



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 92 OF 2012

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's court in Criminal Case No. 524 of 2011 delivered by J. M. Nang'ea Senior Principal Magistrate on 16/7/12)

BENSON KHISA KIPNGUSO.....APPELLANT

VERSUS

REPUBLIC.....ACCUSED

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(3) of the Sexual Offence Act No. 3 of 2006**. The particulars of the offence were that **on the 2nd day of March 2011 within Trans – Nzoia County, intentionally caused his penis to penetrate into the vagina of LC, a child aged 6 years.**

2. He was convicted and sentenced to Life imprisonment hence this appeal. Before looking at the merits or otherwise of the appeal it shall be appropriate to summarise the proceedings as presented during trial.

3. **PW1 the complainant** gave unsworn testimony. She said that she knew the appellant as a boda boda man who used to take them to school – **[particulars withheld]** Junior Academy. She said that one day she took her home from school but on their way he took her to a bush where he proceeded to defile her. He told her not to tell her mother after leaving her. She however told her mother N C who thereafter escorted her to the police station at Kitale and later Kitale District Hospital where she was treated.

4. **PW2 JK** the father to PW1 stated that he was home when the child was dropped at around 6.00 pm which was unusual. When she was questioned she said that she had been defiled by the appellant. The appellant used to ferry her to and from school. Her mother checked and found that there was unusual appearance on her private parts and there was some discharge.

5. He then tried calling the appellant in vain. He called the chief who also tried calling the appellant but his phone went unanswered. They traced and found him at the shopping centre. He was taken to Kitale police station and the child taken to Kitale district Hospital and the P3 form filled later.

6. **PW3 Dr Jonathan Kiprof** a dentist from Kitale District hospital examined the complainant age and concluded that she was 6 years old.

7. **PW4 P.C. William Andanje** attached to Gender and child Protection Unit Kitale police station carried out the investigations. The appellant was brought by the members of the public and he arrested him. He further organised for the P3 form to be filled and recorded statements from the witnesses and preferred charges against the appellant.

8. **PW5 Linus Ligare** from Kitale District Hospital produced the P3 form which he filled after examining the complainant. He found her hymen torn and looked recent.

9. When placed on his defence the appellant gave sworn evidence and stated his age and simply denied the offence.

Analysis and Determination

10. The details of the appellant grounds of appeal basically attacks the entire evidence as presented by the prosecution I have perused the same together with the submissions by the learned State counsel.

11. What is evident is that the appellant was well known to the complainant. He did not dispute that using his boda boda service he would ferry her to and from school. The complainant as well as her father stated as much.

12. Did the appellant defile the child on the material day? What is clear and not denied is that just like in other days the appellant ferried her that day. I have read the testimony of the complainant and I do not find anything to suggest that she was not truthful.

13. Despite her age, and the fact that her testimony was unsworn, she was clear and forthright in her testimony. Earlier on she had been stood down but later came to testify. I have striven to see whether she may have been influenced but from her evidence she was not.

14. This line of thought is buttressed by the testimony of her father who upon realizing that the child had been defiled proceeded to look for the appellant. The appellant did not deny that he was called by the complainant's father or the area chief. Later he was arrested at the shopping centre. The whole transaction took place within a reasonable time span and one cannot conclude that there was any break.

15. In the premises I find that there was no mistaken identity as the appellant is attempting to submit. The child knew him very well. He did not deny that he ferried her to school almost every day. Although the other children were not called to testify I do not find any prejudice or miscarriage of justice or at all.

16. The question of defilement was clearly proven. The medical reports especially the P3 form attested to this. The evidence of the minor clearly explained who and how she was defiled by the appellant.

17. Dr Kiprop Jonathan established the age of the minor. Although there was no production of any document I am satisfied that the dental age assessment gave a proper estimate of her age.

18. In the premises I find that the trial court correctly applied the law and the facts in arriving at the decision. The appellant despite his age abused the trust bestowed upon him by the complainant parents. In fact he abused the business relationship.

19. The appeal is otherwise dismissed.

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

Accused – present

Kirong – Court Assistant

Judgment read in open court.