



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL CASE NO. 79 OF 2013

TIMOTHY KIMUTAI CHEBIRWA.....APPELLANT

VERSUS.

REPUBLIC .....RESPONDENT

**JUDGEMENT**

The appellant herein was charged with 2 counts namely **Defilement 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 **19<sup>th</sup> day of August 2012 at [Particulars withheld] within Trans Nzoia County** intentionally caused his penis to penetrate into the vagina of **P N H** a child aged 14 years.

The alternative count was committing an **Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006**. The Particulars were that on the **19<sup>th</sup> day of August 2012 at [Particulars withheld] within Trans Nzoia County** intentionally touched the vagina of **P N H** a child aged 14 years with his Penis .

The second count was **Deliberate Transmission of Syphilis contrary to Section 26(1) (a) of the Sexual Offence Act No. 3 of 2006**.

The particulars of the offence were that on the **19<sup>th</sup> day of August 2012 at [Particulars withheld] within Trans Nzoia County** having actual knowledge that he was infected with Syphilis a life threatening sexual transmitted disease intentionally and willfully did unprotected sexual intercourse with **P N H** which infected the said **P N H** with the said life threatening disease.

The prosecution called 6 witnesses to establish its case which evidence can be summarised as follows;

**PW1 P N H** told the court that on the material day, 19/8/2012 at 9 pm she was going to her uncle's place when she was grabbed by the appellant and forcefully dragged to a nearby backside of a hotel where the appellant used to work. He then blocked her mouth so that she could not scream.

He then proceeded to defile her till morning (6 am) when she screamed and her grandmother came for help. She then left the scene and informed her grandmother who in turn informed the village elder. The appellant was arrested and taken to Kimondo police and then Endebess police station. Meanwhile the complainant was taken to Kitale District Hospital for treatment and examination.

She said that the appellant infected her with a sexual by transmitted disease (Kisonono). She was

categorical that she knew the appellant as she used to see him everyday.

**PW2 Z N** is the complainant's grandmother. She testified that on the material day the complainant had gone to spend the night at her uncle's place. She came at 6 am but declined to tell her where she was.

Pw2 then decided to go to the appellant's place and inquired. The complainant said that she was grabbed and defiled by the appellant. PW2 decided to report the matter to the village elder who organised the Kenya Police Reservist (KPR) to arrest the appellant and later taken to Endebess police station.

**PW3 E N** told the court that PW1 did not spend at her uncle's place. She was told by the complainant that she spend the night with the appellant. She further said that the complainant was found to have been infected with a virus. On cross examination she Said that the appellant had seduced the complainant with a mandazi.

**PW4 Corporal Amos Limo** told the court that he re-arrested the appellant when she was brought by Kenya Police Reservist **Ambrose Ayoy**. He was accused of defilement. He charged the appellant with the offence.

**PW5 Linus Kikare** produced the P3 form which showed that the complainant's hymen had been torn and that there was no syphilis or HIV infection.

**PW6 Dr Kiprop Jonah** a dentist produced the age assessment form prepared by **Dr Ken Ndege** which indicated the approximate age of the complainant to be 14 years.

PW5 also produced a P3 form belonging to the appellant which showed that there was genital ulcers disease which had healed, an STI.

When put on his defence the appellant gave sworn evidence denying the charge. He said that he was arrested on 20/8/12 while transporting sticks by Kenya Police Reservist and taken to court on 24/8/12 after complaining of his incarceration. He denied the charge.

### **Analysis and Determination**

This being an appeal the court is enjoined to evaluate the evidence afresh and reach afresh and new independent finding.

Both counsels for the appellant submitted orally extensively. The learned state counsel however conceded that the second count was not proved and therefore the appeal on that ground be allowed.

He said that the charge of infecting the complainant with syphilis was not proved. However he stood his ground on the 1st count.

The learned counsel for the appellant attacked the prosecution evidence on the first count. He argued that there was contradiction on the evidence so far presented by the prosecution witnesses.

I have carefully perused the entire prosecution evidence as well as the judgement of the trial court. I have also perused the exhibits as produced by the prosecution as well as the submissions as stated above.

The evidence by the doctor suggest that at the time of the incident the complainant was aged 14 years although she testified that she was 15 years.

There was also evidence that there was penetration as the hymen was torn. The argument however was whether it was the appellant who committed the offence.

There is nothing to suggest that the appellant was not known to the complainant as well as PW2 and PW3. What I found disturbing however is the line of evidence as adduced by PW1, PW2 and PW3.

PW1 stated that there was a moonlight and she could see the appellant very well. She went on to state that she could not scream as .. **“ he grabbed me by the neck and held my hand so that I don't scream”**

She went on to state;

**“He f\*\*\*\*d me, he slept on me until 6 am. I screamed and grandmother came to help me. There were no people in the house. Neighbours had slept and woke up.”**

On cross-examination by the appellant she said;

**“At 9 pm when you grabbed me I was going to my uncles. I screamed. People came. I have never been sexually active. The neighbours heard screams and came”**

At re-examination she stated;

**“ I screamed in the morning when he let go of me.”**

There was no consistency on whether or not the complainant screamed or not. There was nothing to show that the complainant between 9 pm to 6 am was held in a situation that she could not scream. In any case there is nothing to show that she actually screamed.

PW2 did not help matters either. Whereas PW1 stated that when she screamed PW2 heard and went to rescue her, PW2 stated that;

**“ I waited. Didn't see PW1. Early 6 am saw PW1 opening door. Asked her where she came from, she declined at first. She at first came and said was at fathers. I went to the accused place. Pw1 revealed the accused grabbed her, the one who works at hotel.”**

She PW2 did not at any one time suggest that she went to the rescue of the complainant . Infact there are no neighbours for that matter who were called to testify about the incident.

The other issue which I find disturbing is whether or not it was actually the appellant who defiled the complainant. Apart from stating that there was moonlight and that the appellant worked in a hotel, there was nothing beyond that description. Infact the complainant suggested that the appellant **“wore his usual jacket.”** What type and colour was the jacket. Further there was insufficient in my opinion of the description of the place where she was defiled. Although it was behind the hotel and a mabati house with no bed I find that the description inadequate.

The investigating officer did not choose to visit the scene which in my opinion was very critical in such serious incidences.

The allegation by PW3 that the complainant was seduced by the appellant with a mandazi was plucked from the air as PW1 did not testify to such.

Although the second count was conceded to be hopeless by the learned state counsel I find the way the parties presented during trial to have swayed the court. PW1, PW2 and Pw3 believed that the complainant had been infected. Nothing was found during the examination by the clinical officers. In my opinion this was simply a ploy to add weight to their evidence.

I think I have said much to show that the evidence as presented by the prosecution was not sound enough to suggest that the appellant defiled the minor. Even more interesting was that despite giving sworn evidence there was no cross-examination by the prosecution for the appellant to test veracity or otherwise of his testimony. I find that it would be unsafe to sustain the charge and conviction against the appellant herein. When the evidence was scanty and insufficient.

For the foregoing reasons the appeal is hereby allowed. The conviction and sentence set aside and the

appellant set free unless lawfully held.

Dated this 8<sup>th</sup> September 2016.

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**H.K. CHEMITEI**

**JUDGE**

Abele for state

Buko for Kaosa for accused

Kirong - Court Assistant