



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 24 OF 2019

(Being an appeal arising from conviction and sentence In Kitale Chief

Magistrate's Court in CRMCC 114 of 2018 delivered by Hon. M. C. Kesse (SRM)).

JOSEPH KIPLAGAT KIBET.....APPELLANT

VERSES

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(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence was that on the 16th day of July, 2018 at [Particulars Withheld] area within Trans Nzoia County intentionally caused your penis to penetrate the vagina of RAB a child aged 16 years.**
2. The alternative charge was **committing 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 16th July, 2018 at [Particulars Withheld] area within Trans Nzoia County intentionally caused the conduct between your genital organs namely penis and the genital organ namely vagina of RAB a child aged 16 years.**
3. The Appellant was found guilty, convicted and sentence to 15 years imprisonment hence this appeal. He has argued in his grounds of appeal that the case was not proved beyond the shadow of doubt and that the medical evidence was not taken into account by the trial court. The other grounds raised are general assault on the entire findings of the trial court.
4. At this level it shall be appropriate to summarise the evidence as presented during trial before undertaking the analysis of the same.
5. **PW1 Dalek Mercy** a dental expert undertook a dental age assessment of the complainant and found that she was 16 years old.
6. **PW2 John Koima** the Clinical Officer from Kitale County Referral hospital relied on the notes prepared by his colleague one Ligare and concluded in the P3 form which he filled that the hymen was missing and fresh and that she had lost her virginity. He produced the P3 form and the treatment notes.
7. **PW3 JM** the mother to the complainant stated that she was 13 years old but was nevertheless satisfied by the dental report that she was 16 years. She said that the complainant was one of her children and suffered epileptic fits sometimes but she would go ahead and recover after sometimes.
8. She said that on the material day she had left home and left behind the complainant and her 3 year old child. She was called at around 1.00 pm by one Mary and told to hurry home which she did and when she arrived she found many people and that the complainant was lying on the road. She was told that she had been raped and she took her to a nearby dispensary and later to Kitale District hospital.
9. She went further to state that the complainant told her that the appellant who was a person she knew had defiled her twice but she did not inform her. She then informed the “nyumba kumi” chairlady and that’s when action was taken.
10. The complainant gave unsworn evidence where she told the court that while at home someone riding on a motor bike, boda boda, came and picked her. She described how the appellant striped her clothes and defiled her. She said that the appellant had in fact defiled her twice. She said she was defiled in a maize field at [Particulars Withheld] area. She was then left at the scene and some lady rescued her and took her home.
11. **PW5 Corporal Alfred Wepukhulu** from Lessos AP camp re-arrested the appellant when he was brought by the members of the public. He said that the appellant admitted that he had committed the offence.

12. **PW6 P.C Esther Nafula** from Kitale police station carried out the investigation and recorded statements from the witnesses. She issued the P3 form to the complainant which was filled. She said that the complainant was taken by a boda boda person and defiled her at a maize field and was left there. On her way home she met some women who rescued her and took her home. On cross examination she said that they visited the scene but did not get the exact place or the scene.

13. When placed on his defence the appellant gave unsworn defence. He said that he was a lorry driver and that he was arrested by some Kenya Police Reservist Officers on 19th July, 2018 at 6.00 am. He was taken to the police station and later the finger prints were taken and charged with the offence which he continues to deny.

ANALYSIS AND DETERMINATION.

14. The court has perused the entire evidence on record and although the parties were granted the chance to file written submissions it appears that none was filed. The duty of this court is to re-evaluate the evidence afresh and come up with a fresh finding with a caution that it did not have the chance to witness the full trial like the lower court.

15. The three ingredients of this offence of defilement are now known namely, the age of the victim must be ascertained, the identity of the perpetrator and that there must be proof of defilement.

16. The age of the complainant was established by the production of the dental age assessment by the doctor. She said that she was 16 years or thereabouts something which her mother did not have difficulty in conceding.

17. The element of defilement was proved through the evidence of the minor as well as the production of the treatment notes and the P3 form.

18. But who defiled the minor? From the evidence on record, there was no eye witness. The complainant who had been left at home was ferried by a motor cycle rider who then defiled her together with the appellant. She told the court that this was not the first time she had been defiled by the appellant but she had done so twice. The first time in his house and the second time in a maize plantation near the house and this was the third time.

19. The court has read the evidence of the complainant in chief and the cross examination and the two are contradictory in some aspect. Whereas in the latter she accused the appellant of defiling her, during cross examination she introduces the boda boda guy who equally defiled her. She went on to reply that:

“The boda boda operator came and picks me and told me he was taking me to Forkland to undress me. I left you at home.you usually undress me. You used to come to our home every day. You are not a boda boda operator. On that day I left was at home washing utensils. The boda boda operator came and held my hand he took me to Forkland. He told me that we were going to do “tabia mbaya”. You were not with me on that day. It was a Monday during the day. The boda boda operator is the one who defiled me. You defile me in your house. The boda boda took me to Forkland.”

20. When re-examined she maintained that it was the boda boda operator who defiled her at Forkland.

21. It had been said by the complainant’s mother that she would regain her ability to remember after about two days. It then appears that by the time she testified she must have remembered what transpired. There was no evidence led by the prosecution to show that the complainant had suffered any epileptic fit on the material day. Those who found her did not come to testify on her status when they found her but it appears that she was found on her way home although her mother stated that she was found lying on the road.

22. Is it possible that it was the appellant who defiled her that day? This is difficult to conclude for the simple reason that there was no eye witness to the incident. The introduction of the boda boda operator to the scene complicates matters. The complainant during cross examination by the appellant and re-examination by the learned State Counsel was clear that she had been taken from home by a boda boda rider and defiled at [Particulars Withheld] area.

23. There was evidence by the minor that the appellant had defiled her twice before near a maize field behind the house and in his house. She however did not tell anybody although her mother admitted to have heard but she also chose to keep quiete..

24. In my view, there was possibility that the appellant may have defiled her twice on another day but not this day. The boda boda operator whom she did not get to know must have defiled her. She was clear that it was not the appellant who took her to Forkland that day. It was therefore not proved that it was the appellant who defiled her.

25. This is a case in which one took advantage of the mental status of the minor. The ladies who found and rescued her and who notified her mother should have been called to testify especially on the state she was found in.

26. The sum total of this courts evaluation is that the appellant should have been granted the benefit of doubt as identification was marred by the introduction into the scene of the boda boda rider who remained unknown and at large. The arrest and charging of the appellant must have been informed by the earlier report by the complainant that he had defiled her. That remains an allegation as the charge sheet was clear on the specific dates.

27. The appeal is therefore allowed, the appellant set free unless lawfully held.

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

.....

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