



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO. 223 OF 2012**

***[ARISING FROM THE JUDGMENT BY M.A NANZUSHI [SENIOR RESIDENT MAGISTRATE]  
IN KIMILILI SRM CR CASE NO. 450 OF 2012]***

**LEONARD SOITA JUMA ...APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**1. BACKGROUND**

The appellant LEONARD SOITA JUMA preferred this appeal arising from a conviction and sentence in SRMCR case no. 450 of 2012 Kimilili. The appellant had been charged with the offence of defilement of a child Contrary to Section 8 (1) as read with Sub – Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The court convicted him of the offence and jailed him for 25 years.

**2. GROUND OF APPEAL**

The appellant appealed to this court on the following grounds;

- 1. The charge was not explained to him in a language he was conversant with contrary to section 77 (2) of The Constitution.**
- 2. He was unrepresented and unable to defend himself accordingly.**
- 3. Seeking for a retrial.**

At the hearing of the appeal the appellant filed his submissions and supplementary grounds of appeal. The supplementary grounds stated that;

- 1. The charge sheet was defective.**
- 2. The court erred by failing to consider the sequence of events.**
- 3. The P3 form had no rubberstamp, dates and particulars were different.**
- 4. Evidence of prosecution witnesses was contradictory on dates on the O.B and when the minor taken to hospital.**

5. **The trial court was biased on relying on the evidence of the minor's mother in that she noticed the minor was in pain as she could not bend without realizing that the mother noticed this after two months.**
6. **Court erred in failing to consider the defence.**

### 3. APPELLANT'S SUBMISSIONS

Ground 1 – The charge sheet was defective since the particulars are not similar to the evidence of PW6 as the P3 indicates that there was a hymen, no tear nor bruises yet the charge sheet indicated that he had “unlawfully and intentionally caused his penis to penetrate the vagina of S O a child of 12 years.

Ground 2 - The complainant was a distance away from the appellant and therefore the appellant could not have pulled her by the hand to the banana plantation. Evidence of PW3 and 4 is contradictory. PW3 saw a man come from the plantation yet PW4 did not.

Ground 3 - P3 form does not have a hospital rubber stamp. P3 issued on 20.3.12 yet it was filled on 17.3.12. The evidence of PW2 gives a different date of 20.3.12.

Ground 4- Contradictions – mother's evidence was that she reported the matter to the police on 7<sup>th</sup> December 2012, the police indicated that information was received on 20<sup>th</sup> March 2012 and the complainant indicated that the matter was reported to the police on the same day.

- Evidence of PW4 – she heard of the defilement same day but she did not see the appellant.
- PW3 said a tall man come from the plantation.
- Complainant stated PW3 and PW4 told her to go home yet PW3 stated in evidence they did not speak to the child.

Ground 5 - Magistrate biased. She arrived at a finding that defilement happened 3 weeks prior to reporting yet P3 indicated 4 weeks. The magistrate further erred in finding that the evidence of PW3 and PW4 corroborated that of the complainant.

Ground 6. Defence not shaken.

### 4. SUBMISSIONS BY THE PROSECUTION –

Mr. Kamau for the State did not oppose this appeal on the grounds that there was no evidence connecting the appellant to the offence. It was his further that the Medical evidence adduced did not corroborate that of the complainant. Further evidence backaches did not relate to defilement and the same may have been caused by something else, further that evidence of PW3 and 4 contradicted each other as PW4 said that she saw the complainant and not the appellant. PW3 on the other hand stated that she saw the complainant and a man emerge from the plantation. He further submitted that PW1 gave evidence as told by her parents finally the conviction was unsafe.

### 5. ANALYSIS AND OPINION OF THE COURT

This being the 1st appellate court it has to study the evidence on record,

Examine and analyze the same and form its own independent opinion.

