



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 80 OF 2018

JOSEPH MARORIA ESIAU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. M OTINDO(RM) DATED 31ST JULY 2015 IN CRIMINAL CASE NO. 192 OF 2013 NAKURU).

JUDGEMENT.

1. The appellant was charged with the offence of Defilement contrary to Section 8(1) as read with sub section 3 thereof of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the diverse dates between 6th September 2013 and 8th September 2013 at [Particulars withheld] estate in Nakuru district within Nakuru county unlawfully and intentionally committed an act by inserting your male genital organ namely penis into a female organ namely vagina of a child name SC aged 12 years' old which caused penetration.
2. The alternative charge was Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that on the diverse dates between 6th September 2013 and 8th September 2013 at [Particulars withheld] estate in Nakuru county unlawfully and intentionally committed an indecent act with a child by touching her private parts namely vagina and breasts of SC a child aged 12 years.
3. The appellant was convicted and sentence to serve 25 years' imprisonment hence the appeal herein. He has raised several grounds thereof notably, that his rights to a fair trial were violated, penetration was not proved and that the sentence was harsh in the circumstances.
4. The learned state counsel has vehemently opposed the said appeal and urged this court to uphold the trial courts findings. Before looking at the merits or otherwise of the appeal it shall be necessary to summarise the evidence as presented during trial.
5. **PW1 AC** the mother to the complainant testified that she was born on the 16th September 2000 and a class 6 pupil at [Particulars withheld] academy. She said that she was called by the wife to the appellant on 9th September 2013 who informed her that the complainant was at her home. She told her that the appellant had promised that the complainant would be her co-wife.
6. After picking the complainant and upon interrogating her she told her that she had been defiled. She took her to Nairobi women hospital and was thereafter remanded at NCRA. She said that the complainant had issues as she disappeared at Nairobi women hospital and later was committed at Kirigiti Rehabilitation School.
7. She said that she found the minor at the appellant's house which was a single room with one bed.
8. **PW2 DR. IMMANUEL WEKESA WAMALWA** from Provincial General hospital Nakuru testified on behalf of Dr. Justus Nondi who had examined the complainant and had filled the p3 form. He found that the minor had soft tissue injuries on the limbs, redness at the vagina, and there was no discharge. The doctor concluded that there was defilement. He produced the PRC as well as the P3 forms.
9. **PW3 DOUGHLAS MWANGI KANYI** a jua kali businessman testified that the appellant on one of the occasions went to collect a sufuria he had repaired for him using a motorbike. In the said motorbike was a young girl who was aged about 12 years. He did not know her. A week later he was visited by the police who wanted the information and he recorded his statement.
10. **PW4** the complainant testified that she was 14 years old and that on 6th September 2013 she was in Nakuru town at Tusksys after escaping from home. She was approached by the appellant who was carrying another woman on his motorbike. On the way the other

passenger, woman alighted. They went with the appellant and collected a sufuria and proceeded to his house.

11. At the house they met the appellant's wife who interrogated her and slept that day. The following day the appellant's wife went to the market and she remained behind with the appellant. She did household chores and she was sent to buy ice-creams.

12. The appellant later when his wife was absent grabbed her from the chair tore her clothes, placed her on the bed and began defiling her. She identified the clothes in court which included her pant among others.

13. She said that the appellant wore a condom while he defiled her. After he was through he told her to take a shower which she obliged. He gave her some other clothes and warned her not to tell anyone or she will suffer some consequences.

14. On 7th September 2013 she gave Rachel, the appellants wife her aunts number and asked that she calls her. At 11 am her aunt arrived as well as her mum and her cousins. They called the appellant but did not come as he was working. She was thereafter taken to the hospital for treatment. She said that she was not there when the appellant was arrested.

15. When cross examined by the appellant she insisted that it was him who had picked her and taken her to his home.

16. **PW5 NICHOLAS KIPRONO MUTAI** from Nairobi women hospital produced the laboratory results of the analysis done upon the samples collected from the complainant. He found that the pregnancy results were negative.

17. **PW6 PLC NYATELA NYAKUNDI** from the children protection unit carried out the investigation after her mother had reported. After interrogating her she referred her to the provincial general hospital where P3 as well as PRC forms were filled. He was also given the clothes the complainant was wearing during the incident and he produced them in court.

18. He said that he recorded statements from the witnesses including the appellant's wife who was also a child. They traced the appellant who was later arrested at Free area. The neighbours he interrogated told him that it was the habit of the appellant to bring children to his house. He also produced the clinic card of the complainant which showed her age.

