



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 9 OF 2019

(Being an appeal from the decision of Hon. M. Moranga

in Criminal case No. 52 of 2017 at Kitale)

EMMANUEL WANYONYI.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of **Defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006**. The particulars of the offence were that **on the 3rd day of May, 2017 at [Particulars Withheld] village within Trans Nzoia County intentionally caused your penis to penetrate into the vagina of CN a child aged 12 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 3rd day of May, 2017 in [Particulars withheld] village within Trans Nzoia county intentionally caused contact between your genital organ namely penis and genital organ namely vagina of CN a child aged 12 years**.
3. The appellant was convicted and sentence to 20 years' imprisonment hence this appeal. He has raised several grounds on his appeal and it shall be worthwhile to summarise the evidence as presented during trial before looking at the merits or otherwise of this appeal.
4. **PW1 CNW** the complainant testified that she was 12 years of age and on the material day she had been sent by her mother at around 7.30 pm to buy cooking oil. As she came back from the shop she went to relieve herself behind a posho mill and after she was through and as she stood up to leave she was held by someone. She was then taken to a nearby house where two people held her down. One of them held her hands while the other one proceeded to defile her.
5. She further stated that her attempts to scream for help was not possible as her mouth was blocked. In the process of defiling her, the perpetrators phone was ringing and as he reached to answer it she was able to see his face using the light from the said mobile phone.
6. The suspect after he was through ordered her to leave and not to tell anyone as he was going to beat and harm her. She then put on her clothes and went home where she informed her mother who in turn informed her father. Her parents then reported the matter to the village elder and they traced the Appellant's house.
7. In the meantime, the matter was reported at the police station and the complainant was taken to the hospital where a P3 form was issued and subsequently filled. The complainant led her parents including her brother to the Appellant's house and although they did not manage to arrest him that night they did so the following day.
8. On cross examination by the Appellant she stated that she was not able to identify the other person who pinned her down and held her hands while the Appellant defiled her. She said that she guided the people to the Appellant's house and that is why he was arrested.
9. **PW2 AWS** the complainant's father testified that on the material day he was watching his television when her wife sent the complainant to buy cooking oil. She later came back after a while and his wife told him of the defilement incident. He went to the scene in the company of a young man and his wife together with the complainant. They were unable to get the Appellant and he informed the village elder.
10. He came back again and found the door locked but when they called him he answered and told him that he was asleep and that they should discuss the issue the following day. He took the child to the hospital and had the mater reported at the police station. The following

day at around

7 a.m together with the village elder they arrested the appellant.

11. **PW3 CNW**, the complainant mother testified that she sent her to the shop to buy cooking oil but she delayed coming back. She decided to go and look for her and she heard her crying. She informed her of her ordeal. They went together to the house which was opened but there was nobody. She went back and informed PW2 who went with the village elder. The complainant was taken to the hospital by PW2 and the following day they arrested the Appellant.

12. **PW4 ALICE TARIGO** from Kitale police station carried out the investigation when the matter was referred to her by the OCS. She issued them with the P3 form and recorded the statements after it was filled. She later preferred charges against the Appellant.

13. **PW5 KIRWA LABATT** from Kitale district hospital produced the P3 form as well as the treatment documents. He concluded after examining the complainant that her hymen was broken and had no other physical injuries.

14. When placed on his defence the appellant gave sworn evidence denying the charges. He said that the *nyumba kumi* person, one Mulea came to his home and told him that there was a child who had been defiled by two people in his house but he told him that he was staying with his wife and no other person.

15. He said that the complainant who had been beaten and could not look at his face stated that it was him who had defiled her and he was then taken to the chief's office. At the said office he was beaten by the AP officers and forced to confess. He denied that he committed the incident and said that the place was so open as there are traders selling their wares nearby.

16. **DW2 MARGARET NALIKA WAFULA** the wife to the Appellant stated that she works in a hotel and that on 4th May 2017 they were woken up by *nyumba kumi* person called Mulea who took the appellant and accused him of defilement. He followed and found him being beaten and was told to accept the offence. He denied that the Appellant could have been a child defiler.

17. **DW3 THOMAS BARASA KISIANGANI** worked with the Appellant as well as being neighbours. He went looking for him on 4th May, 2017 and he was told by his wife that he had been arrested. He followed with DW2 and found that he had been beaten up and forced to confess.

ANALYSIS AND DETERMINATION

18. Having summarised the evidence as presented, the duty of this court is to re-evaluate the same and come to afresh and an independent finding noting that it did not have the benefit of conducting the trial and therefore seeing the demeanour of the witnesses.

