



REPUBLIC OF KENYA

N THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO.17 OF 2018

(Being an Appeal from the judgment of Hon. P. C. Biwott in Criminal Case No. S.O 100/2015)

SIMON WANJALA WANYONYI.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

BETWEEN

REPUBLIC.....PROSECUTION

VERSES

SIMON WANJALA WANYONYI.....ACCUSED

JUDGMENT

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1), (3) of the Sexual Offences Act No. 3/2006**. The particulars of the charge are that on **the 30th day of May, 2015 within Trans-Nzoia County intentionally and unlawfully committed an act by inserting a male genital organ namely penis into the female genital organ namely vagina of MC (name withheld) a girl aged 6 years which caused penetration.**
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 206**. The particulars of the charge are that **on the 30th May, 2015 within the Trans-Nzoia County intentionally touched the vagina of MC (name withheld) a child aged 6 years.**
3. The Appellant was convicted and sentenced to life imprisonment hence this appeal. The Appellant raised several grounds of appeal which this court shall consider shortly. The state has opposed the same arguing that the case against the Appellant was well proved beyond a shadow of doubt and therefore the appeal ought to be dismissed.
4. The summary of the proceedings at the tribunal ought to be summarised before the analysis of the appeal.
5. The Complainant **PW1** stated that she was 6 years old and a class 1 pupil at [Particulars Withheld] primary school. On the material day she was playing with her friends Memo and Teti when she was called by the Appellant. He then took her to his house and defiled her after removing her clothes. She said she felt pain but warned her not to tell anyone.
6. She then went home and Mama Memo saw her underwear which had blood and she beat her up. She explained to her what the appellant had done. She took her to the home of the Appellant.
7. On cross examination she said that she knew the Appellant well as she was sometimes left with her when her mother goes to work at the posho mill.
8. **PW2 AM** testified that she was home at around 4pm on 30/5/2015 washing the kids. She realised that the Complainant was bleeding from her private parts and when she inquired she cried. She told her of what the Appellant had done to her. She went with her to the Appellant's house but when the child saw him she ran away. She took her to the clinic although the Appellant disputed. She took the child to the Kitale District hospital and later to the police station. The public arrested the accused in his house while he was changing his clothes.
9. **PW3 ACE** the mother to the Complainant said that she was not around during the incident but was called by PW2 and informed of the

incident. She produced the child's birth certificate which showed that she was born on 17/1/09. He said that she knew the appellant as they attended the same church together.

10. **PW4 LINUS LIGARE** a clinical officer from Kitale District hospital examined the complainant and opined that she had blood stains in her private parts and had broken hymen. The lower side had cut and bruises inside the walls. He concluded that she had been defiled.

11. **PW5 CPL JACOB CHEPTICH** from Kobolet police station testified that he was the Investigating Officer. He said that on the material day he left the office for Kachibora market and on the way he found members of the public attacking the Appellant. He rescued him and took him using a motorcycle to Kachibora police station where he found PW2 reporting the defilement of the Complainant.

12. He then recorded the statements from the witnesses and referred her to the hospital for treatment. The Complainant according to him knew the appellant. He also produced the birth certificate as an exhibit. On cross examination he said that those who were playing with the complainant were too young to record their statements.

13. When he was put in his defence the appellant gave sworn evidence denying the charge. He said that on the material day he was at Kapcherop where he had gone to plant potatoes with his workers up to around 5pm when he returned home. As he alighted at Kachibora stage a group of boda boda people attacked him and brought him to Mois Bridge stage where he was rescued by a Police Officer.

14. He was thereafter taken to the cells and his finger prints taken and later charged. On cross examination he denied that he knew the complainant and that he could not recall the date he was arrested.

ANALYSIS AND DETERMINATION

15. The court has perused the submissions by both the Appellant and the learned state counsel extensively and they are of course as expected at variance.

16. The grounds raised by the Appellant in his appeal generally are that the evidence as presented by the Respondent did not meet the threshold for him to have been concocted. He accused the trial court of not according him a fair hearing and specifically that the witnesses were not recalled.

17. The court in making this decision is alive to the fact that it did not have the benefit of conducting the trial and thus did not see the demeanour of the witnesses. **See OKENO VS. REPUBLIC (1972) E. A .32.**

18. The three ingredients of defilement namely the age of the victim, the identity of the perpetrator and whether there was penetration must always be established.

