



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 30 OF 2019

(being an appeal from the judgement of Hon. V

Wandera (CM) in criminal case No.64 of 2017)

MAURICE WANDILI NAKITARE.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

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 24th day of January 2017 at [Particulars withheld] estate Kitale within Trans-Nzoia County intentionally caused his penis to penetrate the into the vagina of GNB a child aged 13 years old.**
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 offence were that **on the 24th day of January 2017 at [Particulars withheld] Estate within Trans-Nzoia County intentionally caused contact between your genital organ namely penis and the vagina of GNB a child aged 13 years.**
3. The Appellant denied the charge and the matter went to full trial where he was convicted and sentence to serve 20 years' imprisonment hence this appeal. Before looking at the grounds of appeal raised by the Applicant it shall be necessary to summarise the evidence and facts as presented during trial.
4. **PW1 KIRWA LABATT** a Clinical Officer from the Kitale County Referral hospital examined the Complainant on 24th May 2017 and found that her genitalia were normal, the hymen was broken and old looking and there were no bruises. He concluded that there was no evidence of penetration.
5. **PW2 GNB** the Complainant testified that she was a class 3 pupil at [Particulars withheld] primary school. She said that on the 24th February 2017 at around 1.00 pm she came back from school and after changing her uniform she went outside. The appellant then pulled her inside his house and she felt into a pit as in the process. The appellant left her when she felt into the said pit and went to wash a sufuria.
6. The Appellant then cooked some ugali and some vegetables and gave her to eat. After they finished eating the Appellant closed the door from inside then proceeded to defile the minor. He placed his hand on her mouth so as to stop her from screaming.
7. The Appellant after he was done then opened the door and let her go but told her not to tell anybody. Her mother arrived at 4pm and she did not tell her. She went on to state that she sustained injuries on her waist and on the knee. Later her pastor's wife asked her what had happened and she told her everything. She said that the appellant had defiled her 10 times on different occasions and all were in his house.
8. She said that the appellant at some point wanted to cut her using a panga. Later she was taken to the hospital where she was treated and age assessment done and the P3 form filled.
9. When cross examined by the Appellant she said that she sustained injuries on her legs and waist and that she felt pain while urinating.
10. **PW3 ES** the mother to the Complainant testified that on the 24th April 2017 she was following her son B who she had gone to a posho mill but since there was no power she advised him to go to another posho mill. As she approached her house when coming back she saw the Appellant coming out of his house and attempted to talk to her but she did not respond as she was in a hurry. While there she saw the Complainant coming out of the Appellant's house and was crying. She followed her and found her sitting on the bed, holding her knee and bending down.

11. They went to a fellowship and the Complainant walked ahead of her. She noticed that she walked with her legs parted. She inquired from her what had happened but she did not tell her. When her husband came back in the evening he interrogated the minor who owned up and promised never to repeat.

12. The minor later opened up to the pastor's wife and told her what the Appellant had done to her. She was then taken to the hospital and a P3 form from the police station filled as well as age assessment undertaken.

13. She said that the Appellant worked together with her husband as security officers or watchmen at the Winners Chapel church.

14. When cross examined she insisted that the child came out of the Appellant's house rear door and that she did not conspire to have him sacked.

15. **PW4 TBS** the father to the Complainant testified that they worked together as watchmen with the Appellant. He said that on the 24th February 2017 after returning from his work he found PW1 not happy and she told him that she had a headache. She bought her some painkiller tablet. He suspected that she was not normal.

16. The following day he requested her teacher to interrogate her but after one month her teacher told him that there was nothing forthcoming. He started carrying out investigations with his wife after finding on 24th April 2017 that she was not joyful. On 2nd May 2017 she informed the pastors wife what the Appellant had done to her. Acting on this information he took her to the hospital on 3rd May 2017. He also had the matter reported at the police station where he was issued with a p3 form.

17. **PW5 JACKLINE MUTHONI MUENDA** testified that on 25th April 2017 PW2 went to her and told her that the Complainant had been defiled. She interviewed her and she told her how the Appellant had defiled her in his house. The child was very timid as the Appellant had threatened her with a panga.

