was not there and she saw that the appellant house was

locked from inside. She called and there was no answer. She forcefully opened the door and saw the two in bed. The appellant attempted to escape but she rang the area Chief who came and arrested the appellant. She said that the appellant was his herdsboy.

**PW5 Christopher Amunje** is the Chief Kolongolo Location. He testified that he was rang by PW3 concerning the incident. He visited the scene and found the complainant inside the appellant's house and on his bed. He arrested him and handed him to Kolongolo police post. He escorted the complainant to Kolongolo Mission hospital.

**PW6 PC Kiragu M. Mbata** rearrested the appellant on 19/2/2012 when he was brought by the area chief together with the villager elder. He then recorded statements and escorted him to Kitale Police Station.

**PW7 PC William Andai** was the investigating officer. He recorded statements of the witnesses and preferred charges against the appellant.

When put on his defence the appellant gave sworn testimony but did not call any witness. He testified that PW2 owed him ksh 4000 having worked for her for many months. She then refused to pay him as planned as he was arranging to go home. He was later arrested by the area chief and escorted to Kolongolo police post. He denied the charge.

### **Analysis and Determination**

The appellant has filed several grounds of appeal. He has equally filed lengthy homegrown submissions which I have perused. The substance of his grounds of appeal is that there was no sufficient evidence to have warranted the court to convict him as the prosecution did not prove the case as required.

I have perused the entire proceedings and I am satisfied that the case against the appellant was proved beyond any shadow of doubt. First of all the evidence of the minor was very consistent and though young she was able to explain how the appellant after finishing milking the cow and as she was eating githeri grabbed her and pulled her inside the house. She vividly described how she was defiled and threatened by the appellant.

In the nick of time PW3 appeared and began looking for her. She pushed the door open and found the two in the bed. The appellant attempted to escape but PW3 called the chief. In fact the minor in her testimony confirmed this. The area chief equally came and found the minor on the appellants bed and in his house.

The evidence of Pw2 was clear. There was sufficient medical evidence to show defilement. This examination was done the same day immediately after the incident. The hymen was torn and the vaginal wall had bruises suggesting that there was sexual activity undertaken by the minor.

As for the age of the minor, the same was clearly proved by the production of the dental age assessment report by PW1.

The upshot of this is that all the three ingredients of defilement namely age, penetration and identity were clearly proved by the prosecution. The appellant defence did not oust the prosecutions evidence. He did not even explain why the minor was found in his house.

Consequently this appeal is unmeritorious. The same is dismissed.

**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**