



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 64 OF 2018

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Sexual Offence No. 150 of 2015 delivered by P.C. Biwott SPM on 3/8/18)

WILSON OCHIENG.....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 22nd day of August 2015 within Trans Nzoia County intentionally caused his penis to penetrate into the vagina of GN a child aged 3 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 22nd day of August 2015 within Trans Nzoia County intentionally caused contact between his genital organ namely penis and genital organ namely vagina of GN a child aged 3 years**.
3. The appellant was convicted and sentenced to Life imprisonment hence this appeal. The appellant counsel has raised several grounds in his submissions and before looking at them it shall be appropriate to summarise the proceedings during trial.
4. **PW1 EMO** testified that she is the mother to the complainant and a business lady at Moi's Bridge. That on the 22/8/2015 at 4.00 pm she was called by her husband W W to go home. When she arrived she found a crowd having arrested the appellant on allegation that he had defiled the complainant. The Appellant was saved from the irate members of the public. She checked the child and found bruises on her private parts.
5. **PW2 the complainant** did not testify as the trial court found her a vulnerable witness.
6. **PW3 WWS** testified that he came home at 2.00 pm to water his cows when a neighbour's daughter one Esther came holding the complainant. She told him that she had been defiled by the appellant.
7. Both the witness mother as well as the appellant confirmed that the child had been defiled. The appellant asked for forgiveness. They arrested him and took him to Simatwet police post. The child was then taken to Kitale District Hospital.
8. **PW4 Linus Ligare** from Kitale District hospital examined the child and found that her hymen was recently torn and the vaginal walls were tender. He concluded that she had been defiled.
9. **PW5 GNS** who is a grandmother to the complainant testified that she had gone for a funeral on the material day when she was called urgently by her son. She went home and found the child crying uncontrollably. She was informed that she was defiled. She saw her private parts. She reported to the village elder and took the child to the hospital.
10. When placed on his defence the appellant gave unsworn evidence denying the charge. He said that on that day he was with his grandmother roasting maize in Kitale. The complainants mum accused him of defiling the child. He was assaulted. He said that he was not found defiling the child.

Analysis and Determination

11. The court has perused the proceedings herein together with the rival written submissions on record. The court did not have the benefit of seeing and hearing the witnesses testify herein and as such it ought to re-evaluate the evidence afresh and arrive at an independent finding

based on those premises . *See Okeno Versus Republic m (1972) E.A. 32.*

12. From the grounds of appeal on board, its apparently clear that the centre of it is to do with the question of identification of the perpetrator. The question of age is not well in dispute. The clinic card produced showed the child to be 3 years old.

13. The question of penetration in my view was established through the medical evidence produced namely the treatment chit as well as the P3 form.

14. The question however that must be answered is whether it was the appellant who defiled her. It's apparent that no eye witness was called to testify. Esther who allegedly found the appellant in the act was not called. She is the one who took the child to her father. Infact from the cross-examination of PW1 it appears that Esther is a cousin to the appellant.

15. Further from the evidence of PW3, it appears that even the appellant's mother was aware of the defilement as told by Esther.

16. The question is why did Esther fail to testify? It is not indeed very fatal if the investigating officer fails to turn up as the rest of the evidence by the key witnesses could sustain the charge. In the instant case I find it very disturbing that an eye witness so to speak was not called to testify.

17. The court is alive to the provisions of **Section 143 of the Evidence Act** which provides that;

“ No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

18. In the case at hand, the complainant did not testify as the trial court noted that he was too young to give any meaningful testimony. This however necessitated that the eye witness should as a matter of priority testify. The rest of he witnesses including the minors parents came after the fact. In as much as they alleged that the appellant apologised, this was not sufficient to conclude that he committed the offence.

19. At any rate no other member of the public especial the crowd that arrested the appellant was called to testify. In my view therefore this was a clear case envisaged by the celebrated case of *Bukenya & Others Vs Uganda (1972) EA 549* where the court stated that;

“ (i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That court has a right and duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate the court may interfere that the evidence of uncalled witness would have tendered to be adverse to the prosecution.”

20. In the premises I find this matter poorly investigated by the State agencies. As much as the appellant was a suspect, I do not respectfully find any direct link to the offence. The innocent child could not testify. The adults especially the key witness Esther failed to turn up despite telling the complainant's parents that she saw the appellant committing the offence.

21. For the above reason, 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

Appellant - Absent

Wanyonyi for the Appellant

Court Assistant – Kirong

Judgment read in open court.