



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 92 OF 2010**

**SIMON BARASA NGEIWA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An appeal against Judgment conviction and sentence of Hon. M.C. Chepseba (Mrs.), Senior Principal Magistrate at Kitale delivered on 11/08/2010 vide Kitale CMCR. No. 3798 of 2009)***

**J U D G M E N T**

1. The appellant, **Simon Barasa Ngeiwa**, appeared before the Chief Magistrate at Kitale charged with Defilement contrary to Section 8(1) read with (2) of the Sexual Offences Act, in that on the 31st October, 2009 in Trans-Nzoia West District, defiled **SCK**, a girl aged nine (9) years.

There was an Alternative Count of Indecent Act with a child, contrary to Section 11(1) of the Sexual Offences Act.

2. After a full trial, the appellant was convicted on the main count and sentenced to life imprisonment. He was dissatisfied with the conviction and sentence and preferred the present appeal. His grounds of appeal are contained in the petition of appeal filed herein on 23rd August, 2010.

3. At the hearing of the appeal, the appellant initially represented himself and presented written submissions in support of his case. He was later represented by learned counsel, **Mr. M. Wafula**, who adopted the written submissions and went further to orally submit that the age assessment report was produced by the Investigations Officer contrary to the Evidence Act and without the consent of the appellant.

4. That, there was controversy in the age of the appellant but he was later taken for age assessment and the report showed that he was nineteen (19) years. That, although the offence occurred in broad daylight in the complainant's neighborhood no independent witness was called to testify. That, the prosecution evidence was contradictory in that the mention of blood was by the complainant's mother and not the other witnesses.

Learned counsel urged this court to allow the appeal.

5. The appeal was opposed by the respondent through the learned prosecution counsel, **Mr. Kakoi**, who submitted that the evidence against the appellant was adequate and unshaken in that the complainant (PW3) narrated to the court how the offence occurred and PW1 found the appellant zipping up his trousers in the house. That, the clinical officer (PW4) confirmed that the complainant was defiled and PW5 produced the age assessment report without the appellant's objection and therefore the issue ought

not have been raised in this appeal.

6. The learned prosecution counsel, contended that the probative value of the report was not altered and submitted that the court ordered age assessment for the appellant after it was alleged that he was seventeen (17) years old. That, this was a cautious move by the court and in any event, the appellant's age was assessed at nineteen (19) years. Learned prosecution counsel urged this court to dismiss the appeal.

7. At this stage, the duty of this court was to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. In that regard, the evidence of the complainant, **SC (PW3)**, was considered along that of her father, **AK (PW1)**, her mother, **TC (PW2)**, the clinical officer, **Francis Barchebo Sowen (PW4)** and the investigations officer, **PC William Andai (PW5)**.

8. The evidence by the appellant in his defence was also given consideration by this court. He denied the offence and indicated that he was framed by the complainant. He contended that he was a Form 11 student at St. [particulars withheld] School and was in school when the alleged offence occurred. He said that he was from school when he used a path that traverses a police station. It was while there that the complainant held and pushed him into the station.

9. The learned trial magistrate considered the evidence in its totality and concluded that the age of the complainant child which was indicated as 9 years was not disputed and that she was indeed defiled by the appellant on the material date.

Learned trial magistrate found that the complainant's evidence was credible and was corroborated by that of her parents who rushed to the scene and found her with the appellant who was at the time coming out of a bed and adjusting his trousers.

10. It was also the finding of the learned trial magistrate that the complainant's evidence was further corroborated by medical evidence and that the identification of the appellant as the offender was never in doubt considering that the offence occurred in broad daylight. It was as a result of the reasons aforementioned that the learned trial magistrate convicted the appellant on the main count.

11. Having reviewed the evidence, this court's opinion is that the appellant was properly convicted as the fact of defilement was not disputed and was indeed established by the complainant's evidence and the medical report (P. Exhibit 1) produced by the clinical officer (PW4) who carried out an examination of the complainant after the fact. He also confirmed that the complainant was aged nine (9) years old at the time.

The complainant age assessment report (P. Exhibit 2) produced by the investigation officer (PW5) left no doubt that the complainant's age was indeed nine (9) years.

12. The production of the report (P. Exhibit 2) by the investigation officer was not opposed by the appellant during trial and it was permissible under Section 77 of the Evidence Act which provides that:-

**“In criminal proceedings any document purporting to be a report under the hands of a Government analyst, medical practitioner or any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence”.**

The age assessment report (P. Exhibit 2) was by a Government Medical Practitioner i.e. Dr. Ken Ndege. It was not necessary for him to appear in court and produce the document unless ordered by the court. Its production by the investigation officer was not prejudicial to the appellant and in any event, the complainant age was not disputed.

13. The appellant could not therefore be heard to challenge the said report in this appeal. There was enough evidence availed by the prosecution to prove that not only did the incident occur in broad daylight but also that the appellant was the person responsible. The complainant's parents (PW1 and PW2) found him with her no sooner had the offence occurred. He was well known as a neighbour to them. His defence was clearly discredited and an afterthought. He could not be heard to say that he was not at the scene when the offence occurred yet he was the identified culprit. Nor, could he be heard to say that he was framed by the complainant without any cause.

14. The prosecution evidence against the appellant was sufficient and credible enough, to prove the charge against him. His conviction by the learned trial magistrate was clearly proper, safe and sound and is hereby affirmed.

With regard to the sentence, it was established that the complainant was aged nine (9) years. Therefore, the life imprisonment sentence meted out against the appellant was lawful and in accordance with Section 8(2) of the Sexual Offences Act.

15. With regard to the age of the appellant at the time of the offence, there was no controversy as alleged by the appellant's counsel as there was documentary proof that he was aged nineteen (19) years and not seventeen (17) as claimed. In any event, his age was not a material factor with regard to the offence. It was only relevant for purpose of sentencing.

In sum, this appeal is not merited and is hereby dismissed in its entirety.

**J.R. KARANJA**

**JUDGE**

[Delivered and signed this **4th** day of **June, 2015**]