



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 68 OF 2017

EDWIN WANJOYA AYOYL.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of Hon. P. Biwott in Kitale Sexual Offence No 14 of 2017)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

EDWIN WANYOYA AYOYL.....ACCUSED

JUDGMENT

1. The Appellant was charged with the offence of **Defilement of a child contrary to Section 8(1), (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge was that **on the 25th day of January, 2017 at [particulars withheld] village in Trans-Nzoia West Sub County Trans-Nzoia County intentionally caused his penis to penetrate the vagina of D N a child aged 13 years old.**
2. The alternative charge was **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act**. The particulars of the offence were that **on the 25th day of January, 2017 at [particulars withheld] village within Trans-Nzoia West Sub-County of Trans-Nzoia County intentionally touched the vagina od D. N. a child aged 13 years with his penis.**
3. The Appellant was convicted and sentence to 20 years' imprisonment hence this appeal. He has raised several grounds which this court shall refer later. For now, it shall be necessary to summarise the proceedings during trial.
4. **PW1 MARGARET NEKESA** testified that on the 28th January, 2017 she went to church and that the Complainant and other children went to the Appellant. She said that on 30/1/2017 she saw that the Complainant was walking abnormally and upon interrogation she told her that she had been defiled by the Appellant in his house. She then took her to the police station who referred her to the hospital where she was treated and the P3 Form filled.
5. On cross-examination she said that she saw the child walking abnormally that is when she inquired. She said that the child told her that the Appellant had promised to give her kshs. 10.
6. **PW2 the Complainant** testified that she was a class 3 pupil at [particulars withheld] primary school and was 11 years old. She said that she was sent to collect a battery by her uncle. She went with Mary on 25/1/2017at around 7.00 pm. Before they reached Starehe where the battery was they met the Appellant who called them and offered kshs.10 and took her by the hand to his house. Mary the other child managed to escape. Inside the house the Appellant removed her clothes as well as his and proceeded to defile her. She felt pain and bled and although she attempted to scream the Appellant threatened her.
7. She went home but she did not tell her uncle. She washed her bloodstained panty and kept the whole matter secret. Her grandmother questioned her when she saw her abnormal walk and she told her what had happened. She was thereafter taken to the hospital. During the process Mary managed to escape and she found her at home.
8. **PW3 MN** testified that she was 7 years old and in class 1. She said that on 25/1/2017 she accompanied PW2 to collect a battery which had been left to charge. On the way the Appellant called the two and promised to give them kshs.10. As they reached his door she escaped

and went home. The Appellant took the Complainant and entered the house and closed the door from inside. She said that she did not see what happened and she was not given the promised kshs. 10. She did not also tell anyone what had happened.

9. **PW4 PHARIS SILALI** the officer from the Dental Department Kitale District hospital produced the Dental Report which showed the Complainant was aged 13 years at the time of the incident.

10. **PW4 PETER MASAKE** the Clinical Officer from Kitale County Referral hospital examined the Complainant and produced the P3 Form. He concluded that he had been defiled as there was penetration and the injuries were fresh looking. He found that the hymen was broken and the vaginal walls inflamed.

11. **PW 6 SERGENT ROBERT NDIWA** carried out the investigations and recorded statements from the witnesses. He also gave out the P3 Form for filling and that was the basis for him to charge the Appellant. He said in cross-examination that he arrested the Appellant in his house.

12. When placed on his defence the Appellant gave unsworn evidence denying the charge. He said that he could not recall what transpired on the 25/1/2017. He said that he was arrested on the 29/1/2017 at Fig tree market and was accused of defiling the Complainant. He said that the Complainant's parents at some point wanted some money but his employer could only raise a sum of kshs. 10,000 out of kshs. 50,000 that had been demanded. He generally denied the offence.

ANALYSIS AND DETERMINATION

13. The court ordered that this matter be heard by way of written submissions which the parties have complied and I have perused the same extensively and to save on judicial time I find no need to reproduce save to state that the State vehemently opposes the appeal and opine that the charges were proved beyond any shadow of doubt. The duty of this court is to re-evaluate the evidence afresh noting however that it did not have the benefit of seeing the witnesses and thus assessing their demeanour, (see **Okeno vs Republic (1972) EA 32**).

14. The three now well accepted ingredients of defilement to be taken into account when considering the defilement charge are the age of the victim, the identity of the perpetrator and whether penetration occurred.

15. The grounds of appeal raised by the Appellant generally attacks the veracity of the evidence as presented by the Respondent during trial namely that the same was insufficient to have occasioned his conviction and subsequent sentencing. He said that the case was based on pure hearsay, something which the trial court failed to appreciate.

16. On the question of the age of the Complainant the dental evidence produced was sufficient in my view. Although the minor as well as her grandmother pw1 seemed not to agree on her age, the scientific assessment generally gravitated around the 13 years which the trial court rightly considered and I do not see any reason to depart from this.

17. In respect to whether she was defiled, the evidence of the Complainant was corroborated by the medical evidence which found that the injuries to her genitalia were fresh and that the hymen had been broken. She said that during her ordeal she felt pain and bled although she washed her soiled innerwear without informing anybody. This was sufficiently proved and at any rate the treatment and the analysis took not more than three days.

18. Was the Appellant the culprit? Although the incident took place around 7.00 pm there was not much challenge even on cross-examination about the lighting. There was nothing shown to indicate that there was a visibility challenge and the sum total of the evidence of the minors was that they were called by the appellant while they were on their way to collect the battery which had been taken for charging.

19. Both PW2 and PW3 agreed that the appellant promised to give them kshs.10 and that PW3 escaped leaving the complainant alone having entered the Appellant's house. The Complainant during cross-examination was clear that they passed the appellant's home while on their way to the trading centre. PW3 on the other hand was clear that the Appellant took PW2 into his house and closed the door.

20. The minors in my assessment were clear in the identification of the Appellant. There was no evidence to suggest that the Appellant challenged this area of identification and it would appear that they come from the same area. In the premises I find that their evidence was truthful and in line with the proviso to **Section 124 of the Evidence Act**. The same states that;

“provided where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim was talking the truth”.

21. The unsworn evidence by the Appellant was not of much probative value for the reason that it was not subjected to cross examination and more importantly he said that he could not recollect what transpired on 25/1/2017. He did not bother to call his employer whom he claimed that the Complainant's grandmother had demanded kshs. 50,000 from.

22. The upshot of this court findings is that this appeal is not merited at all. The other ground that he was incarcerated for more than 24 hours was not proved and in any case the same was not raised during trial.

23. The appeal is hereby dismissed.

Dated, signed and delivered in open court at Kitale this 18th day of December, 2019.

H. K. CHEMITEI

JUDGE

18/12/19

In the presence of:-

Mr Omooria for Respondent

Appellant - present

Court Assistant – Silvia

Judgement read in open court.