



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL CASE NO. 94 OF 2014**

**KEVIN WANJALA WALUBENGO .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

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 Offence Act No. 3 of 2006.**

The particulars of the offence were that on the **night of 12<sup>th</sup> October 2013 at [particulars withheld] within Trans Nzoia County** intentionally caused his penis to penetrate the vagina of **B C M** a child aged 15 years.

The alternative count was **Committing an Indecent Act with a child contrary too section 11(1) of the sexual offences Act No. 3 of 2006.** The particulars were that on the night of **12<sup>th</sup> October 2013 at [particulars withheld] within Trans Nzoia County** intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of **B C M** a child aged 15 years.

The appellant denied the charge and the prosecution called 6 witnesses whose evidence can be summarised as hereunder.

PW1 the complainant gave sworn evidence. She stated that she was 13 years having been born on 2/6/2000. On 11/10/13 she was at home at around 7 pm talking to one M K who had come from Mombasa.

Her mother found them and she ran away. She spent the night at one Mama C. The following day she went to Eldoret on foot and arrived there at 7 pm. She met a woman who convinced her to come back to Kitale. They found the appellant who was a boda boda rider. The said woman left her with him and they went to his place at 8 pm where he proceeded to defile her. The following day the appellant left for Bungoma. The complainant was left with a neighbour.

One F the neighbour advised her to go to his house where later F's mother took her to the chief who later came and arrested the appellant. She was later taken to hospital where she was treated and P3 form filled.

**PW2 M K** is the minor's mother. She said that she was called to school because PW1 was sick. She

took her to the hospital on 11/10/2013. She then went outside and took off. She tried looking for her in vain till 22/10/2013 when she was later taken to Kitale police station where she found the minor. The chief told her of how she had been rescued.

She took her to the hospital and she told her how she had been defiled by the appellant.

**PW3 Linus Ligare** a Senior clinical officer from Kitale hospital produced the P3 form. He testified that on examination it was found that the hymen was torn and old looking. She indicated her age to be 17 years.

On cross-examination he said that there was discharge on private parts. He said that after 48 hours of defilement one could not find discharged.

**PW4 Sergeant Josephine Wabwire** is attached to Kitale police station Gender and Children department who was a co-investigating officer with one P.C. William Andai. He said that both the appellant and the complainant were brought to her by the chief Joseph Togom. They carried out their investigations and were satisfied that indeed the appellant defiled the minor. She said that the appellant was arrested with the minor.

**PW5 Pharis Sitali** produced the dental report on behalf of Dr Kiprof which showed the age of the minor to be between 14-15 years.

PW6 Joseph Togom the area chief was called by one John Omari concerning a case of defilement at a place called Kibomet. He went to the home of the appellant where he found both. On questioning the girl confirmed that she had been raped by the appellant. They then took the girl to the hospital and later to Kitale Police station.

When put on his defence the appellant gave unsworn evidence. He said that he was in his place of work on 22/10/2013 when at around 2 pm he was told that he had visitors. He found 4 people who arrested him and took him to the chief. They did not tell him what offence he had committed. The chief asked for a bribe of kshs 3,000 so as to release him. He refused and he was charged with an offence of defilement which he denied.

### **Analysis and Determination**

The court has perused the entire proceedings including the lengthy homegrown written submissions by the appellant. The court has equally heard the oral submissions by both the appellant and the learned state counsel. This being an appeal, this court is enjoined to reevaluate afresh the entire proceedings with a view of arriving at afresh and independent findings.

The summary of the appellants petition is that the entire evidence by the prosecution was full of contradictions and generally based on falsehood and hearsays and that the same was not proved beyond any reasonable doubt as expected in the criminal offence. The appellant in his submissions cited several instances where the complainant and her witnesses contradicted themselves and I have had time to compare their evidence too.

The age of Pw1 obviously was not conclusive. She said that she was 13 years old whereas the information given to the police was 17 years. The medial records however showed that she was between 14-15 years. In the absence of any documentary evidence which in my opinion was not explained, the evidence of the complainant could as well be 15 years.

What were the circumstances leading to the complainant running away from home.?