19. The age of the minor contrary to the grounds raised by the Appellant was proved by her mother who produced her certificate of birth which clearly showed that she was around 6 years old. This court is satisfied that barring any other objection there was no need to conduct an age assessment on the minor as submitted by the Appellant.

20. On the question of whether she was defiled, I find that the same was proved by the oral testimony of PW1 and 2. The complainant specifically and clearly explained what transpired and how she felt the pain. She bled and although the innerwear was not produced she could identify the same in court.

21. The evidence by the guardian that she saw blood in the complainant private parts and her innerwear still corroborated her evidence that she was defiled. The clinical officer found for a fact that the appellant's hymen was broken and there were injuries in her private parts. This examination took place the following day meaning essentially that it was still fresh.

22. Was the appellant the perpetrator? The direct evidence available is that of the complainant. She clearly said that she was called by the appellant although she was not clear on the time. Taking into consideration PW2 evidence, namely that she was washing the children at around 4pm, then it can be concluded that the incidence took place some few hours ago which was still daytime.

23. The witness said that they went looking for the appellant and the child upon seeing him ran away. The child led PW2 to his house. She went on to state on cross examination that;

“Every time mum went to work in the posho mill, she left me with you. Sometimes you assisted her operating the posho mill.”

24. This was a person she knew and she even led PW2 to his house. I do not find any sufficient reason that she was lying. I find that she was truthful and in line with the provisions of Section 124 of the Evidence Act, the proviso thereof.

25. Looking at the Appellant's sworn defence he admitted that he was rescued by PW5 from the mob, a fact which PW5 stated in his evidence in chief. The Appellant did not bother to call his workers with whom they worked together planting potatoes at Kapcherop that day as he said. If he was not at the scene, then clearly he would have had a strong defence of alibi. This in my view was concocted to suit the occasion.

26. The other issue raised by the appellant in his submission is the fact that the trial court was unfair for the witnesses namely PW1,2 and 3 were not recalled.

27. The court has perused the record and it appears that the reason why he wanted them back was captured in his address to the court on 29/8/17, where he said that;

“the high court application was dismissed. I’m sorry for it. I made application on wrong advice. My witnesses are there. I’m 1st time suspect. My case went when I was not ready. The 3 witnesses who testified be recalled for cross examination by me and we go on with trial “.

28. The Appellant suggested to the trial court that he was not ready. The trial court acceded to his request which later became difficult to comply by the Respondent as they were unable to trace the witnesses as they had moved out of its jurisdiction and all efforts to trace them were fruitless.

29. I sympathise with the respondent but from the proceedings on record it appears that they did all that they could to recall the said witnesses. The Appellant on his part seemed to have prolonged the hearing when he made an application to the High Court to have the matter taken out of the said court to another trial magistrate. The same was dismissed and he tendered the above cited apology. The sum total of this is that the Appellant had himself to blame as he cannot complain since he caused the delay.

30. However, can one read any injustice caused to the Appellant? Can it be said that lack of recalling the witnesses prejudiced his case? I do not think so for the simple reason that the proceedings on record shows that he cross examined the witnesses without any difficulty. He did not complain though he was a first time suspect that he had problems with the trial. Although he requested for the statements later, the proceedings do not indicate that he was denied the same or lack of them hampered the prosecution of the case.

31. In the premises, this court does not find any merit in the appeal and it is hereby dismissed.

32. On the question of sentencing though he was properly sentenced, this court shall borrow the directions given by the Court of Appeal sitting in Kisumu in the case of **JARED KOITA INJIRI VS. REPUBLIC, Criminal Appeal. No 93/14**, where the learned judges stated that;

“In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.

The applicant was provided an opportunity to mitigate in the trial where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruateteu & Another Vs. Republic (supra) we would set aside the sentence for life imposed and substitute it therefore with a 30 years from the date of sentence by the trial court.”

33. I find the above authority in all fours with this matter. The appeal is therefore dismissed, the sentence for life set aside and the appellant is sentence to serve 30 years’ imprisonment from the date of the trial courts judgment.

34. Orders accordingly

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

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H. K. CHEMITEI

JUDGE

18/12/19