



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 101 OF 2015

(Being An Appeal From The Decision Of Hon. C. N . Mugo (Rm) In Criminal Case No.1509 Of 2014).

JOSEPH STEPHEN SIMIYU.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006**. The particulars of the charge were that **on the 18th day of April, 2014 in Transzoia County intentionally caused your penis to penetrate into the vagina of ANJ a child aged 14 years**.

2. The alternative charge was **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 18th day of April 2014 within Transzoia county intentionally caused conduct between your organ namely penis and the genital organ namely vagina of the child aged 14 years by the name ANJ**.

3. The Appellant denied the charge and the matter proceeded to full trial where the appellant was convicted and sentenced to 20 years' imprisonment hence this appeal.

4. The summary of the evidence as presented during trial was as hereunder. PW1 the complainant told the court that she was a class 6 pupil at [particulars withheld] primary school and that on the material day at around 2.00 pm she went to her friend's place where there was a funeral. The appellant called them and told them to go and watch television in his house. They obliged and in the process he sent her friend K to go and buy milk.

5. Meanwhile the appellant went to bath and he used the complainant's sleepers which she had left outside. When he came back she demanded for the same and the appellant told her to pick from under the bed. As she tried to do so the appellant then grabbed her and placed her forcefully on the bed, tore her underpants and proceeded to defile her. After he was through she went out and told K who then told her mother who in turn told the complainant's mother.

6. Her mother then checked her and took her to the hospital where she was treated and the P3 form filled and later the age assessment was done at Kitale district hospital.

7. **PW2 HW** also a minor testified that she was a class 4 pupil at [particulars withheld] primary school and on the material day they were watching television at the appellants home together with the complainant. The Appellant then sent her to buy milk and she left the complainant in the house with him. When she came back she called the Complainant and although they were in the house nobody responded. She said that she could see both in the bed as the curtain was old. She then went and told her mother who in turn told the Complainant's mother.

8. **PW3 SWALEH SIFUNA** testified that he knew PW1 and 2 as well as the Appellant. He said that on the material day he went to the Appellant's house and found PW1 and 2 and other children at the home of the Appellant. He had gone to the Appellant's house to collect a speaker.

9. **PW4 NAA** is the mother to the Complainant. She said that she was aged 14 years old. She said that the Appellant was her neighbour and they have never had any differences. On the material day she had gone to work and when she came back she was informed by her neighbour Janet of the incident. She inquired from the child and she told her what had happened and that she could not scream as he had threatened to

beat her.

10. She reported the matter at Matisi Police Post and took the Complainant to Kitale District hospital where she was examined and treated.

11. **PW 5 LINUS LIGARE** from Kitale district hospital examined the minor and filled the P3 form which he also produced. He found that the hymen was torn and old looking and he concluded that there was evidence of defilement.

12. **PW 6 KPR ABDALLA NADOYA** testified that together with one Kennedy also a Kenya Police Reservist (KPR) they arrested the appellant and took him to Matisi police post.

13. **PW7 FANIS SILALI** from Kitale district hospital dental department carried out a dental Age Assessment on the Complainant and concluded that she was 14 years old.

14. **PW8 P.C ESTHER LOLARI** from Kitale police station was the Investigating Officer. She said that the matter was reported at Matisi police post and she proceeded to issue the P3 form to the Complainant for purposes of being filled and thereafter she recorded statements from the witnesses and preferred charges against the Appellant.

15. When placed on his defence, the Appellant gave unsworn evidence denying the charges and generally explaining a bad blood between him and Violet, Charity and Nancy who had misled his second wife and had her separated with him. He said that he reported the matter at the chief's office and that this were fabrications by the said neighbours.

ANALYSIS AND DETERMINATION

16. The usual three ingredients in proving the offence of defilement are now clear, namely, the age of the victim, the identity of the perpetrator and whether there was any penetration.

17. The Appellant has filed home-grown submissions which the court has perused and considered. Apparently there was no submissions on record by the learned State Counsel.

18. The duty of the court is to reevaluate the evidence and come up with a new and independent conclusion noting that it did not have the opportunity to see the witnesses as well as their demeanour. (**See OKENO V. REP. 1973 EA 32**)

19. The age of the Complainant was well proved by the production of the age assessment report by the Dentist which showed that she was 14 years old. Although she indicated that she was 13 years old that was not far from the 14 years found by the dentist.

20. Was she defiled? The evidence as presented by the Complainant shows that they were with some children on the material day and they were called by the Appellant to go and watch television in his house. He then sent PW2 to buy milk and in that period he went bathing using the complainant's sleepers. When he came back she wanted to have her sleepers back and she was told to collect by the Appellant from under the bed. As she went to collect she grabbed her and proceeded to defile her.

21. The P3 form produced indicated that her hymen was torn and old looking. The Appellant in his submissions has capitalised on this. He said by implication that if indeed the hymen was torn and old she may have engaged herself sexually elsewhere.

22. This line of argument in my view does not hold for the simple fact that although the Clinical Officer found the hymen old, it does not presuppose that she was not defiled. It is now accepted that the hymen may be torn as a result of other activities like sports or exercises etc. and that does not preclude the fact that defilement may not take place.

23. In the premises and in addition to the evidence of PW2, who found the two in bed, this court concludes that penetration was established.

24. The Appellant was identified as the perpetrator. The incident took place during the day, around 3.00 pm and these were people known to each other. There was nothing either from the Complainant or the witnesses nor the Appellant that they did not know each other.

25. The unsworn evidence by the Appellant has no probative value. The same simply blames other people for his ordeal. These women were not witnesses at all. Had he given sworn testimony then the Respondent may have had a chance to interrogate the issue in depth.

26. In the premises and looking at the overall evidence as presented by the Respondent, the case against the appellant was well established. I do not find the minor lied or attempted to fix the appellant. The Appellant simply took advantage of the minor and by sending her friend to buy milk, he created an opportune moment. This is also exemplified by him using her sleepers to bath. In essence it made sure that the child does not leave the house minus the same.

27. The appeal is dismissed.

28. However, on sentencing the court takes the view that since he conducted the trial while in custody all through the entire period ought to be taken into consideration. The 20 years' sentence meted against the Appellant shall be computed from 24th April, 2014.

29. Orders accordingly.

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

H. K. CHEMITEI

JUDGE

30/4/2020