The prosecution evidence at trial was that, between the 1<sup>st</sup> and 7<sup>th</sup> of February 2012, the complainant was sent to buy sugar at around 5.30 p.m and on her way she met the accused who pulled her into a banana plantation, promised to give her 2,000 shillings and defiled her. The complainant began wailing and the accused strangled her and defiled her. He walked away on hearing voices of people approaching

## SUMMARY OF EVIDENCE

The evidence of the prosecution witnesses' may be summarized as follows;

**PW1 – S O** – On the material day she was sent to the shops to buy sugar at about 5.30 p.m, she found the accused known as Soita standing in the banana plantation. He called her “S, S come and see” she refused and he pulled her removed her clothes and told her not to cry he would give her Kshs. 2,000/-. When she began to cry, he strangled her and defiled her. Two women came approached and he ran away. She went home and did not tell her mother. Her mother discovered something was wrong as she was washing dishes.

At cross examination she stated

***”I was told by my parents to come and say that”***

**PW2 – E O** – mother of PW1 recalled that on 1.2.12 she told her child PW1 to wash dishes. On 6.2.12 she enquired from PW1 why she is unable to bend and PW1 started crying and informed her mother that the day she was sent for sugar, the appellant pulled her into the banana plantation and defiled her. On 7.2.12 witness took the child to hospital as she discovered the child was in pain. She was issued with a P3 form.

**PW3 – Pauline Nanyama** - a peasant farmer – she recalled that sometimes in February she came across the complainant while in the company of PW4. The complainant emerged from the banana plantation. A tall man whom she did not identify also emerged from the same plantation running.

**PW4 – Beatrice Nanyama** - a peasant farmer recalled that in February while going to the posho mill with PW3 she saw the complainant. She did not see the appellant.

**PW5 Susan Musir** – attached to Kimilili police station recalled that on 20.3.12 PW1 accompanied by her mother PW2 reported an incident of defilement that took place in February. The mother reported that when she gave her child duties the child could not bend. It was alleged that the appellant had sex with PW1 in a banana plantation. The witness took the child to hospital where a P3 form was duly filed.

**PW5 Nixon Dick Olukutubu** – a clinical officer at Kimilili District Hospital. He stated that he examined PW1 who had a history of defilement. He assessed her age at 12 years. PW1 informed him that she had been defiled in February 2012. She had a hymen, there was no tear nor bruises and she had a smelly discharge. He signed the form on 20.3.12. He examined the appellant on 25.3.12 and signed his P3 form as well.

The court found the accused had a case to answer and he was placed on his defence.

He gave an unsworn statement as follows:

**DW1 Leonard Soita John** aged 30 years is a tractor driver. He stated that he left his home in December to go and plough until 22<sup>nd</sup> March, 2012. When he returned home. 3.00 a.m. he heard a knock on the door, he opened and found police officers who asked him to accompany them. He was handcuffed and taken to the A.P camp and later to Kimilili police station with the offence of defilement.

From the above evidence PW1 is the only person who testifies to the act of defilement by the appellant. Her evidence was as follows;

**“I found the accused standing in the plantation of banana it was about 5.30 he is called Soita. He began calling me “S, S come and see”**

**When I refused he pulled me and removed my clothes, he said I should not cry he will give me 2,000/=.**  
**When I cried he began wailing, strangled me, he then defiled me.”**

PW3 on her part saw the girl come from the plantation. She also saw a tall man emerged from the same place running away.

PW2 the complainant's mother noticed that the child was unable to bend and while washing dishes, she enquired from the complainant what the problem was. The complainant cried and later informed her that she had been defiled by the appellant.

PW3 saw the complainant emerge from the plantation.

PW5 – a clinical officer gave evidence based on the P3 form. His evidence was there was hymen, no tear no bruises but complainant had a foul smell.

Apart from the evidence summarized above I have examined the medical record and noted an anomaly in the way the 2 P3 produced were pinned were tendered in evidence and both prepared by PW5. Nixon Dick Lukutubu. The 1<sup>st</sup> report is dated 20<sup>th</sup> March, 2012 and relates to S O. the said P3 should have pages 1, 2, 3 and 4. Page 2 relates to S O. However a close scrutiny of the same indicates that same lacks page 3 and 4 stand on its own on a separate sheet does not relate to her but ought to be for the second report prepared and signed on 25<sup>th</sup> March, 2012 that relates to Leonard Soita John this is so because it does indicate that it was signed on 25.3.12 and deals with male accused of any sexual offence. Yet page numbers 3 and 4 attached to the 2<sup>nd</sup> report appear to relate to S as it has Section C to be completed on alleged sexual offences after completion of "A" and "B" (found on page 1 and 2 of the report)" page 4 on the other hand deals with age assessment which must be that of Sharon.

