



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 95 OF 2019

(Being an appeal from the Judgement of Hon. M.I.G. Moranga

dated 11th September 2019 in criminal case No.105 of 2017).

TOM MUKHWANA SIMIYU.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

TOM MUKHWANA SIMIYU.....ACCUSED

JUDGEMENT

1. The Appellant was charged with the offence of **defilement contrary to Section 8(1) and (3) of the Sexual Offences Act No 3 of 2006**. The particulars of the offence were that **on diverse dates between 3rd and 5th September 2017 at [particulars withheld] area in Transzoia County intentionally caused your penis to penetrate into the vagina of ECK a child aged 16 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 diverse days between 3rd September 2017 and 5th September 2017 at [particulars withheld] area within Transzoia County intentionally caused contact between your penis and the vagina of ECK a child aged 16 years.**
3. The Appellant after full trial was convicted and sentence to 15 years' imprisonment hence this appeal. In his grounds of appeal, the Appellant has argued that the Complainant acted under pressure from her father, that the minor was dishonest, that she was known to the Appellant and that the court shifted the burden to the Appellant and that the relevant witnesses were not called.
4. Before looking at the merits or otherwise of the appeal it is necessary to peruse the proceedings and evidence as presented during trial.
5. **PW1** the Complainant testified that she was born on 19th December 2002 as per the certificate of birth she produced and that she was schooling at **[particulars withheld]** in Nandi. She said that the Appellant had been her boyfriend for one and half years. She went on to state that she was to go to her sister NC on 3rd September 2017 so as to go to school on 4th.
6. The Appellant then called her and they met at Khetia Supermarket at around 4pm and they left to the Appellant's sister's place who was called Sabby. The Appellant thereafter left for his home at [particulars withheld] and she spent the night at Sabby.
7. The following day the Appellant came and she went with him to his sisters, Gloria's place. She spent that day at the said home and had sexual intercourse with the Appellant in his house. The Complainant's father arrived with 4 police officers and arrested them including Sabby. They spent at the cells and the following day she was taken to the hospital.
8. She said that while at home she used her mother's phone to call the Appellant and on the way she used that of the *boda boda* guy.

9. On cross examination she said that she had been chased away from school and that is when she decided to go to the appellant's place.

10. **PW2 JCK** the father to the Complainant testified that on 3rd September 2017 she advised her to travel early because the roads were bad and she was to stay at her sister's place at Kibomet before going to school the following day. At 6.00 pm her sister told him that she had not arrived and he asked one Edgar the boda boda fellow who had carried her. He informed him that she had borrowed her phone to call someone whom they agreed to meet at Khetias supermarket.

11. Apparently the Complainant had erased the number of that person in Edgar's phone. They resorted to Safaricom provider who were able to trace the phone number and when they called it was traced to Matisi and it indicated the name of the Appellant. With the assistance of the police they managed to arrest the Appellant together with pw1 at their house at 1am.

12. They were held at the police station till the following day when she was taken to the hospital for examination and thereafter he recorded his statements.

13. **PW3 JOHN KOIMA** from Kitale County Referral hospital examined the Complainant and produced the P3 form which he had filled. He found that the hymen was missing and freshly torn and there were swellings on the labia walls. He concluded that there was evidence of penetration.

14. **PW4 EDGAR KEBOGO** testified that he ferried the Complainant using his motorbike after he had been advised by PW2. On the way she borrowed his phone and used it to call someone and they agreed to meet at Khetia supermarket. The instructions he had received was to drop her in town where she was to meet her sister.

15. At around 8.00 pm he received a call from PW2 and upon checking whom she had called he discovered that she had deleted that number. PW2 the following day took his phone to Safaricom offices where the number that was traced belonged to the Appellant.

16. **PW5 BENJAMIN ONDIEK MOCHENYO** from Matisi Police station took over the file from one Corp. Daniel Luvonga who had carried out the investigations and preferred charges against the Appellant. He said that they were arrested at Forkland area together with Eunice and Sabina.

17. When placed on his defence the Appellant gave unsworn defence denying the charge. He said that the Complainant came to his place after running away from home for she had been suspended from school after carrying cosmetics. She therefore went to his place with the hope that he could help her.

18. He then took her to his sister's place at Tiwani where she stayed for two days and thereafter he picked her and they went to Matisi where they stayed up to around midnight when her father arrived with police officers and arrested them. He was also with his brother in the house. He denied that he defiled her and to show good faith she sent her to stay with her sister.

19. **DW2 SILAS SIMIYU** is the brother to the Appellant. He said that the Appellant on 6th September 2017 came with a lady whom he said had escaped from home for fear of her life. He took her to her sister's place at Tiwani but when she received visitors she told him to go and pick her as her house was small.

20. They came to their home and she said that her father had threatened her for she had been chased away from school. At around 1am her father came with police officers and arrested both the appellant and the Complainant.

ANALYSIS AND DETERMINATION

21. The parties did file written submissions as instructed by the court. The court has perused the same carefully as well as the entire proceedings herein. The duty of this court is to re-evaluate the evidence afresh with a caution that it did not have the luxury of seeing the witnesses as well as their demeanour unlike the trial court. See **OKENO V. REPUBLIC (1972) E. A .32**.

22. The three ingredients of the offence of defilement that must be proved include the age of the victim, whether there was penetration as well as the identity of the assailants. See **Daniel WAMBUGU MAINA V. REPUBLIC (2018) e KLR**.

23. In the instant case the age of the minor was proved to be 16 years as per the certificate of birth produced.

24. On penetration, the complainant testified that she had sexual intercourse with the Appellant in his house once. That was corroborated with the findings by PW3 who found upon examination that the hymen was missing and freshly torn and there were swelling on the labia's.

25. The identity of the perpetrator was on the other hand traced to the Appellant who was found with the Appellant. There is no doubt that it was his phone which had been used by the minor to call the Appellant.

26. The issue which has been rightly pointed out by the learned state counsel is on the character of the Complainant. There was a lot of grey areas on whether it was the appellant who defiled the minor. This is so for the simple reason that there were many actors in the scene. These included the sisters to the appellant, her grandmother as well as one Sabina who were not called to testify. The Complainant was not in one house or station at the same time. She seemed to have moved from one house to another.

27. This lack of clarity is coming at the backdrop of whether she was truthful in all her undertakings. He character speaks otherwise. For instance, why would she run away from home yet she was supposed to be going to school the following day. Why would she delete the

Appellants number from Edgar's phone?

28. In fact, there is every evidence to suggest that she was a truant girl and does not qualify to benefit from the provisions of Section 124 of the Evidence Act which state 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.”

29. She was not honest on why she was chased away from school a fact which her father may not have been in the picture. Her evidence ought to have been corroborated as she was a single witness. She was not truthful and this court agrees with the learned state counsel.

30. This appeal for the above reason ought to succeed. The Appellant for the untruthfulness of the Complainant ought to have been granted the benefit of doubt.

31. The appeal is hereby allowed, the appellant set free unless lawfully held.

Dated, Signed and delivered at Kitale this 22nd day of October 2020.

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.