



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 33 OF 2014**

**JOHN CHEPSIR ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(An appeal from the original conviction and sentence of R. M. Washika Ag. Principal Magistrate in Criminal Case No. 17 of 2013 delivered on 22nd July, 2013 at Kapenguria .)***

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

1. **The** appellant, **John Chepsir**, appeared before the Principal Magistrate at Kapenguria charged with attempted defilement, contrary to s.9(1) of the Sexual Offences Act. It was alleged that on the 4th January 2012 in West Pokot County, he attempted to defile, **F A**, a child aged 3 ½ years,
2. After a full trial, the appellant was convicted and sentenced to ten (10) years imprisonment but being dissatisfied with that outcome preferred the present appeal on the basis of the grounds in his petition of appeal dated **14th March 2014**. He appeared in person at the hearing of the appeal and relied on his written submissions. The learned Prosecution Counsel **Mr. Kakoi**, opposed the appeal on behalf of the respondent.
3. It was submitted by the learned Prosecution counsel, that the proceedings show that the findings of the trial court should not be interfered with as PW 1 was very clear that he saw watery substance on the complainant's clothing and realized that the substance was sperms. That, Pw2 and PW3 confirmed as much. That, the complainant was aged 3 ½ years and although there was no penetration there was an attempt to defile her. Therefore, the appellant's conviction was safe and this appeal ought to be dismissed.
4. Having considered the submissions by both sides in the light of the ground of appeal, the duty of this court was to re-visit the evidence and arrive at its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.
5. Briefly, the case for the prosecution was that the complainant/ Victim, **F A (PW6)** was aged 3 ½ years at the material time and was under the care of her mother **V C K (PW1)**, whose other daughter was **S C (PW2)**. On the material date, the child's mother went to the market leaving the child with **S** who was joined by **E R (PW3)**. Both **S** and **E** were cooking when the appellate went to their house and offered to buy them lollipop. He left his beans behind and took away the child **F** whom he returned back home after about thirty (30) minutes.
6. The child later started crying and when **S** examined her, she found watery substance on her legs. Evans also saw the watery discharge.

A nursing officer, **Emmanuel Kiapelton (PW4)** , produced the P3 form which indicated that the child suffered bodily harm but was not defiled.

7. PC **Ngani Michael Randu (PW 5)**, took over the investigations from a colleague. He went through the relevant statements and eventually caused the arrest and arraignment of the appellant in court.

The child victim (PW6), indicated that the appellant took her behind their house and touched her private parts causing her to scream.

8. The defence case was that the appellant did not do anything to the complainant and was merely framed with this offence.

However, the trial court after considering all the evidence concluded that an attempt to defile the complainant was made by the appellant.

9. On its part, this court does not think that there was any attempt to defile the complainant as the watery substance said to have been seen on her legs was not found to be spermatozoa but a vaginal discharge which was whitish.

There was no doubt that the appellant removed the child from her home and was suspected of having defiled or attempted to defile her simply because of the watery substance seen on her legs and the fact that she started crying after being returned home. The child only indicated that the appellant touched her private part and not anything near defilement or attempted defilement.

10. The P3 form however, showed that the child was assaulted and occasioned actual bodily harm. Since it was the appellant who took away the child when she was alright, it was quite obvious that he had everything to do with causing her bodily harm. Consequently, this court would find him guilty of assault causing actual bodily harm contrary to S.251 of the penal code rather than attempted defilement contrary to s.9(1) of the Sexual Offences Act.

11. The conviction on attempted defilement by the trial court against the appellant was therefore not proper and is substituted with a conviction on assault causing actual bodily harm.

Accordingly, the sentence of ten (10) years imprisonment meted out against the appellant is hereby set aside and replaced with a sentence of two (2) years imprisonment. It is to that extent only that the appeal succeeds.

**J. R. KARANJA**

**JUDGE**

**2.7.2015**

(Delivered & signed this 2nd day of July 2015.)