



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 2 OF 2016**

**C K N.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(Appeal against conviction and sentence from the judgment of the Hon.V. O. Chianda (SRM)  
Mukuruweini dated 14/01/ 2016 in Criminal Case No. 353 of 2015)

**JUDGMENT**

1. The Appellant, **C K N**, was charged with the offence of defilement a girl contrary to **Section 8(1)(3)** of the **Sexual Offences Act**. The particulars of the charge are that on the 1<sup>st</sup> August, 2015 within Mukuruweini sub-county, the appellant intentionally and unlawfully defiled **PWK** a girl aged 12 years.

2. In the alternative, the appellant was charged with the offence of Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006**; that at the same place and on the same day herein above mentioned the appellant committed an indecent act by intentionally touching **PWK's** private parts with his member.

**FACTS**

3. PW1 told the court that on the 1/08/2015 at about 11.30pm the appellant sneaked out of their bedroom and sneaked into the child's bedroom; she followed him and found that he had lifted up the minors dress and pulled down her bikers; using the torch on her phone she was able to see the appellant; upon examining the minor she noted that Vaseline had been applied to the minor's private parts; the matter was reported and the minor taken to Mukuruweini Hospital for examination and a P3Form was issued;

4. The appellant was arrested and subsequently arraigned in court; was tried and convicted on the alternative count of Indecent Act and was sentenced to a term of fifteen (15) years imprisonment.

5. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and listed six (6) grounds of appeal and amended grounds of appeal which grounds are summarized as follows;

- (i) The Charge Sheet was defective in the particulars of the Charge;
- (ii) The conviction was based on contradictory evidence of the prosecution witnesses;
- (iii) The prosecution failed to prove its case to the desired threshold;

(iv) The trial court did not take into consideration his defence on the existence of a grudge;

(v) That the sentence imposed was not legal or justified.

7. At the hearing hereof the appellant appeared in person and Ms. Gicheha appeared for the State; the appellant chose to rely on his written submissions whereas the State made oral presentations; hereunder is a summary of the parties respective submissions;

### **APPELLANTS SUBMISSIONS**

(i) That he was convicted on a defective Charge Sheet which was defilement contrary to Section 8(1)(3) of the Sexual Offences Act which is a non-existing Section making the offence the accused is charged with non-existence; the proper wording of the Charge ought to have been Section 8(1) as read with Section 8(3); that Section 8(1) creates the offence whilst Section 8(3) provides for the punishment; that the defect is not curable;

(ii) The evidence of **PW1** was inadmissible as it was that of a spouse testifying against the other spouse in a sexual offence involving their daughter; that the conviction was based on the evidence of **PW1** and **PW2** which was doubtful and insufficient to support the conviction;

(iii) That the trial court erred in failing to comply with Section 77 of the Evidence Act when **PW6** testified and produced the medical notes but was not the maker; and the medical evidence of **PW6** contradicted that of **PW7** P3Form as an exhibit whereas she was not its maker;

(iv) The trial court rejected his defence before considering did not consider his defence

### **RESPONDENTS SUBMISSIONS**

9. The appeal was opposed; On the defective Charge Sheet counsel submitted that the appellant was convicted on the alternate count of Indecent Act contrary to Section 11(1) of the Sexual Offence Act; and that there was no defect and the conviction and sentence was proper;

10. That **PW1** and **PW2**'s testimonies were contradictory as contended by the appellant; that there was sufficient evidence that the appellant went to the bedroom of the minor and indecently removed her clothes and touched her private parts;

11. That there was the evidence of **PW4** the cousin to the minor that the appellant had actually been sleeping with the minor on another previous occasion;

12. The medical reports produced by **PW6** and **PW7** were not contradictory; that there was no need for compliance with Section 77 of the Evidence Act as the maker (**PW7**) of the document was called to testify; that non-compliance had no basis;

13. The evidence of the minor under the Evidence Act did not require corroboration;

14. The defence was considered by the trial court and found to be a mere denial; the appellant did not controvert the fact that he was found in the minors bedroom; the evidence of **PW1** who was the appellants wife was considered and found untenable in law;

15. The appellant was properly convicted and sentenced on the alternative count; Counsel prayed that the court upholds the findings of the lower court and that the appeal be dismissed.

