



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO 57 OF 2017

(Incorporating Criminal Appeal No. 54 of 2017)

(Being an appeal arising from Conviction and Sentence in Kitale Chief Magistrate's

Court S.O. No. 44 of 2016 delivered by Hon. Sitati RM delivered on 3/7/2017)

DAVID SIMIYU WASWA.....1ST APPELLANT

ALICE LAKWENA WANJALA.....2ND APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The first Appellant had been charged with the offence of **Defilement of a child contrary to Section 8(1) (4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge was that on the **diverse dates between 5th March 2016 and 7th March, 2016 at Laini Moja Estate Kitale within Trans Nzoia County , intentionally caused your penis to penetrate the vagina of S. K. a child aged 17 years.**
2. The alternative count 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 are that on **diverse dates between the 5th of March, 2016 and the 7th of March, 2016 at Laini Moja Estate within Kitale, Trans Nzoia County intentionally caused contact between your penis and private parts organ (vagina) of S. K. a child aged 17 years.**
3. The 2nd Appellant was charged with the offence of **Benefiting from child prostitution contrary to section 15(e) of the sexual offences Act no 3 of 2006**. The particulars of the charge were that on **diverse dates between 5th March, 2016 and 7th March, 2016 at Laini Moja Estate Kitale within Trans Nzoia County, threatened and used violence towards S. K. a child aged 17 years to procure her sexual intercourse /indecent act.**
4. The Appellants were convicted and sentence to 15 and 10 years respectively hence this appeal. The Respondent has vehemently opposed this appeal. Before looking at the merits or otherwise and the grounds raised it would suffice at this juncture to summarise the evidence as presented during trial.
5. The complainant stated that she was 13 years old and a class 6 student at M primary school. She said that on the 6th March 2016 she went with her friend M to collect maize at railways. There, they met the 2nd Appellant who promised to give them some clothes if they accompany her to her place. They obliged and went to Laini moja where they entered a single roomed house where they met the 1st Appellant.
6. While in the house the 2nd Appellant forcefully tied her legs and covered her mouth with a clothe. She was undressed and the 1st Appellant defiled her. After two days they screamed and they were rescued by some neighbours. They were then taken to the hospital where they were treated and the P3 form filled.
7. **PW2 M N** also a minor testified that she was with the complainant at the railways where they had gone to collect maize. She gave the same version of evidence just like pw1. She said that the 1st Appellant was armed with a knife and threatened to harm them if they screamed. She saw him defiling PW1. She was also defiled by the 1st Appellant.

8. **PW3 S C** testified that she knew both appellants. The 1st Appellant was his neighbour since they live in the same estate while the 2nd Appellant used to work for people within the same estate although she did not know where she lived.

9. She said that she heard some screams of children emanating from the 1st Appellants house in the morning which was abnormal as there are no children within that area. She went to check and found the two distraught children. The appellants then escaped when other members of the public came. They were then taken to the hospital after the matter was reported at the police station.

10. **PW4 D M T** is the caretaker at the premises occupied by the 1st Appellant and PW3. He said that he was in his house on the 7th when he heard commotions outside. He came out and saw the two girls sitted outside the veranda and were being interrogated by some women. They said that they had been lured by the 2nd Appellant into that house with a promise of being given clothes. While in that house they were defiled by the 1st Appellant. He called the area chief and informed him of the incident. He told them to report at the police station.

11. **PW5 AP ANDREW MASINDE** testified that he arrested the Appellant at Kitale district hospital on 10th March, 2016 after he had been alerted by the security officers. He handed him over to kitale police station.

12. **PW6 PC PETER KWATENGE** from the Kitale police station gender and children unit carried out the investigations and preferred the charges against the Appellants.

13. **PW7 JOHN KOIMA** from Kitale County Referral hospital examined the complainant and found her hymen absent and hyperaemic vulva tender. He concluded that there was penetration.

14. When placed on his defence the 1st Appellant gave sworn evidence denying the charge. He said that he was coming from his work at around 5.30 pm when he was arrested on 10th March 2016 by plain clothes police officers. They were with PW3 whom he had differed with and threatened that he had finally been napped. He was shocked to hear that he had been accused of defilement.

15. The 2nd Appellant gave unsworn evidence denying the charges generally. She just prayed to be forgiven.

ANALYSIS AND DETRMINATION

16. Having heard the parties and perused the rival submissions, the ingredients of defilement charge which faced the 1st Appellant are now clear. One must established the age of the victim, the identity of the perpetrator and whether penetration did occur.

17. The age of the complainant was proved by the production of the dental age assement report which showed her to be about 17 years. She had however said during trial that she was 13 years. In the absence of any other documentary prove, this court shall presume that her age was that given by the dentist.

18. Was there penetration? Yes. The same was established by the minor's testimony, pw2 and the production of the P3 form. The p3 form in my view was conclusive.

19. Was the 1st Appellant the perpetrator? The evidence by PW1, 2, and 3 in my view nails the Appellant. PW3 in particular heard the children's voice emanating from the 1st Appellants house. They were neighbours, a fact not denied by the Appellant. In the meantime the children came out of the Appellants' house and were distressed and explained to them the ordeal they had gone through for the last 2 days.

20. PW4 the caretaker of the houses confirmed that the appellant was the one living in the said house. It cannot be true then that he lived elsewhere as he purports to say in his defence. If the children came from the said house, what were they doing and looking distressed. The conclusion was that they were defiled, a fact proved by the production of the medical documents and the oral evidence.

21. I thus find that the case against the 1st Appellant was proved beyond any shadow of doubt. The said children were lured by the 2nd Appellant. The 2nd Appellant was known by PW3 and PW4. The incident of luring the children took place in the afternoon and there can therefore be no case of mistaken identity. She spent quality time with the children who were able to see her clearly even assisting the co-appellant to when he defiled the complainant.

22. Her unsworn evidence and by extension that of the 1st Appellant did not shake the prosecution case at all.

23. I do not therefore find any merits in their appeal. The grounds raised are not substantive enough to challenge the trials courts findings. The appeals are hereby dismissed.

Dated signed and delivered at Kitale this 7th day of August, 2019.

H. K. CHEMITEI

JUDGE

7/8/19

In the presence of:-

Mr Omoria for Respondent

1st & 2nd Appellants present

Court Assistant – Kirong

Judgment read in open court.