19. When placed on his defence the appellant gave unsworn evidence denying the charge. He said that he received a call from his wife on 12th September 2013 to go to the stage, pick and take her to the market. He was using his motor bike registration number KMCH O63H. When he arrived he found her with 4 other women. He was arrested and taken to his house and told to open his house but he did not have the key. He was later arrested and charged. He denied being at Tuskys or knowing the complainant.

20. The court directed the parties to file their written submissions which they complied. The appellant reiterated his grounds of appeal by stating that he did not receive fair trial as he was unrepresented by counsel as enshrined under **Article 50 of the constitution**. He said that the same is a fundamental right considering the nature of the matter that faced him.

21. He further submitted that the respondent failed to prove that penetration did occur and that the complainant appeared to have been a delinquent child. He run away for instance from her parents and the rehabilitation school.

22. He also criticised the court for not allowing him to make his submissions which essentially are provided under the criminal procedure. He finalised his submission by arguing that the sentence was excessive in the circumstances. He said that the sentence of 25 years was excessive and harsh.

23. The learned state counsel on her part submitted in support of the findings by the trial court. She said that all the grounds of the offence namely age of the complainant, penetration and identity of the perpetrator were proved. She urged the court to dismiss the appeal.

ANALYSIS AND DETERMINATION

24. The court has perused the record and the entire proceedings and evidence tendered as well as the submissions by the parties and the cited authorities. This courts duty at this juncture is to re-evaluate the evidence afresh and arrive at an independent finding with full knowledge that it did not have the benefit of seeing the witnesses and their demeanour like the trial court. See **OKENO V. REP. 1972 E.A. 32**.

25. The three now accepted ingredients of the offence of defilement are well known namely the age of the victim, the element of penetration and the identity of the perpetrator.

26. In the matter at hand it was stated that the minor was born on the 16th September 2000 as per the clinic card. As rightly found by the trial court she was one-month shy of 13 years. The said card was a sufficient prove of her age. It was not disputed. Her mother corroborated the same.

27. Was she defiled.? I think the answer lies in the minor's evidence as well as that of PW2 the doctor who examined her. She told the court in her evidence in chief that;

“when I went back I did not find his wife, the accused grabbed me from the chair he warned me not to make any noise, he took me to his bedroom, he removed clothes, she tore the sweater I was wearing, I was wearing a dress, I had his wife's sweater and skin tight. The clothes are.... he did not remove his trouser completely. He pulled up to the knees. He put my clothes on the bed. He defiled me. He used a condom which he put on his penis. He forced me to sleep on the bed facing upwards. He knelt over me with his legs apart on top of me. He inserted his penis in my vagina (wriest). He defiled me for a short while, I had never had sex

before”.

28. When examined, PW2 he concluded as follows;

“The doctor examined the genitalia, the injuries were barbed with redness at the vagina and there was no discharge.... the doctor confirmed the act of defilement.”

29. The above extended quotation clearly and graphically captures what the complainant went through. There was not much in cross examination by the appellant to poke holes on the complainant’s evidence. She was clear on what the appellant did. She saw the appellant wear a condom before defiling her and tearing her clothes. Those clothes were produced as part of the evidence by the respondent.

30. In the premises, based on the above and the fact that the medical report demonstrated that indeed she was defiled, the court just like the trial court finds for a fact that she was defiled.

31. The perpetrator could not be mistaken. The appellant ferried the complainant from Tuskys area within Nakuru town. They went via PW3 place of work to collect the appellant’s sufuria on their way to his home. They spent about two days at the appellant’s home including sleeping on one bed with the appellant and his wife. All these took place during daytime. It cannot therefore be said that there was any case of mistaken identity.

32. The court therefore finds that all the critical three ingredients of the offence were established. The argument that the appellant was unrepresented may be true but there is no evidence to suggest that he was denied representation upon request. Neither was he barred from seeking his own advocate.

33. The complainant from the evidence of her mother may have been a truant girl as shown from her escape from her parents and the hospital. This is however a peripheral issue and does not in any way justify the appellant’s actions.

34. On the issue of submissions, there is evidence of written submissions on record and it is not therefore true that he was denied the opportunity.

35. The only issue which this court will want to tinker with is on sentencing. The sentence of 25 years’ imprisonment may have been correct but the trial court in my view should have taken into consideration such factors as the period which the appellant has been in custody and the fact that he was a first offender.

36. For the forgoing reasons the appeal is otherwise dismissed. The sentence is however set aside and replaced it with 20 years’ imprisonment from 17th September 2013.

Dated signed and delivered via video link at Nakuru this 23rd day of September 2021.

H K CHEMITEI

JUDGE.