



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 29 OF 2018**

**(An appeal arising conviction and Sentence arising from Kitale Chief Magistrate's court S.O. No. 166 of 2016 delivered by Hon. G. Sitati SRM on 23/2/18)**

**HARON KHAEMBA SITUMA.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant was charged with the offence of **Gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on the **diverse dates between 19<sup>th</sup> and 27<sup>th</sup> October, 2016** at [Particulars Withheld] village within **Trans Nzoia County, jointly with another not before court intentionally and unlawfully caused his penis to penetrate the vagina of RWN a child aged 16 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 was that on the diverse dates between 19<sup>th</sup> and 27<sup>th</sup> October, 2016** at [Particulars Withheld] village within **Trans Nzoia County intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of RWN a girl aged 16 years.**
3. The Appellant was convicted and sentenced to 15 years imprisonment hence this appeal. The substance of the grounds as raised in the petition generally attacks the entire evidence adduced and the fact that there was uncertainty on the age of the complainant. He also argued that the real culprit was not napped and that he had personal differences with the complainant's grandmother.
4. The state has opposed the appeal and has argued that the same is unmeritorious and ought to be dismissed. It shall be worthwhile to summarise the facts and evidence as presented before looking at the merits or otherwise.
5. **PW 1 GN** stated that she was the mother to the complainant. She was born on the 18<sup>th</sup> June, 2002. She said that she was not at home on the 19<sup>th</sup> October, 2016 but she knew that she had gone to her uncle at Amba. She was later told that she had been locked in a house and defiled by the complainant and another person.
6. **PW2, the complainant** testified that she was 15 years as per the certificate of birth produced and a class 8 pupil at [Particulars Withheld] Primary school. She said that on the 19<sup>th</sup> October, 2016 she was unwell and her mother was not around. She went visiting her uncle at Amba so that she could get money for treatment. She did not get his uncle but she found the Appellant and his wife. The Appellant's wife left and he and another person locked the complainant inside the house.
7. The other person then defied her after threatening to harm her if she raised any alarm. The Appellant also did defile her the following day. She stayed till 27<sup>th</sup> October and she said that they used to bring her food and would relief herself on a basin. Later she told the appellants' wife that she wanted to go home and she called for a motor cycle and took her. On the way the Kenya Police Reservist and her grandmother came and the matter reported at the police station. The complainant was taken to Kapsara health centre.
8. On cross examination she said the other man who defiled her was called Silas and he would come and defiled her at night. The appellant defiled her the following day. She said that she did not have the chance to escape as the door was locked from outside.
9. **PW3 PETER KIBET** the Clinical Officer from Kapsara district hospital examined the complainant after 9 days. He found that the hymen was broken and there was some whitish discharge. He concluded that there was penetration.
10. **PW4 PC ALI MOHAMED** from Cherangany police station carried out the investigation, recorded statements from the witnesses and preferred charges against the appellant. He said that the complainant's grand mother gave him all the information although she refused to

come and testify. The complainant was being defiled by the appellant and his friend, Silas, who was still at large. He also produced the certificate of birth.

11. When put on his defence the appellant gave unsworn evidence denying the charge. He said that he had been sacked and was no longer working at Amba. He said that he was never in good terms with the grandmother to the complainant since she owed him kshs. 12,000.

### **ANALYSIS AND DETERMINATION.**

12. The court has perused the evidence on record as well as the proceedings. The age of the complainant though it is argued to the contrary by the appellant was well proven by the production of certificate of birth and the evidence of the minor and her mother. As at the time of giving her testimony she was around 16 years or thereabouts. Still she was a minor and the appellant cannot benefit from this argument.

13. Was she defiled? The answer is on the affirmative. The complainant's testimony was corroborated by the evidence of the clinical office who found that the hymen was missing and there were pus cells which indicated sexual activity.

14. Although the Appellant attempted to exonerate himself during cross examination he cannot deny that he did not know the whereabouts of the minor for all those days. Although Silas was not apprehended, there could not have been mistaken identity on the part of the minor.

15. Having stayed in that room for some days, there was every possibility that she saw all her assailants who included the appellant. If it was a one off episode then it may have been possible to have mistaken identity. The minor testified that the appellants wife even cooked food which they all ate.

16. From the evidence of the complainant, she was locked in the house between 19/10/2016 till 27/10/ 2016, a total of 8 days or thereabouts. The defilement according to her was done by the friend to the complainant (silas) as well as him she relieved herself on the basin provided and they used to bring food to her.

17. What is interesting though is the fact that she was able to have her freedom including conversing with the appellant wife, whom she helped to prepare vegetables. Although threatened and defiled by Silas, there was no evidence that the appellant threatened her. She did not tell the court that she made any attempt to escape. She did not notify the appellant's wife of what she was going through, which I find very strange.

18. More importantly the Investigating Officer did not tell the court whose house the minor had been locked in for all those days.

19. The openness with which the complainant had with the appellant's wife in my view appeared so free that she could even have told her what was going on. It appears that her desire to go home was voluntarily as the motor cycles were called by the complainant's wife.

20. Strangely, the complainant's grandmother who was the architect and almost a star witness did not bother to testify despite being bonded. The refusal by her grandmother to testify could well be read together with the appellant unsworn defence which stated that she owed him Kshs 12,000.

21. There was no suggestion by the Investigating Officer was unable to arrest, Silas, the alleged co-culprit. There were no efforts made and from his defence nothing suggest that he was outside the jurisdiction of the said police station.

22. The sum total of my finding is that the gaps left by the prosecution were too wide to sustain the charge. It would have been different if Silas had been apprehended. The appellant should have been granted the benefit of doubt as the complainant's evidence was inconsistent. Though the defilement may have occurred, the evidence adduced leaves doubt as to whether it was the appellant or the alleged Silas.

The appeal is allowed. The appellant set free unless lawfully held.

**Dated signed and delivered in open court at Kitale this 7<sup>th</sup> day of August, 2019.**

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**H. K. CHEMITEI**

**JUDGE**

**7/8/19**

**In the presence of:**

**Mr Omoria for Respondent**

**Appellant present**

**Court Assistant – Kirong**

**Judgment read in open court**