



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL NO. 46 OF 2015

[Being sentence by Hon. K. Mukabi (RM) arising from Sirisia Criminal Case No. 284 of 2014]

ALEX KIPROTICH CHEPKWONY.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

JUDGEMENT

1. The appellant **ALEX KIPROTICH CHEPKWONY** alias **KIPCHUMBA** was charged in PMCC No. 284 of 2014 with the offence of defilement contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act, he also faced an alternative count of indecent assault contrary to Section 11 (1) of the said Act.
2. The trial court acquitted him of the main count but convicted him on the alternative count and convicted him to 10 years' imprisonment.
3. Being dissatisfied with the decision of the trial court he appealed to this court on the grounds that; the proceedings in the trial court violated his rights; the trial court failed to put into consideration the defence and mitigation; the court failed to take into account contradictions in the evidence of **PW1 & 2**; and the trial court misinterpreted the law.
4. At the hearing of the appeal the appellant gave oral submissions as follows;

Appellant stated that **PW1 & 2** are daughter and father, **PW5** the investigating officer alleged that he had escaped while being taken to Kimilili court but does not explain how this happened further, the trial court did not furnish him with statements and lastly **PW4** the doctor informed the court that **PW1** was not defiled.
- The State opposed the appeal on grounds that the issue of statements was not raised at the trial court and the appellant had indicated to the trial court that he was ready to proceed and indeed participated in the trial; further there were no contradictions in the evidence of **PW1 – 3** as alleged.
5. This being the first appellate court it must consider the evidence afresh, consider and evaluate the same in order to arrive at an independent opinion. **See Okeno Vs. R [1973] E.A at 322.**
6. The prosecution case in brief is that **PW1 V C** was defiled by the appellant on the 25th of June, 2012. That while in the company of her sister coming from their grandmothers, the appellant tricked **PW1** took her to a house, defiled her, and gave her kshs. 10/= . On returning home **PW1** informed her mother of the incident and the mother reported the matter to Kipsigon police station, the victim escorted to Kimilili

hospital and a P3 form issued. The P3 form indicated that the genitalia had no bruises, no blood or discharge. However, there was detection of pus cells and epithelial cells. The medical officer formed the opinion that this could be a possible case of defilement.

7. The issue before court is whether in convicting the appellant on the alternative count the court erred as it failed to see the contradictory evidence, misinterpreted the law and violated the rights of the accused.

8. There was ample evidence before the court that the victim was aged 10 years at the time of the commission of the alleged offence.

9. The victim was categorical and gave detailed evidence of how the appellant lured her and defiled her. However, the trial court did not entirely rely on her evidence as the P3 form was not detailed and clear as to whether defilement occurred or not. Indeed, the medical officer stated that there was possible defilement which cast doubt as to whether or not this happened.

10. The trial court chose to find the appellant guilty of a lesser count on the face of the P3 form that was not conclusive despite the evidence of **PW1** and **PW2** who had examined her daughter and found the girl was bleeding and had a torn pant.

11. There was no cross- appeal and I will not dwell on the fact that in my view the evidence of **PW1**, **PW2** and **PW4** coupled with the proviso to Section 124 of the Evidence Act was adequate to have convicted the appellant on the count of defilement.

12. Having stated the above it is clear that against glaring evidence the appellant was convicted of a lesser charge. He should thank his God for the luck of setting a conviction on a lesser charge. The prosecution had proved its case beyond doubt in the circumstances I will not disturb the conviction and sentence.

Appeal dismissed.

DATED and DELIVERED at BUNGOMA this 10th day of November 2016

ALI-ARONI

JUDGE.