



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 88 OF 2013

(Being an appeal arising from conviction and sentence in Kitale

Chief Magistrate court Criminal Case No. 1335 of 2012 delivered

by P. Y. Kulecho Resident Magistrate on 11/7/2013)

EMMANUEL KHAEMBA HAMIS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge was that **on the 30th day of May 2012 at [particulars withheld] trading centre within Trans Nzoia County intentionally caused his penis to penetrate into the vagina of MWK a child aged 6 years.**

2. He was equally charged with the alternative count of **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 30th day of May 2012 at [particulars withheld] trading centre within Trans Nzoia County intentionally by use of his genital organ namely penis caused a contact with the genital organ namely vagina of MWK a child aged 6 years.**

3. The appellant was convicted and sentenced to life imprisonment hence this appeal.

4. The brief summary of the evidence as presented during trial is as follows. **PW1 the complainant** told the trial court in her unsworn evidence that she was a class 1 pupil at [particulars withheld] Academy. That on 30th May 2012 at 7.00 pm she was seated at a corridor near their neighbour's home. She was alone when the appellant grabbed her hand, pulled her into his house and proceeded to defile her. She thereafter went to her aunt's place one B's house and thereafter went to her home where she informed her mother. Her mother then took her back to B's house where she demanded that she should tell B what she had told her. Later she was taken to the police as well as Kitale District hospital for examination.

5. **PW2** told the trial court that she had been told by the child that the appellant had threatened to stab her with a knife before defiling her and that this was not the first time. That the appellant had given her Kshs 10. In the process of interrogating the appellant, she screamed which attracted attention and members of the public came and arrested the appellant. The appellant was her brother in law.

6. **PW3 SC** a minor testified that on the material day the appellant had send her to buy cigarettes but she declined but the complainant was sent instead. She was by then playing with the complainant at the veranda.

7. **PW4 BNK** a niece to the complainant and a sister in law to the appellant testified that at 7.30 pm on 30th May 2012 she met the complainant who was looking for her daughter so as to play together. She left as her daughter A was not there. There after her mother came with the complainant and she started beating her and asked her where she had been. The child said that she had been at the appellant's corridor playing. She said that the complainant had told her that the appellant had defiled her. On cross-examination she said that she had seen some discharge.

8. **PW5 Linus Ligare** a clinical officer examined the complainant and found that her hymen was freshly torn and there was no discharge.

9. **PW6 P.C. Monica Sisa** from Sibanga police patrol base carried out the investigations. She examined the child on 30th May 2012 at 8.00 pm when she was brought to the station and did not find any blood stain or discharge on her genital organs. She also produced the age assessment report by Dr. Ken Ndege which found that she was 6 years old.

10. When put on his defence, the appellant gave sworn defence and stated that she was back home on 30th May 2012 and passed by her stepmother's home. Shortly thereafter the complainant's mother came and asked her where she was. She began assaulting him and her sister joined her. One FJ came to his rescue and was taken to the police station. He said that in 2003 the complainant's mother accused him of defiling their sister and was acquitted for lack of evidence. In 2010 he was accused by their brother of having stolen a donkey but was acquitted. He said that this was a 3rd time.

11. **DW2 FJS** testified that they were with the complainant On 30th May 2012 at 7.00 pm when the complainant's mother came and demanded to know where she was coming from. The child said she came from Auntie B's house. The child left with the mother. Suddenly she heard the screams and when he went to check the complainant's mother was accusing him of getting used to her in a bad way. Many people came and attempted to lynch the appellant. He escorted him to Sibanga police patrol base. The police officer Madam Sisa examined the child and found her private parts normal.

Analysis and Determination.

12. The court is enjoined to re examine the evidence afresh and come up with independent conclusion with the usual caution that it did not have the chance of witnessing the witnesses testifying. *See Ekeno Vs Republic (1973) E.A. 32.*

13. The court has carefully perused the proceedings herein as well as the submissions by the appellant. The substance of the homegrown grounds of appeal attacks majorly the evidence as presented by the prosecution. In essence the appellant state that the same was not sufficient enough to have warrant his conviction.

14. This court takes judicial notice of the fact that the charges that faced the appellant were very grave and that indeed it attracted life imprisonment. The threshold therefore ought to be very high.

15. The three ingredients of the offence of defilement are now clear and straightforward namely, the age of the victim must be established, the identity of the perpetrator must be proved and penetration must be equally proved.

16. There was no eye witness to the incident herein. It was thus the complainant's word against the appellant. The complainant whose age was proved to be 6 years gave unsworn evidence. She explained in a simple way how the appellant grabbed his hand while she played alone at the corridor and took her to his house and defiled her.

17. Under the Provisions of Section 124 of the Evidence Act, in a case of a minor in sexual offences, her evidence must be taken but consideration has to be placed on whether she spoke the truth or not.

18. I have examined carefully her evidence viz a viz that of her mother, her aunt, the clinical officer as well as the police officer and I find great schism cutting across.

19. First of all I do not find any evidence that she was sitted alone. There were other children who included SC as well as C.

20. Her mother and her aunty stated that she was threatened with a knife and given Kshs 10. This was a major issue of evidence which the child did not raise. If indeed she was threatened, why would the child forget this piece of evidence.

21. Her mother stated that this was not the first time the appellant was defiling the child. The clinical officer did not say that she had earlier own been defiled by the appellant. If he had done so, I presume it would not have been difficult to state so.

22. The child when cross-examined by the appellant stated that she did not bleed after the ordeal. The police officer equally did not find any abnormality when she examined the child's genital organ. Does it take rocket science for one to conclude that a 6 year old child's genitalia has not developed enough not to rupture or at least injured if one attempted any forceful entry? I do not think so.

23. The clinical officers findings were a mixture of the two. On the other hand he did not notice any discharge, while on the other hand he found that the hymen was torn and fresh looking. The examination did take place the same day. How then was it possible not to find any discharge including blood stains even on her panty but conclude that the hymen was freshly torn.

24. More importantly, why was it hard for the complainant's mother not to examine the child and yet concludes that the child had been defiled.

25. Infact PW2 according to her evidence had to be told by PW3 that the child had been defiled. Surely, was it difficult for her to examine her child.

26. I find the child's movement from the appellant's house not very clear. On one hand she was looking for her friends to play with at 7.30 pm while on the other hand she was at PW3 's house. There was no consistency.

27. Without going further into other contradictions by the prosecution witnesses I find the defence evidence by the appellant ought to have been considered by the trial court. There was evidently bad blood between PW2 and the appellant. She said that PW2 wanted to fix the appellant the 3rd time having failed in the earlier 2 attempts.

28. The screaming and calling in of the members of the public was in reality a plot and I dare to state that her breaking down and crying in court was to seek the sympathy of the court. Nowhere does any of the prosecution witnesses especially PW3 states that PW2 lost

consciousness when she learned of her child's defilement.

29. Consequently as a result of the prosecution witnesses inconsistent evidence this court is unable to grant the complainant the benefit of the Proviso to Section 124 of the Evidence Act . Benefit of doubt ought to go to the appellant.

30. The appeal is allowed. The appellant set free unless lawfully held.

Delivered, signed and dated at Kitale this 30th day of January, 2019.

H.K. CHEMITEI

JUDGE

30/1/19