



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 95 OF 2016

SOLOMON WANYONYI MAMATI.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of Hon. G. Sitati SRM in Criminal case No. 63 of 2016)

BETWEEN

REPUBLIC.....PROSECUTION

VERSES

SOLOMON WANYONYI MAMATI.....ACCUSED

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 offence were that between 8th May, 2016 and 9th May, 2016 within Trans - Nzoia County intentionally caused his penis to penetrate the vagina of AN a child aged 10 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 offence were that between 8th May, 2016 and 9th May, 2016 within Trans Nzoia County intentionally touched the vagina of AN a child aged 10 years with his penis.
3. The Appellant denied the offences. The prosecution called several witnesses whose evidence can be summarised as hereunder.
PW 1 JN the mother to the complainant testified that the complainant was a daughter to her late sister and was not of a sound mind. She said that in the evening of 8th May, 2016 she sent her daughter F together with the complainant to go and get some items from some house where they had vacated. The children did not come back till the following day.
4. After one week she realised that the complainant was unwell and upon checking she found that she had pain in her vagina. She explained to her that she had been defiled by the Appellant and that she had even left her panty in his house. She called *Mukasa, Nyumba kumi*, who advised that she reports the matter at the police station.
5. Meanwhile the Appellant was summoned and he admitted the offence. They went to his place and the complainant panty was recovered. The child was taken to the hospital where she was treated and the P3 Form was also filled.
6. **PW2 the complainant** testified that she was 12 years old and on that evening she was sent by PW1 to get some items from the vacated house. They met the Appellant who advised them to spent in his house that evening. They were together with R the Appellant's daughter.
7. That in the cause of the night the Appellant came to where they were sleeping and took the complainant and defiled her after removing her panty. She felt pain but the Appellant promised to buy her some soap and that she should not inform her mother. She however informed her later and she was taken to the hospital where she was treated and the p3 form, which she identified in court was filled. She also identified her panty which she had left at the house of the Appellant.
8. **PW3 DAVID WANJALA** said that he was in charge of *Nyumba kumi* and that he knew the Complainant. He said that he was called by the village elder on 16th May and found a crowd had gathered there. It was alleged that PW2 had been defiled. The Appellant who was there

sought forgiveness and he let them to his house where the child's panty was found. He was then taken to the police station at Kachibora.

9. **PW4 JOSEPH MORARA** a Senior Nurse at Cheranganyi Sub County hospital examined the minor and found in his conclusion that she had been defiled as there was laceration on the labia majora and minora. He also produced the dental age assessment report which showed that she was 12 years old.

10. **PW5 SGT. MARGARET NJERI** from Cheranganyi police station carried out the investigation after the Appellant had been brought to the station and recorded statements from the witnesses. She also gave out the P3 Form which was filled and she preferred charges against the Appellant.

11. When placed on his defence, the Appellant gave sworn evidence denying the charges. He said that when he came home that evening from Mois Bridge it was raining and he found the three girls who included his daughter at home. They made food, ate and slept.

12. He said that he went away on Monday morning and did not find them when he came back. He was arrested on the 16/5/2016 and he denied that he defiled the Complainant. On cross examination he admitted that the Complainant's panty was found in his house and that he was the one who gave it to the police.

ANALYSIS AND DETERMINATION

13. The court has perused the grounds of appeal raised by the Appellant and in summary the same are general attack on the veracity of the evidence as presented by the Respondent during trial. The court has also extensively read the homemade submission by the Appellant as well as that of the learned state counsel.

14. This being a first appeal, this court is enjoined to analyse the evidence afresh with a view to arriving at an independent finding with a caution that it did not have the benefit of conducting the trial and thus seeing the witnesses and their demeanour (**See Okeno Vs. Rep (1972), EA. 32**)

15. The three ingredients of defilement in my view were fully proved by the Respondent during trial. The first one was the age of the victim. The Dental Age assessment Report found that she was 12 years old a fact which was not disputed.

16. Secondly and as found by the trial court there was proper identity of the perpetrator. The child did not hesitate to inform her mother that it was the Appellant who had defiled her when they went to his place and spent the night there.

17. The Appellant did not deny that the children slept in his house. In fact, the production of the minor's innerwear by the Appellant was a testimony to this.

18. Was the Complainant defiled? In other words, was penetration established or proved? The answer is on the affirmative. The finding by PW1 as well as pw4 the nurse was a testimony to these. There were injuries found in her private parts and there was nothing to suggest that she sustained them elsewhere.

19. In a nutshell this court does not see any reason to disturb the findings of the trial court. The defence offered by the appellant did not oust the prosecution's evidence. Although the hymen was not broken the injuries as found by pw4 showed that there was attempted or partial penetration.

20. In short this court does not find any merit in this appeal. The appellant took advantage of the minor whom I suppose were friends with her daughter. The appeal is otherwise dismissed.

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

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H. K. CHEMITEI

JUDGE

25/11/19

In the presence of:-

Mr Omooria for the Respondent

Court Assistant – Kirong

Appellant – Present

Judgement read in open court.