



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 19 OF 2019

(Being an appeal from the decision of Hon. P. Mutai

(SRM) dated 22nd February 2019 in criminal case no.75 of 2018)

ROBERT SITUMA WANGILA.....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 diverse dates between 1st April 2018 and 17th May 2018 within Trans Nzoia County intentionally caused your penis to penetrate into the vagina of CDK a child aged 15 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 offence were that **on diverse dates between 1st April 2018 and 17th May 2018 within Transzoia County intentionally caused the conduct between your genital organ namely penis and the genital organ namely vagina of CDK a child aged 15 years**.
3. After a full trial the Appellant was convicted and sentence to 15 years' imprisonment hence this appeal. In his grounds of appeal, the Appellant has generally attacked the evidence as presented during trial arguing that the same was not sufficient to have sustained the charge. He said that the entire defence evidence was contradictory.
4. The court ordered this matter to be disposed by way of written submissions which the parties have complied. It is however at this juncture appropriate to summarise the evidence and facts as presented during trial and thereafter make an analysis and determination.
5. **PW1** the Complainant testified that she was aged 15 years having been born on 30th December 2002. She said that she has been having relationship with the Appellant who is her neighbour from April 2018. The Appellant who had a motorcycle would even give her a lift and promised to buy her a phone as well as some money.
6. During the same period the appellant while his wife was away took the Complainant to his house where he proceeded to defile her. She said that she felt pain but he restrained her from screaming. That incident occurred at night but was able to recognise him as there was a kerosene lamp.
7. In May 2018 the Appellant again met her when she had been chased home from school to get school fees. He told her to take a shortcut route where he met and defile her inside a bush. She said that they were standing. Apparently her brother saw them in the act and went to inform her parents.
8. When she arrived home her parents inquired and she told them the truth. They went and asked the Appellant who was running his shop but he denied. The matter was reported at the police station and the Appellant was arrested. The Complainant was taken to the hospital where she was examined, treated and a P3 Form filled.
9. When cross examined she said that the appellant pestered her for two months and that she knew his wife because she would assist her with some chores. By that time, the Appellant's wife was expectant and had gone to Kiminini to visit her aunt.
10. **PW2 JK** the brother of PW1 testified that she was 12 years old and in class 5 at [Particulars Withheld] primary school. That on May 2018 at around 5.30 pm he was coming from school and he noticed a man standing inside a bush. On moving closer, he noticed that it was the Appellant and he had removed his trouser. Standing with her was her sister who had also pulled her skirt. They did not see him.

11. He went home and informed her parents what he had seen. PW1 was interrogated and she admitted and the matter reported at the police station. He said that he knew the Appellant since he had moved to that place recently and he used to carry her sister using his motorbike.
12. On cross examination he said that he saw the Appellant lying on top of PW1 and that he had a good view of them.
13. **PW3 BN**, the mother to PW1 testified that the Complainant came home and told her that school fees was required and she left home to look for the money. When she came back in the evening PW2 told her that he had seen the Appellant and the Complainant inside the bush. When her husband came she informed him as well and they went with the girl to the Appellant's shop. He denied but earlier on she had seen the two in a compromising situation and had warned the Appellant.
14. They reported the matter at the police station and the Appellant was arrested. The following day she was taken to the hospital for examination where the P3 form was as well filled. She said that she had known the Appellant for about three months and had even warned him on three occasions.
15. On cross examination she said that she knew the Appellant as her neighbour and that they had no business dealings.
16. **PW4 MK** the father to pw1 testified that he was informed by PW2 on 17 May 2018 of the incident. He went with pw1 to the Appellant's shop but he denied any relationship with her. He reported the matter at the AP camp whose officers came and arrested the Appellant. The following day he took her to the hospital where examination was carried out and P3 form filed.
17. On cross examination he said that he had known the Appellant for about three months but had never seen him with his daughter. He denied owing the Appellant any money nor having any business dealings.
18. **PW5 LINUS LIGARE** a Clinical Officer from Kitale County Referral hospital produced the P3 form as well as treatment notes on behalf of the late Kirwa Labatt who had examined the minor and found her torn old looking hymen and some whitish discharge from her private parts. He concluded that there was penetration.
19. On cross examination he said that he did not notice any bruises and that she must have engaged in sexual affairs on several occasions.
20. **PW6 P.C. LINET OMWAMBA** from Kitale police station gender office testified on behalf of her transferred colleague P. C. Nolari who carried out the investigations. He recorded statements from the witnesses and preferred charges against the appellant. She also produced the birth certificate of the Complainant.
21. When placed on his defence, the appellant gave unsworn evidence denying the charge. He explained how police officers came to his place on 13th May 2018 and picked him without any reason. He was taken to Kitale police station where he was charged with an offence which was strange to him.

22. He said that he knew the Complainant's father whom he had given some bus fare to go to Nairobi and he had failed to pay him. He said that the charges were framed against him.

ANALYSIS AND DETERMINATION

23. The duty of this court at this juncture is to re-evaluate the evidence afresh and come up with an independent finding noting that the court did not have opportunity to see the witnesses and their demeanour. See **OKENO VS. REP. (1973) E. A 32**.
24. The three ingredients necessary to prove the offence of defilement are now clear namely, the age of the victim, the identity of the perpetrator and whether penetration occurred.
25. In this matter the age of the Complainant was proved through the production of the certificate of birth as well as the oral evidence of her parents. This was not contested.
26. As to the identity of the perpetrator, the evidence of the minor was that the incident took place on three occasions. The minor zeroed on the Appellant who was a neighbour and a shopkeeper as well. She seemed to have known him very well as she said that she would help his wife with some chores. In other words, she knew his family.
27. The last incident took place at around 5.30 pm which was still daytime and PW2 was able to see them. There was therefore sufficient time for the Complainant to see the Appellant.
28. Was there penetration? The answer to this as rightly found by the trial court was positive. Although in the other earlier two occasions nobody else witnessed, the last occasion was witnessed by PW2 the Complainant's younger brother as he came from school. When she was taken the following day to the hospital the Clinical Officer found that there was recent penetration as he was able to see recent vaginal discharge. Although the hymen was torn and old looking the clinician was able to hold that there was penetration and she had engaged herself sexually before.
29. In any case the examination was done the following day which in essence the evidence was still fresh.
30. The defence by the appellant was of no probative value as it was unsworn and therefore he could not be cross examined. Although he said that the Complainant's father was indebted to him and thus he was framed, that issue should have been challenged by way of cross

examination.

31. The court finds that the case was proved beyond any shadow of doubt. The Appellant decided to befriend the Complainant who was within his knowledge a school going child. He actually betrayed the trust she had with her family. He took advantage of the absence of his wife to defile her.

32. This appeal is therefore unmeritorious and the same is hereby dismissed.

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

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H. K. CHEMITEI

JUDGE

29/10/2020