



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 91 OF 2017

(Being an appeal arising from convictions and sentence in Kitale Chief Magistrate's Court

Sexual Offence No. 66 of 2016 delivered by G.N. Siatu RM on 21/12/2017)

BENARD WEKESA NAKASALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was charged with the offence of **Defilement of a child contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. No. 3 of 2006**. The particulars of the offence were that **on the 26th day of April, 2016 at Saboti trading centre within Trans Nzoia County, caused his penis to penetrate into the vagina of P.N. W. a child aged 7 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 26th day of April, 2016 at Saboti trading centre within Trans Nzoia County, caused the contact between his genital organ namely penis and the genital organ namely vagina of P.N. W. a child aged 7 years.**
3. The Appellant was convicted and sentenced to life imprisonment hence this appeal. Before analysing the merits or otherwise of the appeal its appropriate to summarise the proceedings at the trial court.
4. **PW1 Pharis Silali** a health officer from Kitale District hospital examined the minor and produced the dental age assessment report which indicated that she was 7 years old.
5. **PW2 Kirwa Labatt** a clinical officer from Kitale County Referral hospital examined the minor after one week of the incident. He found that there was bruises on labia walls but the hymen was intact. He concluded that there was partial penetration.
6. **PW4 S W** is the grandmother to the complainant whom she stays with. She said that the complainant had gone visiting her mother on 22nd April 2016 where she stayed for a week. When she came back her mother called and told her that something had happened to the child. Apparently the complainant had not told her. She inquired from the child and she informed her of what transpired while at her mother's place. She was taken by her mum to Saboti hospital. She said that the appellant was her neighbour whom he is referred to as "fundi".
7. **PW4, the minor** testified that she stays with her grandmother when schools are closed but with her mother when the school are opened. She says she knew "kuka" the appellant. She stated that she was playing with her younger siblings near the appellant's place when he called her. He took her into his house and defiled her and thereafter gave her a sweet and told her not to tell anyone. She was later taken to the hospital.
8. **PW5 Felicity Rono** from Kitale Police station gender department investigated the matter. The matter was reported by her grandmother and she issued them with a P3 form. She recorded the statements from the witnesses and preferred charges against the appellant.
9. When put on his defence the Appellant gave sworn evidence denying the charge. He said that on the material day he was working at St Benedict Secondary school doing welding job. He went there at 8.00 and left at 5.00 PM. He produced the school visitors book. According to him the whole matter was framed up because of business rivalry from the rest of the fundis including the husband to the complainant's grandmother.

10. **DW3 Mildred Wanyonyi** from St Benedict Secondary school testified that she was an accounts clerk at the said school for over 5 years. She produced the visitors book which showed that the appellant went to the said school on 26/4/2016 to do some welding works. She said that he worked there for 2 days.

Analysis and Determination

11. The appeal centres majorly on the evidence as adduced by the prosecution. The appellant submissions on the grounds are essentially to the effect that the case was not proven to the requisite standard namely beyond reasonable doubt.

12. The role of this court is to analyse the evidence afresh and thereafter come up with an independent findings taking into consideration the fact that the court did not have the opportunity of seeing the witnesses – *See Okeno Vs Republic (1972) E.A. 32.*

13. The court has read carefully the proceedings herein as well as the submissions by the appellant's counsel. Apparently there were no submissions by the Respondent. The three now known and accepted ingredient of defilement are the age of the victim, the identity of the perpetrator and the fact that there was penetration.

14. As to the matter at hand, the age of the minor was clearly established through the production of dental age assessment report. She was estimated to be 7 years old.

15. On the question of whether there was defilement, the clinical officer report though taken after 7 days suggested that there was partial penetration. There were bruises on the labia but the hymen was intact. The child graphically explained how the appellant defiled her inside his house or garage.

16. The question which I have had to grapple with is whether it was the appellant who defiled the minor. It is appreciated that the charge facing the appellant was so greivous that it affected his liberty forever. The prove therefore needed to be watertight and if there was any doubt, then it should be in favour of the appellant.

17. The scenario herein is that the person who raised the red flag was PW3 , the minor's grandmother. In her evidence in chief she said that;

“ On 29/4/2016, J called me and told me that something had happened to her. She never disclosed. She was crying but later she told me that the child had been defiled.”

