



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 22 OF 2013

BEING AN APPEAL FROM THE DECISION OF HON J A OWITI PM.

IN CRIMINAL CASE NO. 1155 OF 2011)

JULIUS ROTICH KIBET.....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 offence were that **on the 6th day of March 2012 at [particulars withheld] children's village within Transzoia County intentionally caused his penis to penetrate into the vagina of D. A. T. a child aged 15 years.**
2. The Appellant was convicted and sentence to serve 20 years' imprisonment hence this appeal. The Appellant being dissatisfied with the same has filed this appeal which raises several grounds. When the matter came up for hearing the court ordered that the same be disposed by way of written submissions. The summary of the proceedings at the trial court was as hereunder.
3. **PW1 JOYCE INGATO** stated that she was the children's guardian at [particulars withheld] children's home and she knew the complainant as one of the children at the said home. She said that on the 12/4/2012 during a counselling session she learned that the complainant had been defiled. She told them that the appellant who worked at Moi university had defiled her. They took her to Kitale District hospital where she was examined and the matter reported at Kitale police station. She was issued with a P3 form which was later filled at the same hospital.
4. **PW2 the complainant** testified that she was 15 years old and a class 5 pupil at [particulars withheld] Academy. She said that on the 6th March 2012 she was sent by Grace to get vegetables. She went with Sharon her friend who was younger than her. The appellant then chased Sharon away and remained with her. He was having a panga and he then proceeded to defile her at the vegetable farm. She felt a lot of pain and once the appellant was through he gave her Kshs.20.
5. After leaving the farm she told Sharon what had transpired who reported the matter to one Joyce (PW1) a guardian at the home. She was thereafter escorted to the hospital and later to the police station.
6. **PW3 SHARON ELAITELA** a minor aged 9 years and in class 4 at [particulars withheld] Academy testified that she was in the school farm on 3rd March 2012 with the Complainant. The appellant chased her away and remained in the farm. The Complainant later came and told her that she had been defiled. On cross examination she said that it was her who told Joyce their guardian what transpired.
7. **PW4 A.P.C ISAACK LUVISI** from Emuro police post assisted in arresting the appellant after the matter was reported. He conducted the identification parade before arresting and handing him over to Kitale police station.
8. **PW5 DR. KEN NDEGE** a dentist from Kitale District hospital did dental age assessment on the complainant and concluded that she was aged about 15 years old.
9. **PW 6 P.C. MARY UMASI** from children and gender department Kitale police station carried out the investigation after the incident was reported. She issued the Complainant with the P3 form and recorded the witnesses' statements and had the appellant charged. She said that the incident occurred on the 6/3/2012 but it was reported on 27th April 2012.

10. **PW7 LINUS LIKARE** a clinical officer from Kitale District hospital examined the Complainant and filled the p3. He found that her hymen was torn and old looking. He filled the P3 on the 30th April 2012.

11. When placed on his defence, the Appellant denied the charge and gave sworn evidence. He said that he worked at Moi university Kitale campus and on the 6th March 2012 he was not on duty as it was his off day. He said that while he was working in the kitchen, his work station, some people came accompanied by police officers and he was handcuffed. He was taken to Emuro police post where an identification parade was conducted and he was singled out and accused of defiling the complainant. He denied having been on duty on the material day.

ANALYSIS AND DETERMINATION.

12. The sole duty of this court is to re-evaluate the evidence afresh and come up with an independent finding noting that it did not have the chance of seeing the witnesses like the trial court. **(SEE OKENO V.REP.1972 EA 32)**

13. The court has also perused the submissions by the parties and does not see the need of reproducing them here.

14. The three ingredients of the offence of defilement are clear now, namely the age of the Complainant, the identity of the perpetrator and prove of penetration.

15. The age of the Complainant was proved by the production of the dental age assessment which showed that she was 15 years old.

16. The issue regarding the identity of the perpetrator in my humble view was questionable. I state so because it appears that the matter was reported by the minor to her guardians several days after the incident. As a matter of fact, it was reported by PW3 another minor.

17. This then prompted PW1 and others to take action and reported the matter at Emuro police post. When the officers came they were not sure of the person which necessitated them to conduct an identification parade. They rounded many employees working with the appellant and did their identification which zeroed on the appellant.

18. This form of identification was a charade. The same was to say the least a mockery of the police Standing Orders which gives the guidelines on how an identification parade ought to be conducted. For instance, this was conducted by an officer not permitted to, no parade forms were filled and above all the appellant had already been handcuffed. He was already a marked man and all that the minor did was to simply single him out.

19. The evidence on record by both minors suggest that there were other people at the farm who included some who were burning charcoal. In light of this was it possible that there were other persons involved and that is why there was need to conduct an identification, regardless of its credibility?

20. It appears that the incident though it took place on the 6th March 2012 was only reported about one and half months later. What happened in between? Why did the minor or for that matter her friend report the incident late yet she had in fact been chased away?

21. It was also alleged that the Complainant was given some money and that is the reason why PW1 and other guardians were suspicious. Why was the money not produced as part of the Respondent's evidence?

22. Looking at the evidence of the minor, I do not find her truthful and thus capable of benefitting from the provisions of Section 124 of the Evidence Act which states that;

“There are contradictions as to the identity of the perpetrator and the scene of the incident as well. For example, whereas the rest of the witnesses say that there was a thicket at the farm, she says that it was not there. At the same time, she said that the appellant was armed with a panga, PW2 said that there was nobody with a panga.”

23. On the issue of penetration, the examination was undertaken about two months after the incident. To state that the hymen was torn and old looking does not necessarily meant that she was defiled by the Appellant. She may have engaged herself sexually elsewhere since the period was very long. There was no explanation by the minor why she did not disclose to the guardians what had befallen her for the almost two months after the incident

24. This court in the premises find that the Appellant ought to have been granted a benefit of doubt. The evidence upon him was not cogent enough. He raised a defence of alibi and although he did not pursue much of it, the trial court should have taken into account.

25. In the premises, the appeal is allowed, the appellant set free unless lawfully held.

Dated, signed and delivered via zoom this 28th day of May 2020.

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H. K. CHEMITEI

JUDGE

