



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 7 OF 2020

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. M. KESSE

(SRM) DATED 5TH FEBRUARY 2020 IN CRIMINAL CASE NO. 209 OF 2018)

AMOS KULOKHOMA.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **defilement contrary to Section 8(1) and, (4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the night of **15th November, 2018** at **[Particulars withheld] farm within Trans-Nzoia county intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of SB a child aged 16 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 night of 15th November, 2018** at **[Particulars withheld] farm within Trans-Nzoia County intentionally touched the genital organ namely vagina of S. B. a child aged 16 years with your penis**.
3. The Appellant was convicted and sentence to 10 years' imprisonment hence this appeal. The Appellant in his grounds of appeal has argued that there was no sufficient evidence to prove that there was penetration and or defilement. He alleged that the court did not accord him time to seek legal representation as well as prepare his defence.
4. The summary of the evidence as presented during trial is worth doing at this juncture and thereafter analyse the merits or otherwise of the appeal.
5. **PW1 ANNE KIPTANGEN** testified that she was a Clinical Officer based at Kapsara hospital and that she examined the complainant on 20th November, 2018 with a history of defilement. She found the hymen broken and from the history she concluded that there was sexual engagement. She said that she may have engaged in sex but the accused may have used a condom. She concluded that there was defilement.
6. **PW2 SB** the complainant testified that she was 17 years old and a student at **[Particulars withheld] Secondary School**. She said that on the night of 15th November, 2018 she had gone for an initiation ceremony at her uncle's place where she carried clothes for the initiates. While there the Appellant came and told her that her aunty who was epileptic had fainted and that she should go and see her. They went together using a motorcycle which was ridden by the Appellant. When they arrived at the appellant's house, he locked it and forcefully had sexual intercourse with the Complainant from that date to 17th November, 2018.
7. She said that she left his place on the 17th November, 2018 and went home and explained what had happened. She was taken to Kapsara hospital where she was examined and treated and the P3 form filled. The matter was reported at Kapsara police station.
8. When cross examined she said that she was defiled for a period of two days by the Appellant in his place and that he threatened to kill her if she screamed.
9. **PW3 CB** the mother to the complainant testified that she was born on 3/2/2002. She said that there was a circumcision ceremony at her brother in laws home that particular time and the Complainant had been permitted to go. At around 3.00 am she saw the dogs barking and the Appellant running. PW2 disappeared for three days and she went to report at the chief as well as Nyumba kumi.
10. The Complainant later arrived and she told her that she was at the Appellant's place who had in the process defiled her. She said that she knew the Appellant who was a member of her church.

11. When cross examined she said that the appellant had hid the Complainant at the market and that the Appellant's father had fought her husband. She said that the Appellant was given time but he was not remorseful.

12. **PW4 SWM** testified that PW2 was a daughter to her brother and on the 14th November, 2018 he was conducting an initiation ceremony and the Complainant was to carry his son's clothes. She disappeared at around 3.00 am and all efforts to trace her were fruitless including reporting at the Chief's Office at Makutano. She came on the 17th and told them that she was at the home of the appellant.

13. **PW5 PC ISAAC TOO** from Kapsara police station carried out the investigation after PW3 reported the disappearance of the minor. She later came back on the 18th with her and she said that she was in the house of the Appellant after she took her that night to check on her aunt who had allegedly fainted because of epilepsy. When cross examined he said that they arrested him on 5th December, 2018.

14. When placed on his defence the appellant gave sworn defence and prayed for leniency stating that he did not commit the offence.

ANALYSIS AND DETERMINATION

15. The court has perused the entire proceedings carefully and it is of the opinion that this matter ought to go for retrial at the stage of the defence only before the same court. This is basically for the reason that the appellant as per his submissions may not have had adequate time to prepare for his defence.

16. This is for the simple reason that immediately after being placed on his defence his bond was cancelled and was effectively placed in custody. The following day on 31st January, 2020 he was placed on his defence and further hearing was scheduled for 3rd February, 2020 which was simply a day or so thereafter. Being in custody he may not have prepared himself adequately and further getting his witnesses while in custody was obviously a challenged given that he was given just a day so to speak.

17. Returning the matter to the same court may not prejudice the Appellant noting that this court has not touched on the other issues raised in the appeal. More importantly, being a matter dealing with a minor, it may not be easy to have another court begin this matter *denovo*.

18. In the premises, this appeal succeeds only to the extent that the trials courts judgement is hereby set aside and the matter is reopened for hearing of the defence case **ONLY** afresh.

19. In the meantime, the Appellant shall be released on the same bond terms namely a bond of Kshs. 300,000 with surety of similar amount.

20. This matter be mentioned before the said court on 23rd June, 2020.

Dated, signed and delivered at Kitale via zoom this 16th day of June, 2020.

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H. K .CHEMITEI

JUDGE

16/6/2020