18. Since by then she was with the child, she interrogated her and she told her what transpired between her and “fundu” the appellant.

19. She went further to state that the child told the rest of the siblings who apparently kept mum. None of those children were called to corroborate what the complainant had said.

20. How then did the complainant's mother got to know about the incident? Apparently even the child did not tell her mother. Who told her? Under which circumstances did she learn that the child had been defiled? Wouldn't it have been appropriate for the appellant's mother to testify.

21. What happened to the children who were playing with the complainant when she was called by the appellant? Were they of such tender years that they could not have at least seen their friend whom they were playing with called by the appellant?

22. The investigating officer stated that the complainant's mother was emotional and crying and that is why she did not record her statement. Surely not for all the period the matter was pending.

23. Did the child really identify the perpetrator. Her evidence seemed to suggest so. She said;

“ I know what he does, “ Ya mavichuma. Anachoma vichuma na moto na moto ni fundu.”

24. When cross-examined PW3 stated that there were other 3 fundis at the same place. She said;

“ At Saboti centre there are about 3 fundis the other 2 I don't know by their names, one works at the inner, the other upper while the accused works central. She told me that “fundu called her by signalling her to go.”

At no point where the 3 fundis brought together for the minor to identify him. We never went with the police to the point where the fundis work (with the police). “

25. This evidence should be juxtaposed with the alibi defence raised by the appellant that on 26/4/2016 he was at St Benedicts Secondary School doing some welding works. Although the same came at the tail end of the matter it was necessary to consider it for the simple reason that DW2 produced the visitors book which showed that indeed he was in school that day. Even though the trial court noticed some discrepancy in the pens used , its almost judicially noticed that in the usual happenings, visitors books , unless there are some exceptions, are written and signed by the visitor himself or herself. The question of the pens may not necessarily be relevant for the simple reason that ultimately, the Respondent did not object to the production of the same. At any rate DW2 was the custodian of the same.

26. This brings me to the essential question of identification . Having taken place a week ago, wasn't it necessary for the police to have rounded the 3 fundis at Saboti trading centre and subject them to parade identification in the usual manner and style? It is not, in my view to expect that a child of such tender age may not be mistaken. Apparently, it appears all the 3 fundis were male and were in the same area.

27. PW5 stated that she went to the scene after the arrest. She confirmed that there are other fundis within the area though she did not see any other fundi doing welding work within the vicinity. She did not describe the shop. It appears she simply saw the shop and left.

28. She even confirmed that there were other boys who were playing with the complainant. None of them was called to testify.

29. PW5 concluded in cross-examination that;

“ The matter was reported (7) days after the incident. He was not framed up. She told another girl who told the mother. The girl “G” refused to talk. The mother was key and she is not here”.

30. In my respectful view therefore the matter was poorly investigated. The evidence of the minor must always be corroborated. However if she is believed to be truthful, then the same can be admitted (See Section 124 of the Evidence Act).

31. In this case, the minor's friends as well as the mother ought to have corroborated her evidence. For reasons best known to her, she did not despite attending court. The other children were not called to buttress the complainant's version of events namely, that they saw the appellant call the complainant while they played outside his shop.

32. The Appellant alibi although it came late in the day was fairly reasonable. The production of the visitors book from St Benedicts secondary school seemed to show that the appellant was indeed away from his shop that day. Even though it was 45 minutes walk from the school and therefore capable of committing the offence and going back, there was no eye witness to suggest that he was seen with the complainant that day.

33. Finally on the question of the injury occasioned by the defiler, there was no evidence that the child, least of all had problems walking or was in such a great pain thereafter. Again it is her mother who should have shed light on the above.

34. For the foregoing reasons I am satisfied that the trial court misdirected itself in arriving at its conclusion. The appeal is hereby allowed, the appellant set free unless lawfully held.

Delivered, signed and dated at Kitale this 25th day of March, 2019.

H.K. CHEMITEI

JUDGE

25/3/19

In the presence of:-

Mr Omoria for the Respondent

Okara for the Appellant present

Appellant - present

Court Assistant – Kirong

Judgment read in open court.