18. She told her husband who was the church pastor and a church disciplinary committee met and interrogated the appellant. Minutes of the meeting held on 7th May 2017 were kept. She said that the Appellant and the family of PW3 were staying together in the same compound.

19. **PW6 PHARIS SILALI** a Dental Officer from the County Referral hospital examined the Complainant and carried out a Dental Age Assessment and concluded that she was about 13 years old. He produced his report as part of the exhibits.

20. **PW7 PETER CHENGWONYI MNOIBEI** a part time pastor and a retired teacher testified that they received a report concerning the incident. Both the appellant and PW3 worked for the church as watchmen. He said that they sacked the appellant and left PW3 to move forward the Complaint.

21. **PW8 PC CHARLES NJIRU** from Kitale police station took over the matter from P. C. Kwatenge who had retired and who had recorded witness statements and preferred charges against the Appellant. He had also issued a P3 form to the Complainant.

22. When placed on his defence the Appellant gave sworn evidence denying the charge. He said that the whole issue was fabricated by PW3 so that he could be sacked. That there was the issue of his family which the pastor's wife did not approve them staying within the compound as they did not attend her church.

23. He further testified that the pastor's wife did not like him as she claimed that he had spread bad propaganda against the church. He denied that he committed the offence.

ANALYSIS AND DETERMINATION.

24. The court has perused the grounds of appeal by the appellant which centres on the fact that the Respondent's evidence was not sufficient to have convicted him as the minor's evidence was not corroborated. The parties have filed submissions which the court has equally perused.

25. The duty of this court was well explained in the case of **Okeno Verses Rep. (1973) E. A. 32**, which state that;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.

26. There are three ingredients of this offence which must be proved namely the age of the Complainant, the identity of the perpetrator and penetration.

27. The age of PW1 was proved to be 13 years' courtesy of the Dental Age Assessment report produced.

28. As to the identity of the assailant, both the minor and the Appellant lived together in the same compound and there was no doubt that they were people who knew each other. At the same time the minor stated that the incident took place during the day at around 1.00 pm.

There was thus sufficient lighting.

29. The evidence by PW1 the clinical officer was very clear, namely that when he examined her there was no evidence of penetration. The hymen was torn and old looking. There were no bruises on the labia either and there was no vaginal discharge.

30. This therefore left the court to base its conclusion on the evidence of the minor as there was no eye witness to the incident. Section 124 of the Evidence Act Cap 80 Laws of Kenya provides as follows especially the proviso thereof;

“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.”

31. Was the evidence of the minor believable and watertight? Looking at the entire spectra of the Respondent’s evidence I do not find that she was believable for the following reasons.

32. First of all, it is not true that she reported the incident on the 24th February 2017. That evidence is contradicted by the evidence of PW2 her mother who said that she noticed the minor walking badly on the 24th April 2017. She said that the minor did not disclose to her what had happened but she did disclose to her pastor’s wife PW 5.

33. Nowhere is it indicated that the minor was taken to the hospital on the 24th February 2017. So what happened on that day? Why did she not inform her parents yet she had even injured her leg and her waist.

34. PW4 her father did not help things either as he spoke of two dates namely 24th February 2017 and 24th April 2017. So when did the defilement occur? Even if they were 10 times as the minor wanted the court to believe which dates specifically?

35. Why at the same time did the Clinical Officer failed to find any evidence of defilement if indeed she was defiled 10 times. This was a minor and such sexual encounters for that short period of time cannot go unnoticed.

36. It is also instructive to note that it is only the minors father pw4 that saw the child crying and holding her stomach. That evidence did not come from her nor her mother.

37. On the same note PW3 said that she saw the minor coming out of the rear door of the appellant’s house. That evidence was from her and not the child. At no time did the minor said that her mother saw her coming out the Appellant’s house.

38. The Appellant defence appears plausible in my view. The minor’s parents, the pastor’s wife as well as PW7 did not deny that there were some differences to do with his place of work and the residence. The Appellant had already been sacked it appears.

39. The trial court for the fact that the minors evidence was not believable and not adding up ought to have handed the Appellant the benefit of doubt. This court in the premises allows the appeal, set the Appellant free unless lawfully held.

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

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H. K. CHEMITEI

JUDGE.

29/10/2020