



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 87 OF 2018

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. G. SITATI (RM))

IN CRIMINAL CASE NO. 31 OF 2016

JEREMIAH WANJALA SIMIYU.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of **defilement of a child 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 19th day of February 2016 within Transzoia County intentionally caused your penis to penetrate into the vagina of FSO 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 charge were that **on the 19th day of February 2016 within Transzoia County intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of FSO a child aged 13 years**.
3. The Appellant was convicted and sentence to 20 years' imprisonment hence this appeal. The Appellant has raised several issues and has submitted at length on the same. The Respondent through the learned state counsel has opposed the appeal and file written submissions also. Before looking at the merits or otherwise of the appeal it shall be necessary to summarise the proceedings at the trial court.
4. **PW1 CM** the mother to the Complainant testified that the Complainant had been staying with her mother (grandmother) and schooling at (particulars withheld) primary school in class 6. On the 19th February, 2016 her mother called her by phone and notified her that the Complainant was having stomach pains. She advised her to give her some painkillers.
5. On the 20th February 2016 the Complainant was send by her grandmother and she took her to Kitale hospital as she was still unwell. She was treated but she did not get well and was later admitted and operated on. She identified the Clinical documents from the hospital.
6. The Complainant thereafter explained to them what had happened and this led to the matter being reported at the police station where a P3 form was issued. The Appellant was later arrested from his home after being pointed out by the Complainant.
7. The witness said that she knew the Appellant who was constructing a borehole and a pit latrine for her mother. She said that the Complainant had been threatened by the appellant if she reports the matter to anyone.
8. **PW2 the complainant** testified that she was 12 years old and class 6 pupil at (particulars withheld) primary school. She said that on the 19th day of February 2016 at around 6pm she was coming from school and on the way she saw the Appellant whom she knew. As she passed him, he got hold of her and took her to the nearby bush and removed her clothes as he did so also. He had a knife and he threatened her. He covered her mouth with a rag and he proceeded to defile her.
9. After he was through he left her at the scene and she went home while in great pain and limping. She found her grandmother and she was afraid to tell her as the appellant had warned her not to tell anyone or he would kill her. She told her that she was having stomach pains.
10. Her mother PW1 came the following day and took her to the hospital. She went on to state that she did not reveal to them what had transpired but she only did so when they went to the police post. She said that she knew the Appellant who use to dig boreholes and toilets at their home. She led the police to the appellant's home where he was arrested.

11. She said that she was admitted at Kitale District hospital for four days and she underwent operation. She identified the P3 form and other treatment documents.

12. When cross examined she was categorical that it was the Appellant who had defiled her while she was heading home from school. She said that she did not tell anyone as he had threatened to kill her. She said that at some point at her home the Appellant had seduced her.

13. **PW3 JOHN KOIMA** a Clinical Officer from Kitale District hospital examined the Complainant and filled the P3 form. He relied on the other earlier treatment notes and he concluded that she had been sexually assaulted as there was prove of penetration, hymen was torn and the labial walls were red and tender on touch.

14. He said that she was later admitted and underwent an operation where a litter of blood was expelled from her vagina as she could not pass urine.

15. **PW 4 CPL MOSES WANJALA** from AP post Bikeke received the complaint from PW1. She told her that the child had refused to tell her the perpetrator but after sweet talking her she told him that it was the Appellant who had defiled her.

16. They went to the appellant's house and arrested him in the presence of his wife and handed him over to Kitale police station.

17. **PW5 PC MARY UMANZI** from Kitale police station Gender and Child Protection Unit carried out the investigation, recorded statements from the witnesses and preferred charges against the Appellant. She as well issued the complainant with the p3 form which was later filled at Kitale District hospital.

18. She also had the complainants age assessed and was found to be 13 years old. When cross examined by the Appellant she said that she visited the scene although she did not take any photographs.

19. **PW6 DR. OYIEKE MARY** from Kitale District hospital undertook dental age assessment upon the minor and found that she was about 13 years old. She produced her report as part of the evidence.

20. When placed on his defence the Appellant gave unsworn evidence denying the charge. He said that on the material day at around 6.00 pm he was watering his maize together with his wife. Thereafter he slept and did not go anywhere.

