



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 103 OF 2012

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

Criminal Case No. 2799 of 2011 delivered J. A. Owiti SRM on 2/10/12)

GEOFFREY OMONYA WAFULAAPPELLANT

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 19th day of November, 2011 within Trans Nzoia County, intentionally caused his penis to penetrate into the vagina of DNW a child aged 11 years.**
2. The Appellant was convicted and sentenced to Life imprisonment hence this appeal. The summary of the proceedings is worth reproducing herein before analysing the merits or otherwise of the same.
3. **PW1 Linus Ligare** from Kitale District hospital examined the complainant and signed the P3 form which he produced. He found her hymen torn and of recent friction. There was pus cells and epithelial cells and yeast cells in her urine. He concluded that he had been defiled.
4. **PW2 APC Stephen Jimba Momanyi** from St Mary AP post re arrested the appellant when he was brought by the members of the public in company of the complainant and her father. He escorted them to Kitale Police station.
5. **PW3 MWM** testified that the complainant was his child and aged 11 years having been born on 13/11/2000. He said that he had permitted her to occasionally stay at Mama I's house as her husband had been arrested and incarcerated. That on 19/11/2011 Mama P came to his place and inquired if the complainant was home as she was not at her home. They left to Mama I's shop but the complainant was not there.
6. They learned that she was at the appellant's place. They went and knocked at the door which was eventually opened. They found the complainant, the appellant and the appellant's father. The complainant was in the appellant's bedroom. They arrested both the appellant as well as the complainant and took them to the AP post. The complainant remained behind at the appellant's house.
7. **PW4 the complainant** testified that she was 11 years old and a class 1 pupil at M primary school. She said that she would go to reside at Mama I's home as her husband had been incarcerated. She said that the appellant led her to his house and gave her Kshs 5 and proceeded to defile her. His father was in the same house. The appellant threatened to kill her if she told her father.
8. On the same day the complainant's father knocked the door of the appellant and after hesitating went ahead to open it. They were arrested and taken to the police station. She was taken to the hospital the next day for treatment.
9. **P.C. Caleb Yator** from Kitale Gender and children section carried out the investigation and preferred charges against the appellant. He also issued the P3 form to the complainant which was filled at Kitale District hospital. An age assessment was equally undertaken at the same hospital.
10. **PW6 Dr Kiprop Jonathan** a Dentist at Kitale District hospital produced the dental age assessment report of the complainant and he estimated her age to be 11 years old.
11. When placed on his defence, the appellant gave unsworn testimony stating that he was owed Kshs 2,500/= by Wasike Simiyu the father

to the complainant. On 20/11/2011 he had called for the same. In the evening he was arrested and escorted to the AP camp and later charged.

Analysis and Determination

12. The court has perused the proceedings herein as well as the submissions by the appellant. The State apparently did not file any submissions.

13. The duty of this court is to evaluate the evidence afresh and come up with a fresh finding with a rider however that it did not see or hear the witness testimony.

(See Okeno Vs Republic (1972) EA 32.

14. The three ingredients of defilement are now well known namely, the age of the complainant, whether penetration occurred and whether the appellant was the perpetrator.

15. The question of whether the appellant defiled the minor in my view was well established. There was sufficient evidence from the minor's father that the minor was traced to the house of the appellant. She was actually rescued inside his bedroom. Although Mama P or Mama I did not testify, I do not think the complainant's father evidence was challenged.

16. Secondly, the evidence by the complainant was consistent with that of her father, namely, that she was found inside the appellant's house. She described how the appellant defiled her that night .

17. That defilement was consistent with the findings of PW1 the Clinical officer.

18. These were people who knew each other and contrary to the submissions by the appellant there was no case of mistaken identity.

19. The age of the minor was estimated to be 11 years old. PW2 did not produce any documents like the birth certificate or the baptismal card to buttress the same although he said that they were left at home.

20. Be it as it may, the findings by the Dentist was an approximate age. Where it is estimated an allowance is usually provided for instance plus or minus one. In this case, putting all the factors constant and in the absence of any registration documents, the complainant's age would as well be estimated at plus or minus 11 years. It means that she could be 12 years or thereabouts.

21. I further state so because if the scientific age assessment was mathematically accurate then the same essentially would not have been an estimate.

22. For the foregoing reasons I hold that the estimated age of the complainant was about 12 years old. This obviously would affect the sentencing.

23. In the premises, and having found that the complainant was about 12 years old, the sentence of life imprisonment produced under Section 8(2) of the Sexual Offence Act shall be and is hereby set aside and replaced with a sentence of 20 years imprisonment as provided under Section 8(3) of the Sexual Offence Act No. 3 of 2006.

24. In the premises this appeal is hereby dismissed for the reason that it was established beyond any shadow of doubt that the appellant defiled the complainant. The sentence is however reduced to 20 years imprisonment from 22/11/2011.

Orders accordingly.

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

Appellant – present

Court Assistant – Kirong

Judgment read in open court.