



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**CRIMINAL APPEAL NO. 30 OF 2015**  
**[Being judgment by Hon. C.L. Yalwala arising from**  
**Bungoma criminal case no. 1136 of 2011]**  
**ERICK BARASA MAKOKHA.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....PROSECUTOR**

**JUDGEMENT**

1. The appellant herein is serving a life imprisonment having been found guilty and sentenced for the offence of defilement contrary to section 8 (2) of the Sexual Offences Act no. 3 of 2006.
2. Being dissatisfied with the conviction and sentence he appealed to this court on grounds that; the trial court violated his rights; the trial evidence was contradictory; the court did not consider the weight of the evidence before it; there was mis-interpretation of the law; and the sentence was harsh and excessive.
3. At the hearing several grounds were dropped by a counsel Mr. Otsiula appearing for the appellant. He submitted that the evidence by prosecution witnesses had glaring contradictions; age of the complainant was not clear; panty that was alleged to have been blood stained was not produced as part of evidence; the appellant was not examined; and the accused was made to proceed without his counsel contrary to Article 50 of the Constitution.
4. The State opposed the appeal through State counsel Oimbo who argued that there was an admission that the witnesses were the appellant's students; that the only contradiction was whether at the time of commission of the offence the appellant was standing or sitted and this was not fatal; that both witnesses placed the appellant at the room and place defilement happened. That **PW1** stated that her panty was blood stained; and on examination the hymen was found missing, she had bruises and this was consistent with evidence of **PW1**. She stated that the missing pant would not have added value. Further whether there was forceful penetration or not is not the issue but the fact that the complainant was a minor with no capacity to give consent. Lastly it was argued that the appellant was not denied representation as the date for hearing was taken by consent and his counsel failed to appear.
5. This is the first appellate court and it must consider the evidence on record afresh, analyze and evaluate the same in order to arrive at an independent decision **See Okeno Vs. Republic [1973] E.A.**
6. The prosecution's case in summary is that the appellant was a teacher in school where the

complainant was a pupil in class 3. The complainant was 8 years old when the offence occurred. That on the material day the 15<sup>th</sup> June, 2011 at around 7 a.m. while in class with the complainant and 3 other people the appellant took the complainant behind the class and defiled her while the other pupils were in class. PW1 the complainant stated that the appellant took her behind the class, told other pupils not to look behind, removed her biker forcefully and inserted his penis in her

vagina. That when this happened she was sitted while the appellant was standing; that she saw blood coming from her private part; she reported to her class teacher who chased her. She later told her mother who took her to the school director and together with the mother took her to hospital.

**PW2 L M** also a minor gave an account of what happened between the complainant and the appellant on the material day. She said that while defiling PW1 the teacher was sitted on the desk while the complainant sat on him and that despite the warning not to look behind she looked and saw what was happening and she later reported the incident to her mother.

**PW3 R A B** father to the complainant. He learnt of the incident from his wife. Together with his wife, the Director and her deputy they took the girl to hospital. Later he reported the matter to police.

**PW4 J A** mother to the complainant. She recalled her daughter informing her that the complainant had defiled her. They took the complainant to the director's home and later the child was taken to hospital. She denied having a grudge with the complainant.

**PW5- Elias Adeka** a clinical officer at Bungoma District Hospital. He produced a P3 form filled by as Dr. Kisaka whom he knew and whose handwriting he was familiar with. Dr. Kisaka had left the civil service. He gave details as follows;

Injuries were 1 day old. Degree of injury was classified as grievous harm, there were bruises on clitoral area and the hymen was broken. Urine analysis showed red blood cells.

High vagina swap showed some spermatozoa. The doctor formed the opinion that there was forceful vagina penetration in line with defilement.

Age of the child was given at 7 years.

**PW6 – PC Martin Kiprono**, the investigating officer. He was directed to arrest the appellant. He took the statement of the complainant and escorted her to Bungoma District Hospital. In his investigations he gathered that the appellant had defiled the complainant.

7. The court found the appellant had a case to answer. He was placed on his defence and he stated that the testimony by prosecution witnesses were a lie. That on the material day he was at work between 8.00 a.m. and 11.30 a.m. when he left for burial arrangement. He was also unwell and he did not go back to school until the following day. When A.P police officers went for him he denied that the complainant and the witnesses were in school by 7.00 a.m. as it had been alleged, the class had no lockable windows and he therefore could not have committed the offence as the school is next to the road, further he was not either taken for examination. In summary he denied the offence. He also denied having taught the complainant who was a class 3 pupil. He alleged to have taught classes 4 – 7.

8. Having considered the evidence there are 3 issues for consideration as follows;

- i. Was the complainant a minor at the time of the incident?
- ii. Was she defiled?
- iii. If so who was culpable?

9. From the evidence on record the appellant was a minor aged 8 years at the time of the incident. There is

no dispute though the P3 form and the charge sheet gave her age as 7 years. This is a technicality which should not be used to defeat the cause of justice. Either 7 or 8 years she remains a minor.

10. Was she defiled. From the testimony of PW1 she was defiled. The mother PW4 confirmed that **PW1** told her so and she saw blood coming from the complainants private parts. **PW5** produced a P3 form which confirmed forceful penetration, hymen missing, trace of red blood cells and precourse spermatozoa. The report clearly corroborated the testimony of PW1. I therefore find as a matter of fact that the complainant was defiled.

11. Who was responsible for the defilement. PW1 named the appellant to the mother, the director of the school, the police, the doctor and the court. She was consistent as to who defiled her. PW2 confirmed the defiler thought her testimony on the position of the teacher while defiling. PW1 differs with that of PW2. I find that PW1 was truthful and consistent in her testimony. I believe her story as against the claim by the appellant that the whole incident was made up by PW4. Defilement was medically confirmed and could not have been a fabrication.

The appellant's testimony as against the weighty evidence of the prosecution cannot stand.

12. I therefore am in concurrence with the findings of the trial court. Any inconsistencies were too minor to interfere with the over whelming evidence against the appellant.

13. The appellant may not have been examined, there was an eye witness to the incident, secondly the complainant's testimony suffices in this instance. See provision to Section 124 of the Evidence Act.

***“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall 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.”***

14. The record is clear that the appellant opted on his own accord and proceed in the absence of his counsel and the trial court cannot be faulted.

15. In the premises and for the reasons above I find the conviction proper and the sentence safe.

Appeal dismissed.

**DATED and DELIVERED at BUNGOMA this 10th November, 2016**

**ALI-ARONI**

**JUDGE.**