



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 58 OF 2018

(Being an appeal from the Judgement of Hon. P. Biwott dated 16th July 2018

in Criminal Case No. 120 of 2017)

BEN MOMANYI MOKAYA.....APPELLANT

VERSES

REPUBLIC.....DEFENDANT

JUDGEMENT

1. The Appellant was charged with the offence of **defilement contrary to Section 5(i) and (ii) as read with subsection (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 5th day of October 2017 within Transzoia County intentionally caused part of your body namely fingers to penetrate the genital organ namely vagina of ANM a child aged 7 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 offence were that **on the 5th day of October 2017 within Transzoia County intentionally touched the vagina of ANM a child aged 7 years**.
3. The Appellant denied the charge but after a full trial he was convicted and sentence to 10 years' imprisonment hence this appeal. The summary of the facts is clear and straightforward.
4. **PW1** the Complainant testified that she was 7 years old and a class 2 pupil at [Particulars Withheld] primary school. She said that she was heading home on 5th October 2017 with her friend PW2 when a man who was weeding a farm offered to take them through a shortcut. He then told PW2 to wait and carried her further where he proceeded to undress her and inserted his finger into the vagina. He told her to keep it secret and was released. She went home and informed her mother who took her to the hospital.
5. When cross examined she said that the Appellant closed her mouth and that she bled from her virgina.
6. **PW2 AN** aged 8 years testified that they came with PW1 from school at around 2.00 pm on the material day. The Appellant told them to go through a shortcut on their way home. He then took PW1 aside and told her to walk ahead. She went and told her grandmother that the Appellant had chased them. She also said that PW1 had told her what the Appellant had done to her.
7. **PW3 PN** testified that she was an aunt to PW1 and that when she arrived home from school she noticed that she was not walking well and she told her that her shoe was pinching her. As she washed her in the evening she noticed white vaginal discharge and she told her what the Appellant had done. She informed her mum who took up the matter with her teacher.
8. She was taken to the hospital the following day and the matter reported at the police station and the P3 Form was also filled. She said that the children identified the Appellant.
9. **PW4 ALBERT MATIRO MASIGA** a teacher at [Particulars Withheld] primary school testified that he received a phone call from one LM a parent in their school concerning the incident. He went on to state that he was told that the incident occurred during the night. They had the matter reported at the police station.
10. **PW5 DR PETER AGAME** from Kapsara hospital examined the Complainant and filled the P3 Form. He found no bruises or bleeding in her vagina. Her hymen was absent. There was vaginal discharge. The lost hymen was recent.

11. **PW6 PC DOUGLAS NAIBEI** from Kapsara Patrol Base carried out the investigation when the matter was reported through the head teacher [Particulars Withheld] primary school. He recorded the statements from the witnesses. They visited the scene with other police officers. They arrested the Appellant whom the children identified at the hospital. He said that he saw the area where the defilement took place which showed the grass being interfered.

12. When placed on his defence, the Appellant gave unsworn evidence denying the charge. He said that on 6th October 2017 he was with his wife and thereafter went to fetch water for his boss using a wheel barrow and thereafter some police officers came and arrested him with one Kalewa. He was paraded before the children but went ahead and preferred charges against him.

ANALYSIS AND DETERMINATION.

13. The court has perused the entire proceedings, as well as the submissions by the parties. This court is inclined to allow this appeal for the reason that the entire thread of the Respondent evidence was completely inconsistent. The age of the minor was proved by the production of the certificate of birth.

14. The identification of the perpetrator which is a key component was suspect. The Complainant said that the assailant was weeding his farm and was wearing a red cap. How many people wore red caps? Certainly so many. The proper way was to conduct an identification parade noting that the children were too young in the circumstances.

15. The major inconsistency though is the evidence of the minor who said that she bled from her vagina. This was not corroborated at all by the medical examination. More importantly she told her aunt that her shoe was pinching her only for her to discover that there was some injury to her private parts.

16. PW2 testified that she informed her grandmother that they were chased by the Appellant. This was simply plucked from the air as nowhere did pw1 said that they were chased by the Appellant. On the contrary she said that they were shown a shortcut route by the appellant.

17. PW 4 on the other hand said that the Complainant's mother told him that the incident took place at night. On the other hand, the minors agree that it took place at 2.00 pm while coming from school. He went on to state that;

“she told us was heading home when a man weeding showed her and another a short cut. That one child was taken by suspect and the other escaped.”

18. This line of evidence never came from the complainant nor PW2 at all. On cross examination pw4 went on to state that; ***“the children said were showing them a short cut home. It was going opposite their home. You misled them. I visited the scene. You were new in the area. The children did not know your name. They implicated you.”***

19. Looking at the above evidence, it is clear that he was simply exaggerating or giving a version of his own. None of the minors said that the Appellant took them through a wrong route away from home. The same testimony lance credence to the fact that there ought to have been a parade conducted to identify the assailant.

20. The evidence by the investigating officer on the other hand seemed to suggest that the child was laid down and defiled. He said, ***“ they narrated it and took me to the scene. I entered Rubais farm. I saw the area where defilement took place. The grass looked interfered with.”***

21. This leaves a lot of questions on the nature of defilement. If the grass was disturbed, does it mean that the assailant laid her down? That line of evidence was not tendered by the minor. Secondly if she was undressed what extent was the undressing?

22. For the above inconsistencies, this court finds that the entire case was poorly investigated. All that the Respondent did was to throw pieces of evidence to the court for it to piece them together. The said evidence was not sufficient to have sustained a conviction.

23. The appeal is hereby allowed, the Appellant set free unless lawfully held.

Dated, Signed and Delivered at Kitale this 29th day of October 2020.

H. K. CHEMITEI

JUDGE

29/10/2020