



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CRIMINAL APPEAL NO. 9 OF 2017
(BEING AN APPEAL FROM THE DECISION OF HON. P.M. WASIKE (RM))
IN CRIMINAL CASE NO.4828 OF 2014)

JOSEPH MARANI WANYONYI.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

JOSEPH MARANI WANYONYI.....ACCUSED

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) and 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 13th day of December 2014 at [particulars withheld] area within Trans-Nzoia county intentionally caused your penis to penetrate into the vagina of C.N a child aged 13 years.
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 offence were that on the 13th day of December 2014 at [particulars withheld] area within Transnzoia county intentionally caused contact between your genital organ namely penis and genital organ namely vagina of C N a child aged 13 years.
3. The Appellant was convicted and sentenced to 20 years’ imprisonment hence this appeal. The Appellants counsel in the petition of appeal has raised several grounds which I shall refer later but for now it’s necessary to summaries the evidence as presented during trial.
4. **PW1 LINUS LIGARE** the clinical officer from Kitale District hospital examined the Complainant and filled the P3 form. He found that she had tears on her private parts and the hymen was torn and fresh looking. He concluded that there was penetration. He did produce the P3 form as well as the discharge summary from the hospital.
5. **PW2** the Complainant testified that she was a class 4 pupil at [particulars withheld] primary school and aged 12 years old. She said that on the material day she had gone to gather some wheat left overs with her friends at the farm of one Akute when the Appellant came and told her to follow him to another section of the farm where there was a forest so that he could give her more wheat. She obliged and the Appellant literally dragged her to the forest where he proceeded to remove her panty and defiled her forcefully. She tried to scream but he warned her that he was going to put a pipe on her nose. She felt a lot of pain and bled.
6. The Appellant after she was through left her and she struggled to reach where her friends were. Her friend Daisy (PW3) rushed and told her mother who took her to the hospital where she was stitched and treated. Her mother and father later arrived and found her at the hospital. She also identified her clinic card which shows she was born on 16th December, 2001.
7. **PW3 DC** also a minor in her unsworn evidence stated that she was with the Complainant collecting left over wheat at the farm of one

Akute when the Appellant came and said that she wanted to go with the Complainant so that he could give her more wheat to bring to them. He went with her while holding her hand and when she came back she was crying and holding her stomach. She said that she saw blood pouring from her legs but she did not tell her what had happened. She went to call her mother who came immediately.

8. **PW4 JKK** the mother to the Complainant testified that she was at home on the material day when at around 12.00 pm she got the news that the Complainant was at Lukhome hospital. She rushed there and she found that the complainant was bleeding from her private parts. She explained to her what had happened. She was then referred to Kitale District hospital where she was admitted for 3 days. She was also issued with a P3 form which she had it filled.

9. She said that she knew the appellant who was a guard at the farm of Akute where she also worked. She further said that she had washed the inner clothes worn by the child that day.

10 . **PW5 PC ROSE SABUL** from Kitale police station was the investigation officer. She said that the Appellant was brought in by the officers from Lukhome AP Camp and accused of defiling the minor. She was admitted at the district hospital. She recorded statements from the witnesses and preferred charges against the Appellant.

11 . **PW6 APC DAVID KANYI** from Lukhome AP Post arrested the Appellant after the Complainant's father one Charles Masoni reported the incident. He was arrested on the same day while coming from his work aboard a tractor and handed over to Kitale police station.

12 . When placed on his defence, the Appellant gave sworn evidence denying the charge. He recalled how he was arrested on the 13th December 2013 aboard a tractor by pw6 and another officer. He was taken to the AP camp and later taken to Kitale police station and charges preferred against him which he still denied.

ANALYSIS AND DETERMINATION

13 . The duty of the court at this juncture is to re-evaluate the evidence afresh and arrived at an independent finding as was clearly stated in **OKENO VS.REP.1973 EA 32**.

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”

14 . The court has perused the two competing submissions by the parties as well as the attached authorities. There are three basic ingredients to the offence herein namely, the age of the victim, the identity of the perpetrator and whether there was penetration.

15 . The age of the minor was proved by the production of the clinic card which showed that she was born on 16th December, 2001 an issue which was not contested.

16 . Was she defiled? The answer is on the affirmative as demonstrated by the minor, PW3 her friend, as well as the clinical officer and her mother. The discharge summary and the P3 form produced clearly indicated that she went through painful ordeal.

17 . Was the Appellant the perpetrator? Although it appears that there was no direct eye witness to the incident the evidence of PW3 corroborates that of the Complainant. Both children were together collecting wheat left overs. It was during the day and there is nothing to suggest that they did not know the Appellant. The lure of getting more wheat must have made them wait in anticipation.

18 . It is also apparent that as soon as PW3 saw the Complainant bleeding she rushed to call her mother who organised to have her taken to the hospital. She did not testify though but the minor's evidence in my view was not concocted as submitted by the Appellant.

19 . His defence does not hold water. He simply explained how he was arrested. There was no evidence of mistaken identity by the Complainant and by extension PW3.

20 . This appeal is not meritorious. The trial courts finding were both sound in law and fact. The appeal is disallowed.

Dated signed and delivered at Kitale via Zoom on this 30th day of April, 2020.

H. K. CHEMITEI

JUDGE

30/4/2020

