



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 42 OF 2017**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal Case No. 159/2016 delivered by P. Biwott – Senior Principal Magistrate on 12/5/2017.)**

**DAVID SOITA SIMIYU.....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) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the **5<sup>th</sup> day of June 2016 within Trans Nzoia County, intentionally caused his penis to penetrate the anus of J.W.W. a child aged 10 years.**
2. He was equally charged with the alternative charge of **Committing an Indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the **5<sup>th</sup> day of June 2016 within Trans Nzoia County , intentionally caused contact between his penis and anus of J.W.W. a child aged 10 years.**
3. The appellant was convicted and he has now preferred this appeal which he has raised several grounds.
4. The facts and evidence at the trial court were that **PW1, S W** testified that on 5th day of June 2016 at 3 pm she went to church . On returning home she did not find her grandson upto around 7 pm. While looking for him, she found him along the road, where he complained that he had been sodomised by the appellant. She then took him to Sikhendu police post who referred her to Kitale District hospital. The village elder assisted in arresting the appellant who was a herdsman of one Henry.
5. **PW2 the complainant** stated that he was 10 years old and a class 1 pupil at [particulars withheld] primary school and that he lived with his grandmother PW1. That at around 3 Pm on 5/6/2016, he went looking for firewood when he was forcefully grabbed by the appellant who ordered him to remove his clothes and he proceeded to sodomise him. He felt pain and screamed but he strangled him. No one came to his rescue and he threatened to kill him. He was released around 7 pm and he went home and had difficulty walking. He informed her grandmother whom she found on the way to the house. The matter was reported to the village elder and he was taken to Matunda hospital. He said that he knew the appellant before this day as Henry's herdsman.
6. **PW3 Hesborn Wakoli** Chief Sikhendu location testified that on 6<sup>th</sup> day of June 2016 at 9 am he was informed by the village elder concerning the incident. That the matter had been reported to the police and he saved the appellant from the irate villagers who wanted to lynch him. He took him using his motorcycle to Sikhendu police station. He had known him for 2 years.
7. **PW4 Fredrick Kimosop** a Clinical Officer at Matunda District Hospital produced the P3 form which he filled after examining the complainant. He found that he had bruises on the neck and his anus was tender with dry blood stains. He treated him and referred him to another hospital.
8. **PW6 PC Evans Odhiambo** of Sikhendu police station carried out the investigations after the appellant was brought by the area chief. He issued the complainant with the P3 form which was filled and returned. He took statements from the witnesses and preferred charges against the appellant.
9. When put on his defence the appellant gave unsworn evidence denying the charge. He said that on 5<sup>th</sup> June 2016 he was herding animals at Bukwet area and thereafter he would milk the same and sell the milk. This would take place between 9 am, 2pm and 6 pm. He therefore did not have time to commit the offence. He denied knowing the complainant nor his grandmother. He said that he was arrested while herding the cows by the Chief and placed in police cells for offence he did not know. He said that he was beaten and forced to admit the offence. He generally denied the charges.

## **Analysis and Determination**

10. I have read the written submissions by both the appellant and the respondent. It is trite law that this being a first appeal, this court is enjoined to reach a fresh and independent finding with a caution that it did not have the opportunity to hear the witnesses.
11. The grounds raised by the appellant in his appeal are what I may call general in nature. He has argued that the case was not proved beyond any shadow of doubt, the charge was defective and rthw burden was shifted to the appellant.
12. The elements which ordinarily ought to be established in such offence at hand are that the age of the victim ought to be ascertained, that the perpetrator was clearly identified and that penetration really occurred.
13. The age of the complainant was corroborated by the evidence of PW5 Pharis Silali the dental officer from Kitale District hospital who produced the report showing that the minor was aged 14 years old. This report was never disputed at all.
14. Was the complainant Sexually assaulted? The answer in my view is affirmative. This was confirmed by PW1 as well as the report by the Clinical Officer. There was injuries on the neck and on the anus with some blood stains. This corroborates what the complainant said that he was forcefully sodomised in a maize field.
15. Did the appellant carry out the offence? There was no eye witness. It was thus the complainant word against the appellant's. The incident occurred around 3 pm. I do not think that there would be any case of mistaken identity.
16. It was generally agreed that the appellant was a herdsman for one Henry. This was confirmed by PW1, the complainant as well as the area chief. The appellant equally affirmed this.
17. It is not therefore true that the appellant did not know the complainant or his grandmother. I have strained to see any reason why the minor would zero in on the appellant maliciously. During cross-examination, he went ahead to tell the court what kind of clothes, the appellant was wearing, namely a white shirt and black trouser. He knew the appellant as Davie and at that time did not have cattle. It was around 3 pm which is almost the time her grandmother had gone to church and advised him to look for firewood.
18. In his unsworn defence the appellant stated that;

**“ I herd from 9.00 am to 2 pm, milk them and go selling milk, then back to herd again till 6 pm.”**

clearly he was a herdsman as explained by the complainant.

19. Under the Proviso to **Section 124 of the Evidence Act** this court is enjoined to belief the uncorroborated evidence of minor if it beliefs that he speaks the truth. The same states that:

**“ ----- 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.”**

19. Looking at chronology and sequence of events, I do not find any inconsistent evidences. PW1 went to the church, and when she came back, she did not get grandson. She the decided to look for him and she found him on the way. He told her that he was being killed and told her what had happened. He was then taken to the hospital and the results are as per the P3 form. I do not see any reason why the child would lie to the grandmother and in zeroing in on the appellant. Even during cross-examination he was empathic and his evidence was not shaken.

20. In the premises and from the above reasons I do not find this appeal meritorious. The same is hereby dismissed.

**Delivered, signed and dated at Kitale this 20<sup>th</sup> day of March 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**20/3/18**

**In the presence of:**

**M/s Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Silvia**

**Judgment read in open court**