



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO 44 OF 2018**

*(Being an appeal from the judgement of Hon. C. C. Kipkorir in criminal case No. 2456 of 2013 delivered on 24th day of November 2014)*

**PETER KIBOI CHEPTANGAT.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**BETWEEN**

**REPUBLIC.....PROSECUTION**

**VERSES**

**PETER KIBOI CHEPTANGAT.....ACCUSED**

**JUDGEMENT**

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 25<sup>th</sup> day of September 2013 within Trans Nzoia County intentionally caused his penis to penetrate into the vagina of MWK 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 the 25<sup>th</sup> day of September 2013 within Trans-Nzoia County intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of MWK a child aged 15 years**.
3. After a full trial the Appellant was convicted and sentenced to 20 years' imprisonment hence this appeal. In his grounds of appeal, the Appellant has challenged the fact that the trial court did not consider the age of the Complainant, the case was not proved beyond a shadow of doubt, and that the court did not consider his defence and thus shifted the burden to him.
4. When the matter came up for hearing the court directed the parties to file written submissions which they did and the court has perused the same. Before looking at the merits or otherwise of the appeal it shall be necessary to summarise the evidence as presented during trial.
5. **PW1** the complainant testified that she was a class seven pupil at [Particulars Withheld] primary school and she was 15 years old although she could not recall her date of birth sometimes in 1998. She said that on the material day she was heading home from school with her friend one F whom she left on her way and proceeded ahead. On the way she decided to take a shortcut through a maize field.
6. She went on to state that on the way she met the Appellant who was armed with a panga, metal bar, a rungu and a torch. He also had a small beer bottle. He told her that there was no through way and he threatened her. She apologised and the Appellant decided to let her pass through as he showed her the way.
7. The Appellant in the process forcefully blocked her mouth using her hand and removed her undergarments and proceeded to defile her. In the process she managed to escape and ran away up to her home where she informed her mother what had happened. She examined her and informed her uncle one C who reported the matter to the village elder.
8. The village elder called the police who organised for the arrest of the Appellant using the Police Reservist (KPR). The Appellant was arrested and she identified him to the police. She was brought to Kitale police station and thereafter taken to Kitale District hospital where she was examined and treated. A P3 form was filled and age assessment undertaken.

9. When cross examined by the Appellant she said that they met next to the bridge and that she was not with any other boy inside the maize farm.
10. **PW2 MW**, the Complainant's mother testified that PW1 arrived home late from school at around 8.00 pm. She told her that she had been raped by the Appellant who was at [Particulars Withheld] farm. She checked her and found some bloodstains on her skirt and her pant. She called his brother PC who in turn notified the village elder. They went to Kisawai police station where the police went searching for the Appellant at [Particulars Withheld] Farm.
11. They brought the Appellant and escorted him to Kitale Police station. She also went with PW1 to Kitale District hospital where she was treated and the P3 form filled.
12. **PW3 MARY CHESANG** is the village elder at Kisawai. She said that on the 25<sup>th</sup> September 2013 at around 8.00 pm she received a phone call from PC concerning the incident. She advised them to bring the girl to Kisawai where they proceeded to the police station and had the matter reported.
13. The police and the Complainant proceeded to [Particulars Withheld] farm as she remained at the station with PW2. The police came with the appellant who was having a panga and beer. She said that she did not know her. He was then escorted to Kitale police station and the child taken to the District hospital.
14. On cross examination she said that the Appellant was not taken to the hospital although the police examined his private parts and said that there were sperms.
15. **PW4 APC ANUNDA VICTOR TIRA** from Kisawai A. P post testified that after they received the report from PW1 and 2 they decided to look for the Appellant. They went to [Particulars Withheld] farm where the Complainant identified him. He was arrested and brought to Kitale Police station.
16. Upon cross examination he said that it was PW1 who identified him before he was arrested.
17. **PW 5 PHILIS SILALI** produced the dental age assessment report on behalf of Dr. Ndogo who opined that the Complainant was aged about 15 years old.
18. **PW6 KIRWA LABATT** from Kitale District hospital examined the Complainant and produced the P3 form as well as the treatment documents. She examined her on the 26<sup>th</sup> September 2013 and found the hymen freshly broken, reddish and paining. He concluded that there was penetration.
19. **PW7 CALEB YATOR** carried out the investigations, recorded statements from the witnesses and preferred charges against the Appellant. He also gave the Complainant the forms which were filled at the hospital.
20. When placed on his defence, the Appellant denied the charge through his unsworn evidence. He said that he was sick on 24/9/2013 and he went to the hospital. On 25/9/2013 he was in his house and did not go anywhere. On 26<sup>th</sup> September 2013 people came to his house and attacked him as well as his family and accused him of a mistake he allegedly knew. He was brought to Kitale police station and later charged in court.