### **ISSUES FOR DETERMINATION**

16. After taking into consideration the submissions of both the Appellant and Respondent this court finds the following issues for determination;

- (i) Whether the Charge Sheet was defective
- (ii) Whether the evidence tendered by the prosecution witnesses had material contradictions;
- (iii) Whether the prosecution proved its case to the desired threshold;
- (iv) Whether the trial court disregarded the appellants defence without giving sound reasons;
- (v) Whether the sentence is legal and tenable in law.

## **ANALYSIS**

17. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32.**

### **Whether the Charge Sheet is defective**

### **Whether the evidence tendered by the prosecution witnesses had material contradictions;**

18.

### **Whether the trial court disregarded the appellants defence without giving sound reasons;**

### **Whether the sentence is tenable in law;**

### **Whether the prosecution proved its case to the desired threshold;**

19. **On identification;** the incident is said to have occurred on three occasions and during the daytime; therefore the circumstances and conditions were favorable for proper identification; the minor vividly narrated how she knew the appellant as a herder who used to take care of goats and sheep near her home and told the court that the incidences occurred inside the kitchen of her home; that after the appellant defiled her she would be given sweets, biscuits or money in return; the evidence of **PW2** the mother of the minor, the father (**PW3**) and **PW4** the neighbor confirmed that the appellant herded goats and sheared sheep at their village known as Nitroche.

20. The trial court found the minor's evidence to be overwhelming and truthful; and was convinced that she was telling the truth and had no reason to doubt her evidence; the trial court made a finding that the complainant knew the appellant also admitted to knowing the minor;

21. From the evidence adduced this court finds no reason to interfere with the trial courts finding that the complainant was a truthful witness and identified the appellant as the person who defiled her; this court is satisfied that the appellant was positively identified by way of recognition;

On the issue of age; **PW1** stated that she was nine (9) years old; this evidence was properly corroborated by **PW2** who testified that the minor was born on the 10/04/2000 and produced a Notification of Birth (**PExb.2**) to prove the age of the minor; her evidence and this document was not challenged by the appellant in cross-examination; this court is satisfied that such documents are admissible as corroborating evidence; Refer to the case of **William Odhiambo Siara vs R [2014] eKLR Kisumu Criminal Appeal No.77 of 2012;**

22. The witness **PW5** the medical officer from Nyeri Provincial General Hospital produced the P3Form (**PExb.1**) in which he had indicated the minors' age as 9 years.

23. This court is satisfied that the prosecution proved the age of the minor to the desired threshold.

24. **On penetration PW1** stated that the appellant would tell her to remove her panty and that he would remove his trousers and inner wear; then he would insert his member into hers; that she would feel pain and cry but would be appeased with the sweets, biscuits and or money; the above description is sufficient proof that there was penetration;

25. That upon examining the minor the doctor (**PW5**) found that the hymen was not intact and that there was a thick white discharge; he concluded that there was defilement; he tendered into court the P3Form as an exhibit;

26. Penetration is defined in the Act as;

**“ the partial or complete insertion of the genital organs of a person into the genital organs of another”**

27. This court is satisfied that the evidence of **PW5** corroborated the evidence of the minor on penetration;

28. This court is satisfied that the prosecution proved all the key elements of the offence;

29. This ground of appeal that the prosecution failed to prove its case to the desired threshold is found lacking in merit and is hereby disallowed.

### **FINDINGS**

30. In the light of the forgoing this court makes the following findings;

The inconsistencies and contradictions in the evidence of the prosecution witnesses relating to medicine and the missing teeth are found to be immaterial and do not to create any doubts in the prosecutions' case;

The prosecutions failure to call Emmanuel and Ngetha as witnesses was not prejudicial to the prosecutions' case;

This court finds that the prosecution proved its case to the required and desired threshold;

### **DETERMINATION**

31. The appeal on conviction is found to be lacking in merit and it is hereby disallowed; the conviction is affirmed.

32. The appeal on sentence is hereby allowed; the sentence imposed of 15 years is hereby set aside and substituted with a term of ten (10) years with effect from 14/01/2016.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 9<sup>th</sup> day of March, 2017.**

**HON.A.MSHILA**

**JUDGE**