



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO.103 OF 2018

(Being an appeal from the decision of Hon.P. Mutai (SRM) dated 16th November, 2018 in Criminal Case No. 81 of 2018)

BONFACE WANYONYI.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1) and (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 30th day of May, 2018 at [Particulars withheld] area within Transzoia County intentionally caused your penis to penetrate into the vagina of EL a child aged 13 years old.**
2. The alternative charge was **committing indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 30th day of May, 2018 at [Particulars withheld] area within Transzoia County intentionally caused contact between your genital organ namely penis and the genital organ namely vagina of EL a child aged 13 years.**
3. The Appellant was convicted and sentence to serve 20 years' imprisonment hence this appeal. The grounds raised by the Appellant in his appeal are that he was not accorded a fair trial, the evidence as presented by the Respondent was contradictory and that his defence was rejected by the trial court.
4. Before looking at the merits of the appeal or otherwise it shall be imperative at this juncture to summarise the evidence as presented during trial.
5. **PW1** the Complainant testified that she was a class 3 student at [Particulars withheld] and that on the 30th May 2018 at 1pm she left school for home. She was alone at home and she did house chores till around 4.00 pm when she was called by the Appellant who gave her kshs 20 and sent her to the shop to buy some doughnuts. When she arrived he closed the door behind, closed her eyes and her mouth using a sheet and proceeded to defile her on his bed.
6. She said that she could not shout and she was released thereafter and warned by the appellant not to tell anyone. Later her mother arrived home and she smelled some foul smell and she inquired from the complainant who told her what had happened. She was taken to Matunda hospital and later Kitale District hospital. The matter was reported at Kiminini police station.
7. She identified the P3 form as well as her age assessment forms and other treatment notes. She said that the Appellant was their neighbour and she knew him well as a driver as well as his children whom they played together. She further said that the Appellant had defiled her in three other separate occasions.
8. On cross examination the Complainant said that she knew the appellants house as well as her children. She said that she bought doughnuts from Mama Mish. She said that the Appellant was lying on top of her and she felt a lot of pain.
9. **PW2 PETER MASINDE** a Clinical Officer from Kitale County hospital examined PW1 and found that there were lacerations on her labia and a tear on the vaginal wall and foul vaginal discharge. He concluded that there was sexual assault.
10. The witness also produced Dental Age Assessment Report by Dr. Osore which indicated the age of the Complainant to be around 13 years.
11. **PW3 RK** testified that the complainant was her niece and that when she came home from her businesses on the 31st May 2018 she noticed some foul smell from her body. Upon inquiry she explained to her what the appellant had done to her and she took her to Matunda

hospital for treatment. She was later referred to Kitale county hospital where a p3 form which had been issued by Kiminini police station was also filled. Age assessment was as well undertaken. She said that the appellant was her neighbour whom they had stayed together for one year.

12. On cross examination she said that the appellant was a neighbour and they did not have any issues or dispute at all.

13. **PW4 CORP. PAUL KARANJA** from Kitale police station carried out the investigation after the Appellant was handed over by Kiminini police post. He recorded statements from the witnesses and preferred charges against the Appellant. He also had the Complainant undergo age assessment.

14. When placed on his defence the Appellant gave sworn evidence denying the charge. He confirmed that PW1 was his neighbour for over one year. He said that he was at the hospital on 30th May 2018 and he therefore did not know what transpired. He produced some medical documents to show that he was unwell from 17th May, 2018 till 30th May 2018.

15. On 1st June 2018, Kenya Police Reservist came to his place and told him that he was required at the police station. They boarded the motorcycle up to the station where he was told that he had defiled the minor. He denied and was placed at the cells and later charged. The appellant produced a set of photos showing the extent of his neighbourliness with the Complainant.

16. He denied that he sent the minor to the shop and that he has had a boundary dispute between the minor's mother and that he was impotent and sickly. He said that he was suffering from cancer and has had two operations.

