



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**CRIMINAL APPEAL CASE NO.84 OF 2013**  
**(ARISING FROM KIMILILI CR.309 OF 2010)**

**LINATUS MATULI LUTTA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant Linatus Lutta Matuli was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No.3 of 2006. Particulars of the offence are that on the 16<sup>th</sup> of January 2010 at [particulars withheld] Primary school in Kimilili Bungoma unlawfully and intentionally defiled a child M N B aged 16 years.

2. As the Appellant had pleaded not guilty the matter proceeded to trial. He was found guilty of the offence convicted and sentenced to 15 years imprisonment.

3. He was dissatisfied with the judgement and preferred this appeal grounds that; the trial Court erred in finding to consider that the Prosecution did not produce any scientific evidence such as DNA to prove its case; no eye witnesses testified, the evidence that the Complainant was pregnant was fabricated, speculative and lacked probative value; the Court was not told how the pregnancy disappeared; the age of the Complainant was not proved; the Prosecution case was marred with contradictions; the Court rejected the appellant's alibi and he therefore sought to have the conviction quashed and sentence set aside.

4. At the hearing the Appellant relied on his written submissions which in summary stated that the Complainant's evidence was inconsistent, she was made to fabricate a story against the Appellant; and the Complainant had conceived and aborted before the alleged offence had been committed.

He further submitted that his witness was not given an opportunity to testify, there was no forensic examination and the age assessment was not professionally done.

The Appellant further orally submitted that there were people jealous of him because he was a teacher and well off and they were out to finish him. He wondered why it took the Complainant long to report the incident. Further the evidence of pregnancy does not tally with that of defilement, the Prosecution failed to case crucial witnesses especially from the school and he cast aspersion to the evidence of PW1 and 2.

5. The State opposed the appeal on the grounds that the Medical Officer PW1 testified that the pregnancy was as a result of defilement, age assessment of PW2 was carried out, there were no eye witnesses to the

incident, the evidence of the 5 witnesses was sufficient to prove the case and there were no contradictions in the Prosecution case as alleged.

6. As the first Appellate Court I have re considered the evidence, analysed and evaluated the same afresh as to arrive at an independent opinion. I have also considered submissions by both sides.

7. The Prosecution case in brief is that the Appellant was a teacher at [particulars withheld] Primary school at the time, and the Complainant (PW1) M N B then aged 16 a pupil in Std 7.

On the 9<sup>th</sup> of January 2010 as the Complainant passed by the school on the way to fetch water, the Appellant who was at the school Office called her and asked me to go and assist him. She went through the fence to the school, entered the office the Appellant closed the door and defiled her. She bled after the incident, threw the panty away and did not tell anyone until a family teacher in the school three months later suspected and asked her whether she was pregnant. The said teacher, C took her for a pregnancy test and she was confirmed pregnant. She then told her parents who reported the matter to the police.

Later on 21<sup>st</sup> March, 2010 the Complainant miscarried and there was an allegation that a lady had injected her to include the same.

8. PW2 the Complainant was the key witness of the Prosecution and she testified that on the 9<sup>th</sup> of January, 2010 the Appellant a teacher saw her pass by the school and called her into the office, undressed her and lay on her and had sex with her. He threatened her when she attempted to scream. She bled. She threw the pant that was soaked in blood and bathed she did not tell anyone.

On 12<sup>th</sup> of March 2010 the family teacher C asked her if she was pregnant. Took her for examination which revealed she was. On 14<sup>th</sup> of March 2010 she informed her parents of the incident.

From her evidence it appears that when teacher C took her to hospital she was injected as on 13<sup>th</sup> and 14<sup>th</sup> she had stomach pain which prompted her to tell her parents who took her to Kimilili hospital where she was examined and found pregnant. She went back to Kimilili on 18<sup>th</sup> of March and 21<sup>st</sup> of March 2010. It appears from the evidence of the investigating Officer that she miscarried on 30<sup>th</sup> March 2013.

9. PW1 Kimendo Zakayo was the Clinical Officer at Kimilili hospital. He examined PW2 on 17<sup>th</sup> of March, 2010, and he found that there was no hymen, she had a whitish discharge and the pregnancy tested positive. The pregnancy was about 16 weeks. He assessed her age at 16 years.

10. PW3 B W is the grandfather to PW1. He noticed she had a problem and asked his wife to interrogate PW1. He learnt that she had been impregnated by the Appellant and he complained to the administration leading to the arrest of the appellant.

11. PW4 Corp. Magdaline Ajiambo who was the investigating Officer recalled meeting the appellant and the Complainant in her office on 17<sup>th</sup> March 2010 and referring them for medical check- up where the Complainant was confirmed pregnant.

12. In his defence the appellant denied the offence and termed it a fabrication as he had a disagreement with his boss. His alibi was that on the material day he did not go to school but worked in his shamba since it was a Saturday.

13. This being a defilement case it is not expected that there would be eye witnesses as rarely do such happen in open. The Prosecution mainly relied on the evidence of PW1 and PW2, the Complainant and the doctor.

14. The issues for consideration are;

*i. Whether the Complainant was a minor*

*ii. If defilement occurred*

*iii. Whether there was evidence connecting the Appellant to the crime.*

15. PW2 testified to the effect that she was 16 at the time of the alleged offence. PW1 the Clinical Officer corroborated this when he did an age assessment. Amongst other examination carried out, he considered dental formula and gave probable age of the Complainant to have been 16 years.

16. In this appeal the appellant appears to be suggesting that the Complainant was not a minor, however the appellant did not raise the issue at the hearing. He cannot be heard to raise the issue on appeal as the same is now an afterthought. I therefore make a finding based on evidence on record that at the time of the alleged offence the Complainant was indeed a minor.

17. The next issue is whether the Complainant was defiled. In her evidence the Complainant testified that the appellant defiled her, she bled, threw away the panty and did not tell anyone until the family teacher interrogated her, took her for examination and she was found to be pregnant.

PW1 and the medical notes prove that on examination the Complainant was pregnant. The issue of defilement is such a serious offence. In this case the Complainant, her grandfather, the Clinical Officer / hospital and the police were involved. I do not see how a grudge between the Appellant and his boss would take such a turn with such a serious offence being Fabricated by all those involved.

18. I do find concurrence with the trial Court in believing the evidence of the Complainant. She appeared truthful in her testimony and consistent. Her testimony is corroborated further by the testimony of PW1.

19. Consequently I find that the Prosecution proved its case beyond all reasonable doubt.

20. I find the conviction safe and the sentence within the Law.

Appeal is therefore dismissed.

DATED and DELIVERED at BUNGOMA this 16<sup>TH</sup> day of MARCH, 2017

**ALI-ARONI**

**JUDGE**