In attempting to answer this question I shall be making cross reference to what other witnesses said. She told the court that she was found by her mother talking to one M K at around 7 pm on 11/10/2013. This was the first time her mother had found her talking to a boy. She got scared and ran away. She went

spending the night at a home of one Mama C a neighbour. The following morning she trekked all the way to Eldoret.

PW2 her mother on the other hand testified that

***“I was called from school that B was sick. I took her to hospital. On 11/10/2013 and told me she felt like vomiting . She went outside and I wondered why she was Taking long.***

***I went to check and when I called her she ran away . I tried looking for her with a neighbour until 11 pm then I went to sleep. I continued looking for her on Monday 13<sup>th</sup> October 2013 I went and reported to the school and police. B fear me because I beat her if she wrongs.”***

So between the minor and the mother who was telling the truth? Why did she ran away. Could she run away just because she felt like vomiting, went outside, overstayed and when her mother came she ran away? Was that a mistake to warrant punishment.

Even if that was the case why didn't she tell Mama C who was a neighbour about the incident. Why didn't Mama C inform PW2 that her daughter was with her?

When the minor came back from Eldoret she went to the appellants house courtesy of a certain lady. As a result she was defiled. The appellant according to her went to Bungoma. She then went to a neighbour one F where she was told that she was infact a 3<sup>rd</sup> girl who had been brought by the appellant. Its F's mother who took her to the chief.

What I find interesting here is that neither the said Freddy nor his mother were called to testify. What were they doing with the complainant for a period of about 10 days? If they knew the character of the complainant why didn't they raise alarm immediately and rescue the minor.

Significantly also none of them testified concerning the incident yet the court was not told of their inavailability.

The other issue of contradiction is that relating to how the appellant was arrested PW6 the area chief said that he arrested the appellant in his house with the minor. The minor on the other hand states that its Freddy's mother who took her to the chief and who in turn called the minors mother.

On the other hand during cross-examination she said that an old man took her to the chief. Which was which?

On the issue of the P3 form the examination was obviously done several days after the alleged incident. Infact the same showed that the torn hymen was old looking.

What brings contradictions however is the issue of some discharged from the private parts which was noticable. Yet at the same time PW3 stated that some discharged could not be available 48 hours after sexual intercourse. If the defilement was on 12/10/2013 and the examination was on 19/10/2013 and review was on 23/10/13 its easy for one to conclude that the minor may have had sexual intercourse either on 22<sup>nd</sup> October 2013 or 23<sup>rd</sup> October 2013. This materially contradicts what she stated namely that she had sexual intercourse with the appellant on 12/10/2013 only once. This further contradicts what the learned state counsel submitted that the appellant had sexual intercourse with the minor more than once.

Section 124 of the Evidence Act Chapter 80 Laws of Kenya states as follows

***“ Notwithstanding this provisions of Section 19 of the oaths and statutory Declaration Act when the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support***

*thereof implicating him.*

***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*** (underlining mine)

This portion of the Law could have served the minor very well-especially the provisos thereof. However I do not think the complainant and her witnesses were truthful. Both the minor and her mother were economical with the truth. The most probable reason she ran away was because she was found by her mother in the company of one M K. To hide her shame she ran away. There is nothing to suggest remotely that she walked from Kitale to Eldoret. The court has pointed out that even the P3 form on its own was contradictory. Although the defilement may have happened but surely it happened 10 days before the examination.

During examination a discharge was discovered which showed sexual intercourse. If on her own evidence she said that she was defiled once on 12/10/2013 by the appellant, who defiled her less than 48 hours before she went to hospital?

Respectively I do not think the minor was truthful. Infact key witnesses who were with the minor for those 10 days or thereabouts including one R, Mama C, F or M K Ought to have been lined up to testify. Although its trite Law that a conviction can be sustained not necessarily by a cloud of witnesses, the charge facing the appellant was serious enough. A conviction of 20 years is such a weighty that the matter ought to be proved beyond any shadow of doubt.

In the premises I do not think that it would be safe to sustain the charge and the conviction herein. The appeal is therefore allowed. The appellant set free unless lawfully held.

Order accordingly.

Dated this 8<sup>th</sup> day of September, 2016.

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**H.K. CHEMITEI**

**JUDGE**

Abele for the state

Accused in person.

Kirong - Court Assistant