REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 18 OF 2019

(Being An Appeal From The Decision Of Hon P. K. Mutai (Srm) In Criminal Case No.82 Of 2018)

TOM WEKESA WANYONYI.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **defilement contrary to Section 8(1), (3) of the Sexual Offences Act No. 3 of 2006.** The particulars of the offence were that **on the 16th day of May, 2018 at [particulars withheld] village Kiminini within Trans-Nzoia County intentionally penetrated your penis into the vagina of YN a child aged 13 years.**

2. The alternative count 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 16th day of May 2018 at [particulars withheld] village Kiminini within Trans-Nzoia County intentionally caused contact between your penis and vagina of YN a child aged 13 years.**

3. The second count was equally **defilement contrary to Section 8(1), (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the 16th day of May 2018 at [Particulars withheld] village Kiminini within Transnzoia County intentionally caused your penis to penetrate into the vagina of EB a child aged 14 years.**

4. 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 16th day of May 2018 at [particulars withheld] village Kiminini Transnzoia County intentionally caused contact between your penis and vagina of EB. a child aged 14 years.**

5. The Appellant was acquitted in the 2nd charge and convicted of the first charge and that is the basis of this appeal. In his petition of appeal, he has argued that crucial witnesses were not called to testify, the medical report was contradictory, and that the court rejected his defence which was plausible.

6. The summary of the evidence as presented during trial is worth consideration before looking at the merits or otherwise of the appeal. It is noted that the court ordered that the same be disposed by way of written submissions.

7. PW1 LN. testified that she was a class 3 pupil at [particulars withheld] primary school. She said that on the material day at around 2.00 pm she was heading home from school with her friend Elda and they met the Appellant who asked them to collect firewood and he promised to offer them Kshs 20. He thereafter took them to the teacher's quarters where he removed her clothes and proceeded to defile her. She screamed but there was no rescue from anybody.

8. She said that she was with her friend inside the house and she felt a lot of pain. She was later taken to Kiungani hospital and the matter reported at the Chief's Office. She said that she did not know the Appellant before.

9. PW2 EW testified that she was a class 5 pupil at [particulars withheld] primary school. She said that she knew the Appellant who on 15th June, 2018 asked them to fetch firewood and he directed them to a house and he locked the door from outside. He then came in through the window and he proceeded to defile PW1. He however did not manage to defile her as she shouted when he tried to turn to her. She said that the Appellant gave her Kshs.20. She said that they escaped through the window as the door was closed.

10. PW3 JW the mother to PW1 testified that she was not at home as she had gone to Webuye to attend to her sick father. As she arrived

home at around 8.00 pm she found many people at her home and the appellant had been arrested and accused of defiling PW1. The following day she went to the chief to report the matter and she took the child to the hospital where she was treated and her age assessed. She said that she was born on the 6/6/2006. PW2 was not defiled however and that she had known the Appellant for a while.

11. PW4 JOHN KOIMA produced the P3 form on behalf of **Labatt** whom he worked with. He found upon examination that PW1 hymen was partially torn and thus concluded that there was attempted defilement. As regards PW2 the hymen was torn and old looking and there were no bruises and that there was no evidence of penetration.

12. PW5 P.C LINET MWAMBA testified on behalf of **P.C ESTHER NOLARI** who had carried out the investigation and recorded witness statements. She said that the minors implicated the Appellant in the offence. She also issued them with the P3 forms which were later filed at Kitale hospital.

13. PC CORP. JOHN ROTICH testified that she received a phone call from the Complainant's mother concerning the Appellant who had by then been arrested. He went with his colleague and they arrested the Appellant and the following day they escorted him to Kitale police station.

14. DW7 DR. MERCY OYIEGE from Kitale hospital carried out dental examination upon the minors and concluded that they were 13 and 14 years respectively. She went ahead to produce the reports as exhibits.

15. When placed on his defence the appellant gave unsworn defence and he said that there was a grudge as he found the Complainants with hay. He went to Kiminini and he alerted his boss and the aggressor was arrested. He was fined Kshs.5000 and thereafter the Complainant's parents stated threatening him. He was later arrested for an offence he did not know.

ANALYSIS AND DETERMINATION

16. Having read the submissions by the Appellant, apparently there were no submissions by the Respondent, the issue to be determined are whether in light of the evidence on board the appeal is meritorious. The duty of this court was spelled out in the case of **OKENO VERSES REPUBLIC (1972) E. A .32** where it was stated that;

> **"*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."**

17. The three ingredients of this kind of offence are now clear namely, the age of the Complainant, the identity of the perpetrator and whether there was penetration.

18. As indicated earlier the Appellant was acquitted of the 2nd charge as the Complainant testified that she was not defiled as she shouted when the Appellant wanted to turn to her. The age of PW1 was proved by the testimony of PW7 who carried out her age dental assessment and found that she was 13 years old.

19. The issue regarding identification of the perpetrator was not difficult as the incident took place at around 4.00 pm which was day time. The house was also having sufficient light as was testified that it had both window and door.

20. The evidence of the minors in my view placed the Appellant at the scene. He was with them when he asked them to collect firewood as they came from school that afternoon. Both testified that he gave Kshs. 20 to PW2.There was therefore no suggestion that there was mistaken identity.

21. Was the Complainant defiled? That question would be answered by interrogation of the child's evidence. The Complainant stated that the Appellant removed his private part and inserted into hers and she felt pain. The evidence PW4 found that the hymen was partially torn. He concluded that there was attempted defilement.

22. The P3 indicates that ***"hymen torn, old looking (partially torn) no labia bruises. conclusion–no evidence of penetration (recent) attempted*** ."

23. The treatment notes produced together with the P3 form indicates that the hymen was torn and old looking.

24. In light of the above medical evidence, I find that there was an attempted defilement since it appears that if there was defilement there would have been perhaps fully torn hymen as well as bruises. The medical evidence was that there was an attempted defilement. There was nothing for them to conclude that there was defilement. Section 48 of the Evidence Act buttresses the evidence of the expert's opinion.

25. In the premises, the evidence of defilement was not established in light of the above finding by the Clinical Officers. Nonetheless the Appellant attempted to defile the Complainant. In the premises the charge of attempted defilement should have been preferred against the Appellant.

26. The Appellants defence was of no probative value as it did not point out any grudge between him and the Complainant's parents. More importantly he never afforded the respondent an opportunity to have him cross examined. The issues raised in his petition holds no water in the sense that the witnesses who testified against him for instance sufficiently proved the charges against him.

27. For the foregoing reasons, the charge against the appellant is hereby reduced to attempted defilement contrary to Section 9 of the Sexual Offences Act no 3 of 2006. The sentence is equally changed to 10 years' imprisonment from the date herein.

28. Orders accordingly.

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

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H. K. CHEMITEI

JUDGE

30/04/2020