21. On the 24th at around 5.00 am he was arrested and accused of defiling a child. He was taken to the police station. He went on to state that he heard that the Complainant had been defiled by his cousin one Sammy. He said that the complainant and the said Sammy had been watching pornographic materials. He said that the only mistake he had done was working in the homestead.

22. **DW1 PELPHINE MUTENDE** the wife to the appellant said that they were together on the 19th February 2016 up to 7.00 pm watering their maize. She went on to state that he did not leave the house that evening. She said that the rumour in the village was that the Complainant had been defiled by her cousin called S.

ANALYSIS AND DETERMINATION

23. The court as stated above ordered that the matter be disposed by way of written submissions. The parties have indeed complied. Basically the appellant has submitted through his counsel that the real culprit was one Sammy and not his client. He said that had the respondent been keen, he should have been traced and arrested and not the Appellant.

24. He further submitted that the minor was forced to implicate the Appellant noting that it took the intervention of the police to have her reveal the perpetrator. He submitted that the trial court failed to appreciate the alibi raised by the appellant which was cogent in the circumstances.

25. The Respondent on its part supported the conviction and the sentence on the grounds that the ingredients of the offence had been satisfied. It urged the court to dismiss the appeal.

26. The duty of this court is to re-evaluate afresh the evidence as presented during trial and come up with a fresh and an independent finding noting that it did not have the benefit of seeing the witnesses and their demeanour like the trial court. (See **OKENO V. REP. 1973 E. A . 32.**)

27. The three ingredients that must be satisfied in the offence at hand include prove of the Complainants age, the identity of the perpetrator and penetration.

28. In this regard the age of the minor was established by the production of the dental age assessment by the dentist. She was proved to be 13 years.

29. On the question of the identity of the perpetrator, the incident is alleged to have taken place at around 6.00 pm when she was coming from school. There was therefore daylight and thus the minor was able to clearly identify her assailant.

30. There was also sufficient medical evidence of penetration. The minor suffered to the extent that she was admitted for 4 days as she underwent surgery where a litre of blood was drained from her private part. The Clinical Officer as well in his P3 form attested to this.

31. Was the Appellant the assailant? It is admitted that there was no eye witness to the incident. It was therefore the minor's word against the appellant. The incident as indicated occurred around 6.00 pm and thus there was sufficient light. The minor and the appellant were not strangers to each other as the Appellant constructed a borehole and a pit latrine at the Complainant's grandmother. They were therefore generally known to each other.

32. The provision of Section 124 of the Evidence Act come into play in such incidence. The same states that;

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act , where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

33. The court would and should therefore convict if for reasons to be believed the minor is truthful. I have gone through her evidence and I do not find any reason to disbelieve her. Although she was at first unable to explain to her mother what had happened because of the threats from the Appellant she was open to the police because she may have felt secure.

34. Secondly, I find that she graphically described the incident very well including the colour of the rag used by the appellant to gag her mouth which was white as well as the knife which was without a handle. Beside this it appears that the appellant had earlier on attempted to seduce her while she was with her grandmother and the minor abused him back.

35. More importantly, this court does not find any plausible reason why the minor should target the Appellant. There was no reason that the Appellant had any bad blood between himself and the minor's grandmother or her mother for that reason. When cross-examining PW1 there was no hind that there was any bad blood between her and the Appellant or between the Appellant and the minor's grandmother.

36. The issue of blaming one S in my view was an afterthought. The same was never raised during the main trial and the Appellant did not afford the Respondent the opportunity to cross examine him on that issue as he gave unsworn evidence. Although it was raised by his wife as well, the same was simply a rumour as there was nothing which linked the said S to the offence. At best therefore the same was simply a rumour.

37. The Appellant's counsel has raised the question of alibi. Respectfully, I do not see much in it as the appellant simply stated that he was home that evening but nobody cross examined him over the same as he gave unsworn evidence. If he wanted to rely on it in his defence, he should have raised it during trial and more significantly allow the Respondent to cross examine him over the same.

38. In the premises, I find the evidence of the minor consistent and cogent. She clearly identified the attacker. Although she did not disclose him immediately, the threats from the Appellant was enough as this was a person he knew and was in fact working at their home. Being a child of tender age it was clearly understood.

39. This appeal is unmeritorious and the same is hereby dismissed.

Date, signed and delivered via zoom in Kitale this 28th May 2020.

H. K. CHEMITEI

JUDGE

28/5/2020