ANALYSIS AND DETERMINATION

17. The court ordered that this appeal be disposed by way of written submissions. The Appellant lengthy submissions have been read by the court as well as the grounds of appeal earlier indicated above.

18. The duty of this court at this juncture was well captured in the case of **OKENO V.REP.1973 E.A** at page 32 where the court stated inter alia that;

19. The three ingredients of the offence at hand are that the age of the victim must be established, penetration, and the identity of the perpetrator.

20. In this regard the age of the minor was established by the production of the Dental Age Assessment Report which showed that she was aged 13 years old although initially she said she was 10 years old.

21. On the question of penetration, it was the evidence of the minor that she was indeed defiled and her mother noticed so when she arrived home. The evidence of PW2, the Clinical Officer as per the P3 form he produced found that there was laceration on the vagina wall which was fresh looking, tenderness external genitalia with some blood and foul smell which in his conclusion found that she had been defiled. Although the minor testified that this was not the first time the Appellant had defiled her the Clinical Officer however stated that it was not possible to estimate the number of times she had been defiled.

22. Was the Appellant the perpetrator? It is clear that there was no eye witness to the incident and therefore it was the evidence of the minor against the Appellant's defence. In such a situation the court is called to reach a verdict if it believes that the victim was truthful. See Section 124 of the Evidence Act.

23. The scrutiny of the minor's evidence showed that she knew the appellant very well. Later in his defence, the Appellant when cross examined stated that he was now at home having been a driver. This was as well the position taken by PW1. At the same time the Complainant was able to describe the Appellant's house at that particular occasion. She went on to state that;

“... he was lying on top of me. He took me inside his house. there was new sofa set, basin under the water. The room has a bedroom...”

24. The minor was well aware of the environment. It is difficult to conclude that she may have been defiled elsewhere as the period between the defilement and the finding by her mother was very close. She was taken to the hospital thereafter and there was a finding that she had been defiled.

25. Could she have been defiled elsewhere? There is no evidence to suggest that she went to any other house or came into any contact with other male. When questioned about her friends she said that most of her friends were girls.

26. The appellant raised a very interesting defence concerning his health and the boundary dispute between him and the minor's mother. First of all, on the issue of boundary the same was never raised when PW3 was being cross examined. The same can thus be concluded as an afterthought.

27. Secondly on the issue of the medical situation of the Appellant, the same was only raised during defence. All along he was aware that he was unwell but chose to keep quiet during trial. He did not produce the documents when the Respondent's witnesses were testifying especially the Clinical Officer. This alibi would have been appropriate if it had been raised during the trial and not after the Respondent had closed its case.

28. At any rate whether he was impotent or was suffering from any urinary disease does not in any way absolve him from the offence. There was no medical evidence that by virtue of the said illness he was incapable of committing defilement. There was no evidence that he was admitted in any medical facility during the period of the incident.

29. Consequently, I find the evidence of the minor truthful. She was lured by the Appellant into his house after sending her to buy doughnuts. He took advantage of the absence of her niece that afternoon.

30. It is therefore not true that the Appellant was not accorded a fair trial as he was represented by a counsel all through who was able to conduct the trial on his behalf successfully.

31. Contrary to the Appellant's submissions there was nothing to show that the respondents witnesses contradicted themselves or at all.

32. This court has stated as much to show that the appeal is unmeritorious and the same is hereby dismissed.

33. On the question of sentence, the court finds that the period meted by the trial court was lawful. However, considering the status and age of the appellant and his health, this court shall require a medical report from a recognised government facility to consider whether it may interfere with the same or not. This direction is necessary considering other pronouncements by this court pursuant to the Supreme Court of Kenya decision in the now famous case of **FRANCIS MURUATETU & ANOTHER VERSES REPUBLIC**.

34. This matter be mentioned on the 30th day of June 2020.

35. The appeal is otherwise dismissed.

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

H. K. CHEMITEI

JUDGE

16/6/2020