19. The parties were ordered during the trial of this appeal to file their written submissions which were apparently filed by the appellant alone. I have not at the writing of this decision seen the respondent's submission.

20. The grounds raised by the appellant in his appeal are general attack on the entire evidence as tendered by the respondent. He contends that the same was so contradictory that the trial court ought not to have arrived at the impugned decision. He said that the medical officer who carried out the exercise was not qualified to do so.

21. Having read the proceedings, the grounds and the submission, it is apparent that the three grounds for one to establish this offence must include that age of the victim, the identity of the perpetrator and whether penetration indeed took place.

22. On the question of the complainant's age the same was not in dispute during trial and even on this appeal. The certificate of birth produced and not disputed showed that she was 12 years old as at the time of the incident.

23. The other crucial question is the identity of the perpetrator. Given the circumstances of this case and in particular where there was no eye witness can one conclude that the complainant managed to identify her assailant?

24. On this she testified that;

“there was someone who was calling the person who raped me severally but he would disconnect. He was called twice. On the twice he picked his mobile phone which shone on his face and with the beam I could clearly identify him. He was standing about me as I lay on the ground facing up. That is when I recognised the accused by his facial looks”.

25. This line of evidence was not rebutted by the appellant during cross examination. In the estimation of this court there was every possibility of the complainant taking advantage of the light from the assailants' phone to identify him noting that her eyes were not covered.

26. What makes it stronger and as found by the trial court is the fact that the complainant immediately after the incident went home and came back with her mother and her brother to look for the appellant. The distance between the scene and the complainant's home seemed not very far for the complainant to have been mistaken.

27. Apart from her coming with her mother, she again came back with her father and were not able to get the appellant till the following morning. Given the quick action taken by the complainant, I find that it was not very possible to have mistaken the house where the incident

occurred. At any rate, the appellant and his wife have not denied that they were looking for him that night and was arrested by the *nyumba kumi* and taken to the chief's office the following day.

28. There was no evidence that the appellant was assaulted and forced to confess as he alleges. There was no production of any medical documentation noting that even after taking plea he was able to go back home and conducted the trial while a free person.

29. I find that the complainant was truthful as provided under the provisions of **Section 124** of the Evidence Act. In other words, being a single identifying witness and a minor in this case she was truthful and her evidence on identification with the aid of the light from the appellant's phone was not challenged.

30. Was the complainant defiled? This question should be answered by both the oral evidence on record as well as the medical documents produced. The complainant in her evidence in chief stated that;

“When I say ‘Alinirep’ I mean he removed my skirt and under pant then he placed his private organ into mine where I urinate. I felt bad and he took about 5 minutes before releasing me...”

31. From there she said that she wore her clothes and went home and explained to her mother what had happened.

32. On his part the clinical officer pw5 stated in his findings that;

“...she had no physical injuries on her body. On her genital organs she was fine. She had broken hymen...”

33. When cross examined by the appellant he went on to state that;

“I did not know what you did to make her scream after hymen was broken. It was old looking”.

34. The court has perused the p3 form which was filled the following day and it is clear that the hymen was **old looking** and that there was no other injury to the genitalia area of the complainant.

35. The issue this court is crumbling with is if indeed there was penetration would not have the injuries been fresh and not old looking as the doctors have indicated? Taking into context the age of the minor could she not have sustained other serious injuries taking into consideration also the force used by the assailant?

36. The minor simply told the court that she **“felt bad”**. There was no indication that she bled or felt pain at all. Equally in her evidence in chief she said that the appellant **“placed his private organ into mine where I urinate”**.

37. Taking into context the oral evidence as well as the medical evidence on board I do not think that there was partial or full penetration as defined under Section 2 of the Sexual Offences Act. This court considers that what took place should be construed as an Attempted Defilement as provided under Section 9 of the Act.

38. For the above reasons, and without going into other peripheral issues raised by the appellant I do not think that the charge of defilement was established in the circumstances but instead attempted defilement was.

39. In the premises, this appeal is hereby allowed only to the extent that the charge and sentence on count one is hereby set aside and substituted with the charge of **Attempted Defilement contrary to Section 9(1) and (2) of the Sexual Offences Act**.

40. Having found so the sentence of twenty years' imprisonment imposed against the appellant is equally set aside and substituted with a custodial sentence of 10 years' imprisonment from 5th February, 2019.

Dated signed and delivered in open court at Kitale this 25th day of November, 2019.

H. K. CHEMITEI

JUDGE.

25/11/2019

In the presence of:-

Mr Omooria for the Respondent

Court Assistant – Kirong

Appellant – present

Judgment read in open court.