#### **ANALYSIS AND DETERMINATION**

21. As indicated above the parties complied with the order of filing written submissions. In his home-grown submissions the Appellant has criticised the trials court findings for the simple reason that the exhibits namely the pant and the skirt of the Complainant which was alleged to have been stained with blood was not produced.
22. He also argued that the weapons namely panga and rungu which it was alleged he had were not produced. He argued that the court failed to appreciate that he ought also to have been taken to the hospital for examination. He thus prayed for the appeal to be allowed.
23. On his part the learned state counsel submitted that all the ingredients for the offence were established and that the Appellants appeal was not meritorious at all.
24. The duty of the court was well explained by the famous case of **OKENO V. REPUBLIC 1972 E.A 32**, namely 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.*

25. It is therefore necessary for this court to examine the evidence afresh as they were presented during trial noting that it did not have the benefit of seeing the witnesses.

26. It is now common ground that for this offence to be established three ingredients are crucial namely, the age of the victim, the identity of the assailant and whether penetration occurred.
27. In this case, the age of the child was proved by the production of the Dental Age Assessment which indicated that she was about 15 years old. Although she may not have known exact date when she was born except the year for lack of a birth certificate, the Dental Age Assessment was sufficient.
28. Was she defiled? In other words, was penetration proved? The evidence by the minor points out to this fact. The assailant was with her inside a maize field and he proceeded to remove her undergarments after closing her mouth using his hand. She thereafter went home to her mother and immediately told her what had caused her to arrive late from school. Her mother examined her and found that she had blood stained on her skirt and panty.
29. She notified the village elder who called the police and had the Appellant arrested. She was taken to the hospital that night and the P3 form filled the following day. The treatment notes which were produced clearly demonstrated that that the minor was defiled. This was exemplified by the findings of the Clinical Officer.
30. The whole processes right from the incident at the maize farm, reporting to her mother, to the village elder, the AP camp, the arrest of the Appellant and the subsequent treatment at the District hospital were seamless. The court therefore concludes that indeed the ingredient of penetration was proved. The treatment notes as well as the P3 form concluded that there was sexual assault on the Complainant.
31. Was the Appellant the assailant? There was no eye witness to the incident. The Complainant was from school as she was still in her uniform even by the time she reported to the police. The time was around 5.00 pm. There was sufficient light for the Complainant to have identified her attacker. Although she arrived home at around 8.00 pm, the time she spent with the Appellant was sufficient to have enabled her recognise him. In any event there was nothing to suggest that the assailant covered his face or did such an act to conceal her identity.
32. The above conclusion is based on the fact that the minor was able to converse with the Appellant whom she begged for forgiveness having taken a wrong route. She said that he was armed with a panga and a rungu as well as a bottle of beer. At least by the time he was arrested the appellant had a panga and a bottle of beer.
33. The above items were not however produced in court, but their lack of production does not water down the fact that the minor was able to identify her assailant. More importantly as found above there was seamless efforts right from the time she was defiled till the time of his arrest.
34. There was no apparent reason why the Complainant may have targeted the Appellant. In fact when he was arrested, the police had to ensure that the Complainant identify him before he was taken away to the station.
35. Section 124 of the Evidence Act Chapter 80 Laws of Kenya states that;

***“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.”***

36. Can one therefore conclude that the minors evidence though from a single source was believable? The answer is a positive yes. There was no malice proved against the Appellant either by the Complainant or her family members. This was simply a child coming back from school and after avoiding the right route decided to take a shortcut. She met the Appellant who was guarding Honourable Senator Ole Ndiema’s maize farm. Instead of allowing her to pass peacefully, he took advantage of her and defiled her.
37. As found above the entire thread of evidence was seamless and the Appellants defence did not oust it. The lack of production of the rungu and the panga did not water down the Respondent’s case. Neither did the failure to medically examine the appellant. She did not waiver in explaining to her mother who had defiled her. As the police went searching for him, he was arrested and there was no other person guarding the farm that time.
38. Although in his unsworn defence the Appellant said that he was sick on the material day and that he went to the hospital, there was no material evidence to support that line of argument. In any case, the unsworn evidence was of no probative value as it was never tested on cross examination.
39. This court has stated much to show that the appeal is unmeritorious. The same is hereby dismissed.

**Dated, Signed and delivered at Kitale this 22<sup>nd</sup> day of October, 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**22/10/2020**

**In the presence of:-**

**Mr Omooria for Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgement read in open court**