



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 132 OF 2011

(Being an appeal from the Judgement of Hon. T. Odera (SRM) dated 6th September 2011)

WYCLIFFE WANYONYI NYONGESA.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **defilement of a child contrary to Section 8 (1) and 3 of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that **on diverse dates between 31st March 2010 and 16th July 2010 at [Particulars withheld] centre in kwanza District within Rift valley province intentionally caused his penis to penetrate into the vagina of MN 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 charge are **on diverse dates between 31st March 2010 and 16th July 2010 at [Particulars withheld] farm in kwanza District within Rift Valley province, he intentionally touched the vagina of MNG a child aged 15 years old.**
3. The Appellant after conviction was sentence to 20 years' imprisonment. His appeal to this court was dismissed. He appealed to the Court of Appeal which ordered the rehearing of his appeal for want of jurisdiction in the first appeal to this court.
4. The evidence as presented during hearing were that **PW1** the Complainant testified that she was 16 years old and that she had eloped with the Appellant after being chased away by her father. They lived as husband and wife for a period of one month. Both of them were arrested and taken to the police station.
5. Later both were examined and P3 forms filled. She said on cross examination that the Appellant had spoken to her parents before he was arrested.
6. **PW2 SN**, the mother to the Complainant testified that the Complainant was born on 5th May 1995. That she disappeared and she found her after a week in the house of the Appellant. They reported the matter at Endebbes police station and the Appellant was arrested. She then took the Complainant to the hospital. She said that they stayed together from April to July 2010.
7. **PW3 PG** the father to the Complainant said that she run away from home from March to July 2010. He was told by a friend that she was at the Appellant's house and they reported the matter to the police and both of them were arrested.
8. **PW4 INSPECTOR SAMUEL KOGO** carried out the investigations and preferred charges against the appellant. He also produced the age assessment report indicating that she was 15 years old. He also recorded witness statements.
9. **PW5 LINUS LIGARE** a clinical officer from Kitale District hospital produced the P3 forms for both the Complainant and the Appellant whom he had examined. He concluded that the case was one of early marriage. The hymen was old looking and torn. The other tests were negative.
10. When placed on his defence the Appellant gave unsworn evidence denying the charge. He narrated how he met one police officer Rosemary Omolo who went with him and picked a girl. She told him to take her to the police station where he was arrested and locked in the cells. Later he was taken to the hospital for examination with the girl.

ANALYSIS AND DETERMINATION

11. The court ordered the parties to file written submissions which they have complied. The ingredients of the offence are now clear, namely prove of penetration, age of the victim and identity of the perpetrator.
12. The grounds raised by the Appellant in the appeal are general in nature and are general attack on the veracity of the Respondent's evidence. He says that the same were contradictory in nature and incapable of conviction.
13. The age of the minor was proved by the production of the age assessment report which was not disputed. She was around 15 years old although she said that she was 16 years at the time of testifying.
14. On the identity of the perpetrator, this court is satisfied that the Appellant was well identified having been with the minor for close to three months. The court does not find any evidence suggesting that the minor may have exaggerated her stay with the Appellant.
15. On the issue of penetration, it is evident that the two had been staying as husband and wife. Obviously and as found out by the Medical Officer, she engaged herself in sexual intercourse with the Appellant.
16. The defence by the Appellant does not stand for the reason that it was unsworn and even then it was not convincing.
17. The appeal is hereby dismissed.
18. Taking however the Supreme Court of Kenya decision in the now famous **Muruatetu case, Petition number 15 of 2016**, and the reasoning by the Court of Appeal in **Dismas Wafula Kilwake 2018 e KLR**, in which the court stated that;

“The provisions under section 8 of the Sexual Offences Act are indicative of the seriousness with which the legislature and the society take the offence of defilement and thus in appropriate cases, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by statute to impose the prescribed sentence if the circumstances of the case at hand do not demand it.”

19. This court is mindful of the period the Appellant has been in custody from July 2010 to date. The period he has served in jail after the sentencing is equally taken into consideration. He must have learned sufficient lifelong lesson. By the time he was arrested he was about 19 years old.
20. The Appellant is hereby set free unless lawfully held.

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

H. K. CHEMITEI

JUDGE

29/10/2020