



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 93 OF 2017

(Being an appeal from the Judgment of Hon. P.W. Wasike in Sexual Offence Case No. 94/2006)

MARK SHIUNDU WANJALA.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

MARK SHIUNDU WANJALA.....ACCUSED

JUDGEMENT

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 charge were that **on the diverse dates between 1st and 31st October, 2013 within Trans -Nzoia County intentionally caused your penis to penetrate into the vagina of ECK a child aged 13 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 diverse dates between 1st and 31st October, 2013 within Trans-Nzoia County intentionally caused the contact between your genital organ namely penis and genital organ namely vagina of ECK a child aged 13 years**.

3. The Appellant was convicted and sentenced to 20 years' imprisonment hence this appeal. Before looking at the merits or otherwise of this appeal it is necessary to summary at this juncture the evidence as presented during trial.

4. PW1 JOHN KOIMA the Clinical Officer from Kitale County Referral hospital examined the complainant and filled the P3 form on 24th June, 2016. The complaint was that she was passing urine uncontrollably and when inquired she said that she had been defiled by the Appellant sometimes in the year 2013. He found her to have pain in her lower abdomen and her hymen was torn. She had no injuries on her labia but had faecal discharge at her anus. He concluded that she had sexual assault.

5. PW2, the Complainant stated that she was 14 years old and a pupil at [particulars withheld] primary school and that she was born on 3/3/2003. She said that in 2013 she was 11 years old when the appellant who was her neighbour and a herder came to shelter from rain one afternoon. She was with her siblings and the appellant sent one of them to buy sweets and in the process while away he defiled her. He threatened her not to tell anyone or else she would harm her.

6. She did not tell anyone and later while in school she was unable to pass to control her urine. She was taken to the hospital for treatment and that is the time her mother got to learn. The problem was however solved and she has been able to control her passing of urine.

7. PW3 RNK the sister to PW2 said that she was 11 years old and a class 4 pupil at [particulars withheld] primary school. On a date she can't recall in October 2013 she was at home with her siblings including JK who were younger than her. Her parents had gone to work and the Appellant who was taking care of a neighbour's animals came and took shelter from the rain.

8. After the rains had subsided he sent her to get sweets from the shop after giving her ksh.20. He came back and he gave her also kshs. 10 to buy tobacco. She left him at home and when she came back she did not notice anything. PW2 urinated on her clothes and she was sent home by her teacher to go and inform her mother.

9. **PW4 DKW** is the mother to PW2. She said that she was called to school on 23/6/2016 and told to take her to the hospital as she was passing urine uncontrollably. She disclosed to her what the Appellant had done to her. She was not at home at that time and the child told her what had happened. She took her to Cheranganyi hospital where she was treated and later P3 form filled. She has since recovered from the problem.

10. **PW5 P. C ESTHER NOLARI** from Kitale police station carried out the investigation and preferred charges against the appellant. She also recorded statements from the witnesses. She produced the original clinic card showing the complainant's age.

11. The Appellant gave sworn defence denying the charge and explaining how he was arrested on the 8/7/2016 and taken to the police station. He said that he was being framed.

ANALYSIS AND DETERMINATION

12. The court has perused the submissions by the parties herein. The grounds of appeal raised by the appellant are generally an assault on the entire prosecution evidence which in essence according to him did not establish the offence. He said that had the court fully analysed the evidence presented it would not have arrived at the said impugned decision.

13. The three grounds of defilements which must be proved are well captured by the learned state counsel, namely the age of the victim must be proved, the identity of the perpetrator and that penetration did occur.

14. In this case the production of the clinic card is uncontested and thus her age was properly proved.

15. As to the identity of the assailant, the incident occurred during the day and the Complainant as well as her sibling did not show any contrary evidence that there could be a case of mistaken identity. The Appellant did not deny for example that he was a herder and a neighbour to the Complainant.

16. The question however is whether he defiled the Complainant. The challenge which the prosecution had to surmount was the lapse of time. It appears that the matter was reported three years down the line. It only came into fore because the complainant was passing urine uncontrollably.

17. What happened between the time of the incident up to the expiry of three years?. Was the cause of the illness namely inability to pass urine caused by the defilement? The medical evidence produced was the p3 form and treatment notes.

18. The witness, PW1, did not tell the trial court whether that was the cause. He only said that ***"I concluded high suspicion of sexual assault."***

19. Was that suspicion enough? I find it difficult to reconcile the conclusion with the evidence by the minor that she felt pain but did not bleed. Her mother on the other hand stated that she was treated of fistula.

20. There was no evidence of fistula treatment and if that was the case does defilement causes fistula. It is possible that it does but an opinion from the child's mother in the absence of any medical evidence is not conclusive. PW1 on the other hand did not say that the child suffered from fistula.

21. PW 3 stated that when she came home the complainant was not sad but playing. If the appellant defiled the Complainant occasioning her such injuries as to later cause her to suffer from uncontrolled passing of urine, couldn't it have been possible that the minor was in fact unable to walk or bleed in the circumstances?

22. The results of my analysis is that in the absence of strong medical evidence, it is not possible three years later to conclude that the complainant had been defiled. The prosecution should have in my view demonstrated strong evidence that the suffering in which the minor was not able to control her urine was caused by the defilement three years earlier.

23. In essence the Appellant should have been given the benefit of doubt which I hereby do and set him free by allowing this appeal.

24. Let the Appellant be set free unless lawfully held.

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. Omoori for Respondent

Appellant – present

Court Assistant – Silvia

Judgement read in open court