Having noted the above anomaly and having synchronized the same as against the evidence of the clinical doctor and submissions by the State Law Office the said report gives the following information .

Section C

2. (a) ***describe in detail the state of any injuries to genitalia with special reference to labia majora, labia minora vagina and cervix conclusion.***

***"No hymen, pus, vagina discharge no tear"***

**b). Note presence of discharge, ... or venereal infection from genitalia or on body externally stand "PVS discharge foul smell"**

Any additional remarks by the doctor clinical officer states

**"She will need psychological counselling and P.T.C follow up 3/12"**

Further the report states

"Age assessment was done in hospital and according to dental formula her age is

Assessed at 12 years."

The report is signed and the rubber stamp of the hospital affixed. It is dated the

20<sup>th</sup> of March, 2013.

The Section under which the appellant was charged is Section 8(1) as read with 8

(3) of the Sexual Offences Act no. 3 of 2006 that provides;

**"8(1) a person who commits an act of defilement with a child is guilty of**

***an offence termed defilement.”***

On the other hand the Law of evidence part 111 evidence of children in part under Section 124 provides.

***“124 Corroboration required in criminal cases notwithstanding the provisions of section 19 of the Oaths and statutory declaration 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 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 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.”***

Having considered the law as cited above and the evidence on record I am of the view that I must consider issues as follows;

- a). Whether the complainant was defiled or not.
- b). Whether there is evidence linking the incidence to the appellant.

PW1 stated clearly that she was defiled. Her mother discovered that she was in pain and took her to hospital. PW5 a clinical officer examined PW1 and found the hymen missing, She had no tear or bruises but had pus and discharge from her vagina. He formed an opinion that she required psychological treatment. This in my view is a clear indication that he formed an opinion that she had been defiled. The evidence of the mother PW2 is that her daughter could not bend as she undertook chores the child was in pain. The State Counsel’s submission that backache had no connection to the defilement incident and that there is no evidence linking the appellant to the offence and in my view was unfounded.

The complainant seem to have had an infection. It is not clear whether this was related to the incident of defilement or not however it is the man the complainant had that triggered the journey that unraveled the issue of her defilement as the complainant made a disclosure of her sexual encounter and findings made by PW5 which included a missing hymen. I therefore hold that as a matter of fact the complainant had been defiled.

Was the appellant the molester herein.

The only direct evidence linking the appellant to the incident is that of PW1. She stated that she knew the appellant and she saw him as he defiled her. PW3 saw a man emerging from the plantation from where the complainant emerged from but she did not identify the person.

The complainant gave the appellant’s name to the mother, the police and repeated the same to the court. Although in her evidence she stated that she said what her parents told her in court. This statement stands in isolation. It is not possible to decipher why the statement was made as in method of recording proceedings, we only have capture answers. However the said statement as it stands does not erode the evidence of PW1.

I find against the above background that the complainant was truthful in her evidence in court and statements made to her mother and the police and where she pointed an accusing finger at the appellant. The appellant did not elaborate his allegations that he was framed up, the complainant alleged defilement and this was corroborated by the P3 form where her hymen was found interfered with and she had pus and discharge.

Apart from arriving at an opinion that PW1 the complainant was truthful, I find evidence corroborating her evidence. I therefore believe the evidence of PW1 and find that the appellant was the tall man seen by

Pw3 emerging from the banana plantation where PW1 emerge. I find that the appellant indeed is the one who defiled the complainant and concur with the findings and conviction of the trial court. The finding of the trial court is sound and ought not to be interfered with.

Section 8 (3) of the Sexual Offences Act provides;

***“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than 20 years.”***

The appellant was sentenced to a term of 25 years which falls within the law. I see no reason to interfere with the same.

The upshot of this judgment is that this appeal fails in its entirety. It is accordingly dismissed.

**Dated at Bungoma this 9<sup>th</sup> day of June 2015.**

**ALI-ARONI**

**JUDGE.**