



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 30 OF 2018

(Being an appeal arising from conviction and sentence in Kitale chief

Magistrate's Court Sexual Offence No. 25 of 2017 delivered by G.N. Sitati RM on 28/03/2018)

EZRA JUMA MUBALIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

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 offence were that **on the 13th day of February, 2017 within Trans Nzoia County, intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of FC a child aged 10 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 charge were that **on the 13th day of February, 2017 within Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of FC a child aged 10 years**.
3. He was convicted and sentenced to Life imprisonment hence this appeal. The summary of the evidence as presented during trial is worth reproducing herein before looking at the merits or demerits of the appeal.
4. **PW1 JB** is the complainant's mother. She said that the complainant was born on 18/3/2006 and as a result of some meningitis attack, she developed some medical complication which affected her speech and generally all her faculties. She cannot do anything for herself and she has to be helped all through.
5. On the material day at around 10.30 am she left her at home with her younger sibling one AK and went to get some vegetables. She took about 11 minutes. On the way the appellant was herding her neighbour's animals.
6. When she came back she found the complainant on the floor sweating. Her younger brother told her of what the appellant had done. She called the appellant aunt who came and according to her the appellant admitted the offence. She rushed her child to the dispensary as she was by then bleeding from her private part. She was referred to the hospital where she was admitted for 5 days. Thereafter she went to Kwanza police station and recorded statement.
7. **PW2 a minor, AK** is the younger brother to the complainant. She explained how after their mother had locked him with the complainant the appellant came to the house and proceeded to defile her sister. He graphically described how he removed his trouser and the complainant's skirt and defiled her. By the time her mother arrived, he had left but he told her what had transpired.
8. **PW3 APC Ijaa Edward** from Kobos AP Post rearrested the appellant when he was brought by the members of the public.
9. **PW4 Kirwa Labatt** from Kitale County Referral hospital examined the complainant and filled the P3 form. He found that there was a tear on the vagina and anal and sperm cells seen. He concluded that there was penetration.
10. **PW5 PC John Kamau** from Kwanza police post carried out the investigations after the appellant had been booked. He recorded the statements and charged the appellant.
11. **PW6 Dr A.R. Mainer** from Kitale Nursing Home examined and treated the minor. He said that there were injuries in her genitalia (tear of the vagina canal sphincter) which was repaired at the theater.

12. When placed on his defence, the appellant gave sworn evidence denying the charge. He explained how on 13/2/2017 at Kobos area he was arrested by 2 people while going on with his business. He was taken to Kwanza police station and later charged with the offence of defilement where he pleaded innocence.

Analysis and Determination

13. The court has perused the proceedings as well as the exhibits produced especially the medical documents. The court has equally read the long handwritten submissions by the appellant which incorporates the amended grounds of appeal. The Respondent apparently did not file any submissions..

14. The substantive issue running across the grounds of appeal is an assault by the appellant on the general evidence as adduced during trial which according to his estimation did not meet the threshold, namely that it was not proved beyond reasonable doubt.

15. This court's duty is to re-evaluate the evidence afresh and arrive at an independent finding – *See Okeno Vs Republic (1972) E.A. 32*. The usual caveat is that the court did not have the benefit of seeing the witness as demeanor unlike the trial court.

16. The three now known and acceptable ingredients of defilement are the age of the victim, the identity of the perpetrator and whether or not there was penetration.

17. The age of the minor was clearly proved by the production of the birth certificate which was uncontested. As at the time of the incident she was aged 10 years.

18. As to whether there was defilement, the same was clearly established by the medical evidence produced by the clinical officer Kirwa Labatt which fortified PW6 Dr A.R. Mainer who received and treated the minor and even carried out some stitching.

19. Was the appellant the perpetrator? Its admitted across the board and more importantly by her mother, the court and the medics who testified that the minor had all manner of mental challenges. Infact she could not testify on her own.

20. The star witness was her younger brother PW2. Short of one thinking that he was “coached” he graphically explained plainly what transpired. He further stated that the appellant told him in the process to go and look for the cows, a move which appeared to have been a decoy.

21. Marrying the evidence of PW1 and PW2, it appears that the incident did not take a long time. The same took place when PW1 went to collect vegetables and her coming back. She said that the appellant was herding cows. PW2 did confirm this line of evidence that the appellant was a herder.

22. By the time she arrived (that is PW1) the child was on the floor sweating and bleeding. This necessitated her to call the appellant's aunt. Although she was not called to testify I do not find any sufficient reason to suggest that the appellant was not at the scene. Neither do I find any reason to think that PW2 lied despite her tender age.

23. The appellant was a person within the neighborhood a fact which he did not deny. He was a known herder. The incident took place during the day and thus there could be no case of mistake identity.

24. In the premises I find this appeal unmeritorious. The appellant took advantage of the helpless minor. As it were there was no break between the defilement period, the rushing of the child to hospital and the arrest of the appellant.

25. The appeal is otherwise dismissed.

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

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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.