



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 46 OF 2017

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal case No. 18 of 2016 delivered by C.C. Kipkorir – Resident Magistrate on 19/5/2017.)

BENARD BARASA WEKESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the **24th day of January 2016 within Trans Nzoia County intentionally caused his penis to penetrate the vagina of S.N.W. a child aged 14 years.**
2. He was equally charged with the offence of **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 on the **24th day of January 2016 within Trans Nzoia County intentionally touched the vagina of S.N.W. a child aged 14 years with his penis.**
3. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal. The summary of the facts and evidence at the trial court was as hereunder.
4. **PW1 the complainant** told the court that she was 15 years old and a class eight (8) pupil at [particulars withheld] primary school. That on 24/1/2016 she had gone to shave her hair. On her way back at around 4 pm she met the appellant who was her neighbour and asked her that they use a short cut on their way home. She obliged. While on the way he told her **“utanikubali ama nikunyonge”** and he proceeded to undress her and defiled her for about 2 hours. She then went home and told her mother. She went to the hospital – Kachibora where she was treated and P3 form filled. The matter was reported at Kipsingori police station. The appellant was arrested and taken to the police station.
5. On cross-examination she said that she could not raise any alarm in the bush as the appellant threatened to strangle her.
6. **PW2 A N W** the complainant's mother testified that her daughter had gone to shave her hair that Sunday. When she came back she told her what had transpired. She decided to go and look for the appellant who was found and taken to Kipsigon police station. The following day she took the girl to hospital.
7. **PW3 Musa Chepkuyeng** a Clinical officer at Cherengany Sub County hospital examined the complainant on 26/1/2016 and found that he clothes were torn and had bruises on the neck, hand and legs. Her hymen was freshly broken and she had contracted STI – gonorrhoea. He concluded that she had been defiled. He filled the P3 form.
8. **PW4 P.C. Charles Osiengo** of Kipsingori police patrol base carried out the investigations and recorded statements from the witnesses. After getting the P3 form duly filled he preferred charges against the appellant who had been arrested and brought to the station by the members of public. He produced the P3 form and her notification of birth document.
9. When put on his defence the appellant gave unsworn evidence. He only explained his movement on 25/1/2016 when he had gone to watch football and was arrested on his way back by 4 people and taken to the police station and later charged.

Analysis and Determination

10. The appellant's grounds of appeal essentially dwelt on generalities. He states that the matter was not proved beyond reasonable doubt and that the trial court did not consider his defence.

11. I have perused the submissions made by both the appellant and the respondent's counsel. This being an appeal, this court is enjoined to arrive at a fresh, independent decision.

(See Okeno V Republic (1972)E.A. 32)

12. The ingredients for the offence of defilement which ought to be proved are identity of the perpetrator, the age of the victim and whether there was penetration.

13. In this case the incident occurred at around 4 pm according to the complainant. The appellant was her neighbour whom she had known for about 2 weeks. It was not disputed that she had gone to shave her hair as per her evidence and that of her mother. The appellant in his defence did not deny that he did not know the complainant. This being the case, I am satisfied that there was no case of mistaken identity.

14. The next issue is the age of the complainant. The notification of birth produced shows that she was born on 01/03/1999 and although she said that she was born in the year 2000 her mother clarified the same. The notification of birth exhibit 2 was not contested and thus her age is not in contention.

15. Was the complainant defiled and if so by whom? The evidence by the complainant was clearly corroborated by PW3, the Clinical Officer. The injuries on the neck, hand and legs are consistent with the force used by the appellant. Her hymen was freshly torn. Worse still she was infected with sexually transmitted disease.

16. There was no any other eye witness to the incident. It was therefore the complainant word against the appellant. Section 124 states as follows at its proviso:-

“ ----- Provided that 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 person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

17. My general reading of the entire proceedings convinces me beyond any shadow of doubt that the minor was telling the truth. She was examined within 24 hours after the incident. She informed her mother immediately after the ordeal who began looking for the appellant including double locking his door to the house where he was staying with two padlocks. He was immediately arrested and taken to the police. The examination of the complainant showed that she had been freshly defiled. The injuries on her limbs confirmed what she had stated that the appellant had used force and threatened to strangle her.

18. Consequently the totality of the evidence and in particular that there was no malice shown on the part of the complainant and her mother against the appellant I do not see any reason to disbelieve her. More significantly, the appellant when given chance to defend himself did not offer any plausible defence and in particular his movements on 24/1/2016.

19. consequently I do not find this appeal meritorious and the same is hereby dismissed.

Delivered, signed and dated at Kitale this 20th day of March 2018.

H.K. CHEMITEI

JUDGE

20/3/18

In the presence of:

M/s Kakoi for the Respondent

Appellant - present

Court Assistant – Silvia

Judgment delivered in open court