



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NUMBER 26 OF 2018

(Being an appeal from the judgement of the learned chief Magistrate Hon, V.W.Wandera delivered on the 23rd March, 2018 in Criminal Case No. 189 of 2016)

TKM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was charged with the offence of **Defilement contrary to Section 8(1),(2), of the Sexual Offences Act , No. 3 of 2006**. The particulars of the charge were that, **on the 13th day of January, 2016 in Elgeyo Marakwet County ,intentionally caused your penis to penetrate the vagina of FC, a child age 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 January, 2016 in Elgeyo Marakwet County intentionally touched the buttocks /vagina of FC a child aged 10 years.**
3. The Appellant after full trial was convicted and sentenced to life imprisonment hence this appeal. The appellant through his counsel on record has raised several grounds of appeal which essentially gravitates around the entire spectra of the prosecution evidence. Before looking at the merits or the demerits of the same it may be appropriate to look at the summary of the evidence as presented at the trial court.
4. **The complainant** state that she was 10years old and a class 4 pupil at K primary school. She said that on the 13 January 2016 she was home as her parents had travelled At around 7pm as she closed her parents chicken and preparing to go and sleep at their neighbours as instructed by her mother the appellant arrived. He told her not to go to the neighbours and spent the night there as it was already dark.
5. He thereafter locked the house and forcefully defiled her on her mother's bed. She felt pain and could not scream as the appellant threatened to kill her. The appellant thereafter left .
6. The complainant stated that the following morning she went to school and had to come back as she was among those whom their parents had not paid PTA charges. When she arrived home she told her mother who had by then arrived from her journey. She was taken to the hospital for treatment where the P3 form was filled as well. The matter was later reported at the police station.
7. **PW2 JC**, the mother to the complainant testified that she had gone for a journey leaving behind the complainant whom she had advised to spent the night at the neighbours after closing the chicken. She came back the following day and on her way inquired from the neighbour if the complainant had spent the night there and the answer was on the negative.
8. Soon thereafter she came back from school as she had been sent away owing to the fact that the money for PTA had not been paid. She then told her what the appellant had done. She took her to the hospital and reported the matter at the police station.
9. The appellant ,a person whom she knew disappeared until he was arrested several months later. She said that at the time of the incident pw1 was aged 9 years.
10. **PW 3 P.C SAMUEL SUNKUYIA** carried out the investigation after the matter was reported at Kapcherop police station. He said that he issued them with the p3 form which was filled and brought back. He thereafter preferred charges against the appellant.
11. **PW4 LUKA KIPTOO KOSGEI** a Clinical Officer from kapcherop sub county hospital examined the complainant and filled the P3 form when she was brought by the relatives. He estimated her age to be 10years old. She found her on examination to have a foul smell and had difficulty walking. There were injuries on her neck too. He concluded that she had been defiled.

12. When placed on his defence the appellant gave sworn evidence denying the charge but did not call any witness. He said that he does splitting of timber business using a power saw and on 10/12/2016 he was called by one J S who told him about some work. He told him to go to kapcherop police station where he met him but was apparently arrested and later charged with the offence.

13. He said that he was HIV positive and if he had defiled the girl she would have contracted the same. He said that the whole story was a set up by pw2 who had left his brother and got married elsewhere. He said that she was not happy and had promised to teach him some lessons.

ANALYSIS AND DETERMINATION

14. The court has perused the evidence on board as well as the written submissions by the appellants counsel and the attendant authorities. It is now known that the mandate of the appellate court is to analyse the evidence afresh and arrive at a new decision altogether taking into account that it did not have the benefit of conducting the trial and therefore seeing the demeanour of the witnesses. (**SEE OKENO VS.REPUBLIC (1972)EA, 32, at page 36.**)

15. The three now accepted ingredients of the offence are the age of the victim, the identity of the perpetrator as well as whether penetration occurred.

16. Beginning with the first ground, the appellant has contended that the same was not proved as there was no production of certificate of birth or any other such proof.

17. From what was presented to the court it appears that the only evidence is the oral one from the child, her mother and the clinical officer. The trial court of course had a better advantage for it saw the complainant physically.

18. In light of the above can this court believe the assertion that the complainants age was not properly proved? I do not think so. The case of **Francis Omuroni Verses Uganda Criminal Appeal No. 3/2000** is worth mentioning here. The court held inter alia that,

“-----defilement cases, medical evidence is paramount in determining the age of the victim in victim and the doctor is the only person who could professionally determine the age” In the absence of any other evidence, age may also be proved by birth certificate, the victim’s parents or guardians and by observation and common sense”.

19. This authority must be read together with the provisions of **Section 2 of the Children’s Act** which defines a child of tender years as a child under 10 years. Considering the evidence of the minor, the mother, and the clinical officer and the general observation by the trial court, I am satisfied that the complainant was indeed aged 10 years or thereabouts.

20. As regard the question of defilement I find the evidence by the minor, her mother and the clinical officer credible. Although she was examined later, the fact that she was in pain all through and contracted some venereal disease was a testimony to this. The P3 form attests to the minors evidence.

21. Was the appellant the perpetrator? There was no eye witness to the incident for the reason that it took place during the night and the minors parents were away. The Proviso to **Section 124 of the Evidence Act** stipulates that in such incidence the court will convict if it believes that the minor or the victim spoke the truth.

22. The court has perused and analysed the minors evidence and it is of the considered opinion that she was truthful. Her evidence was corroborated by that of her mother as well as the clinical officer.

23. The argument that pw2 used the minor to settle the marital issues between her and the appellants brother does not hold water. In any case the appellant did not deny the fact that the minor knew him.

24. In the premises, I do not find any reason to disturb the trials courts findings. The assertion that other key witnesses were not called were well captured by the evidence of the Investigating Officer who stated that they would not have added much to the case.

25. His defence merely centred on the date he was arrested but he failed to explain where he was from January when the incident occurred.

26. Regarding the arguments that some exhibits were not produced, again I do not see any miscarriage of justice. The medical evidence on record shows that the minor was defiled.

27. Consequently I do not find the appeal meritorious. The Appellant took advantage of the absence of the minors parents to defile her. This appeal is hereby dismissed.

Dated, signed and delivered in the open court at Kitale this 23rd day of May, 2019.

H.K.CHEMITEI

JUDGE

23/5/19

In the presence of:-

Mr. Omoria for Respondent

Mr. Bungei for the Appellant

Appellant – present

Court assistant – Kirong

Judgment read in open court.