



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 121 OF 2012

(Being an appeal from the judgement of hon. J. M. Nangea (SPM) dated 6th November 2012 in Criminal Case No. 1292 of 2011.

MESHACK SIMIYU MUKOLWE.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant and his co accused at the lower court had been charged with the offence of **benefiting from child prostitution contrary to Section 15(f) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the diverse dates between 17th April, 2010 at 11.30 am and on the 24th day of April, 2010 at 12.00 hours at [Particulars withheld] Prison farm in Kitale in Trans-Nzoia West District within Rift Valley Province intentionally owned a house that was used for the purpose of the commission of defilement against MN a child aged 15 years by MESHACK SIMIYU MUKOLWE.**

2. The second count was **defilement of a child 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 diverse dates between the 17th day of April 2010 at 11.30 am and on 24th April, 2010 at 12 noon at [Particulars withheld] Farm prison in Kitale in Trans-Nzoia west district of the rift valley province intentionally caused his penis to penetrate the vagina of MN a child aged 15 years.**

3. The matter has had a long history as it has moved from this court to the Court of Appeal and the said court referred the same for rehearing. His co accused who was a prison warder was acquitted by the trial court of the 1st count. The Appellant was convicted of the 2nd count and sentenced to 20 year's imprisonment.

4. The Appellant was a convict and he had risen to a position of a trustee. It was alleged that he was a friend to his co accused who was a prison warder and lived within the prison quarters. In the process and through the friendship with his co accused he befriended the complainant who was living in her step parents' home and who were prison warders as well.

5. The Appellant through the co accused and while in the latter's house defiled the minor twice. She said that she was given Kshs.100.

6. PW2 the step mother to the minor was informed by PW3 and she inquired from the minor. She first of all denied but later admitted. The matter was reported at the prisons offices and the minor taken to Kitale District hospital for examination.

7. The Clinical Officer PW6 Kirwa Labatt found that her hymen was broken and old looking and the pregnancy test was negative.

8. When placed on his defence, the appellant denied the charge arguing that he carried on with his duties on 17th April 2010 and 24th April 2010. He said that the prisoners were not allowed into the staff houses.

ANALYSIS AND DETERMINATION.

9. The court has perused the entire proceedings herein and is inclined to allow this appeal for the following reasons.

10. First of all, the minor's evidence was full of contradictions and therefore not believable. Throughout her evidence she admitted that she had forgotten some issues or had contradicted herself. She was not able to explain the scene of the incident which raised a lot of doubt if she had indeed been defiled by the appellant.

11. The minor admitted that she had earlier on had other sexual escapades and this was not the only one. This brings in the question of the pregnancy which for some reason the clinical officer was not able to detect during examination.

12. In view of the past conduct of the minor was it possible that the pregnancy belonged to someone else and not the appellant? What about the Appellant's co accused? If he was able to procure the minor on behalf of his co - accused what of himself?

13. This is a case where a DNA ought to have been undertaken. With the character of the minor, there was possibility that she may have had other sexual intercourse with other men and not necessarily with the Appellant.

14. What is baffling as well is the fact that the trial court acquitted the Appellants co accused of the charge yet it went ahead to find the Appellant guilty yet the crime was done in his prison quarters house. If the Appellant was guilty, then the co accused should as well been guilty of procuring the minor. He should not have escaped the offence.

15. For the above reason this appeal must succeed, the Appellant is set free unless lawfully held.

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

H. K. CHEMITEI

JUDGE

29/10/2020