



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 115 OF 2016

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

in Sexual Offence No. 131 of 2015 delivered by V. O. Adet – SRM on 15/12/16)

SAULO OMIA OCHALA.....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(3) of the Sexual Offences Act No 3 of 2006**. The particulars of the offence was that **on the diverse dates between 22nd June 2015 and 1st July 2015 at Trans Nzoia County intentionally caused his penis to penetrate the vagina of DM a child ages 15 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 diverse dates between 22nd June 2015 and 1st July 2015 at Trans Nzoia County intentionally caused contact between his genital organ namely penis and genital organ namely vagina of DM a child ages 15 years.**
3. The appellant was convicted of the alternative count and was sentenced to 10 years imprisonment hence this appeal.
4. Before looking at the merits or otherwise of this appeal it shall be imperative to summarise the proceedings during trial.
PW1 Kirwa Labatt from Kitale District Hospital examined the complainant and filled the P3 form. He found her mental status to be unstable. She had no injuries on her body but bruises on the private parts and had lost her virginity. She was also experiencing her monthly period.
5. **PW2 the complainant** stated that she was 15 years old and a class 2 pupil at [Particulars withheld] primary school. She said that between 22/6/2015 and 1/7/2016 she worked at a sugar farm at Musundi. On her way home she met the appellant who told her to go to his place. She proceeded to carry out household chores including preparing tea and washing utensils. At night he had sexual intercourse with her. This went on for a week. She was then released and according to her she met someone who took her home and later to school. She was later taken to the hospital by her step mother and her uncle.
6. **PW3 AO** is an uncle to the complainant. He came to visit her mother on 1/7/2015 who was staying with the complainant. He found that the complainant had disappeared between 22/6/15 to 1/7/2015. Her mother told her that the vigilante had been informed. He went to Nyayo police station where he met her and took her to the hospital where she was examined. He did not know the appellant.
7. **PW4 P.C. Hassan Wafula** from Nyayo police post testified that he was at the station on 1/7/15 when the complainant was brought by the vigilante. PW3 then arrived. The report concerning his disappearance had been made. He gave them the P3 form which was filled at Kitale District hospital. He found out that the child was staying with her grandmother who was 80 years old.
8. **PW5 Pharise Silali** from Kitale District hospital did dental age examination and found that she was 15 years old.
9. **PW6 Ernest Wekesa Nyongesa** a vigilante testified that a report was made concerning the disappearance of the complainant. After 3 days they confirmed that she was at Musundi's servant quarters. They went with his colleagues and found the child there. The owner of the house was not there. They took her to school and later to Nyayo police post.

10. When placed on his defence the appellant gave sworn evidence. He said that he came to the homestead on 3/7/15 for employment. He was taking care of the chicken. He was arrested on 3/7/2015 by 3 People and taken to the police station. He said on cross-examination that his employer was one Musundi and he was staying in his son's house though not on the same compound.

Analysis and Determination

11. I have carefully examined the proceedings herein. I have equally read the submissions by the appellant which incorporated the homegrown grounds of appeal.

12. From the outset this court is inclined to allow this appeal on the grounds that, there was no sufficient evidence to suggest that the house the complainant was allegedly found belonged to the appellant. No evidence was led especially from the appellant's employee one Omusundi that indeed he had allowed the appellant to stay in the said house.

13. Secondly, I have read the evidence by the minor and it appears that she was found on her way home and not the appellant house. Infact PW6 stated that he found her in the house though the owner was not there.

14. Earlier she had told the court that when released she met an officer who took her home then school. She said on cross—examination that;

“ I met the officer a far distance from your place.”

15. It is necessary to examine this question of *loquos in quo* since it also gives some guidance on whether for the 7 days there was no eye witness who saw this child doing chores at the appellant's premises. It appears that this was a servant quarter and from the evidence of the minor there were other people around.

16. I am further perturbed at the fact that the grandmother though old did not record any statements. There was no evidence to show who made the disappearance report. Her uncle as well as the vigilante alluded to this but did not explain the complaint.

17. The court is gravitating on the above issued as in the absence of an eye witness, the evidence of the minor shall only be believed if it complies with the proviso to Section 124 of the Evidence Act, namely that she spoke the truth.

18. In my humble view I find that there are many gaps left by the prosecution to have sustained the charge. Apparently the P3 form showed that there was no bruises on both labia but the hymen was torn and old looking. If she had sexual intercourse as at 1/7/2015 how would there be no bruises yet the complainant stated that she felt pain. Is it possible that the fact that she was menstruating caused the medical officer not to be conclusive.

19. It appears equally that the complainant had some psychiatric challenges as found by the clinical officer. Wouldn't it have been worthwhile to explain this further. Perhaps her grandmother or her uncle would have shed some light on this.

20. The upshot is that the appeal succeeds. 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

Appellant – present

Court Assistant – Kirong

Judgment read in open court.