



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 37 OF 2017

(Being an appeal arising from conviction and sentence from Kitale Chief Magistrate's Court Sexual Offence Case No. 41 of 2016 delivered by P. Biwott Senior Principal Magistrate on 11/4/2017)

DAVID WANJALA WANYONYI 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) as read with Section 8(3) of the Sexual Offences Act NO 3 of 2006**. The particulars of the charge were that on the **6th day of March 2016 within Trans-Nzoia County, intentionally caused his penis to penetrate into the vagina of L.B.C. a child aged 12 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 were that on the **6th day of March 2016 within Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of L.B.C. a child aged 12 years.**
3. The appellant was convicted and sentenced to 20 years imprisonment hence this appeal.
4. Before dealing with the grounds raised in the appeal its worthwhile to summarise the evidence as presented during trial.
5. **PW1 the complainant** told the trial court that she was 12 years old and class 6 pupil at [particulars withheld] land primary school. That on 6th March 2016 at around midnight and while sleeping with 2 younger children he was woken up by the appellant who was her neighbour. He identified himself as Daudi and ordered him to shut up. He had a knife. He proceeded to defile her. He thereafter took her outside having wrapped the blanket around her and went ahead to defile her.
6. The complainant further stated that she pretended that she wanted to go for a long call and managed to escape. On the way she met one Pati whom she informed what was going on. She ran home and informed her mother and a neighbour called Mama Njeri. He led them together with her father to the scene where they recovered the blanket as well as the appellant's trouser. She was taken to Kitale District hospital by the said Patrick and the matter reported to the police.
7. **PW2 R E M** the complainant's mother testified that she was asleep on 6th March 2016 when at around 1.30 am she heard her daughter knocking the door. She then told her what the appellant had done. She was then taken to the hospital and P3 form filled.
8. **PW3 Moses Wekesa Bukoswa** is the Assistant Chief Matisi sub location. He testified that on 6th March 2016 at 11 pm he was informed of a defilement suspect who was in a deserted house. He went to the scene and rescued the appellant from being lynched by the members of the public. He arrested him and handed him to the police. He said that he had known the appellant for the last 15 years.
9. **PW4 John Koima** the clinical officer based at Kitale District hospital examined the complainant and filled the P3 form. He found that the hymen was absent and there was no blood in urine as well as pus cells. He concluded that there was penetration.
10. **PW5 Pharis Silali** from Kitale District Hospital Dental department produced the age assessment report for the complainant which concluded upon examination that she was 12 years old.
11. **PW6 CPL Felicity Cherono** from Kitale police station, gender officer carried out the investigations and preferred charges against the appellant.

12. When put on his defence the appellant gave unsworn evidence denying the charges. He admitted that he was a neighbour to the appellant for over 10 years and her mother sells alcohol. He said that he had quarrelled with her mother for he customers had covered his parking area and thus he had no space for his bicycle. He said that the charges against him were framed.

Analysis and Determination

13. I have carefully perused the proceedings herein as well as the submissions by both the appellant and the learned state counsel. This being the first appeal, the court is enjoined to reevaluate the evidence afresh.

14. The ingredients for the offence of defilement are now well settled. They include interalia, the age of the victim, the identity of the perpetrator as well as prove that there was penetration.

15. The appellant has raised general issues in his grounds of appeal which include among others that the case was not proved beyond a shadow of doubt and that key essential witnesses were not called by the prosecution.

16. I find that the age of the complainant was well established . The complainant stated that she was 12 years of age, a fact which was well captured by the production of the dental age assessment.

17. As to whether she was defiled the evidence by the complainant was corroborated by that of the clinical officer by producing the P3 form as well as the treatment notes.

18. The next issue which I think merits serious considerations is whether the appellant was the perpetrator. It is not in dispute that both the appellant and the complainant are neighbours and they have known each other for a long time.

19. The incident took place at around 1 pm. The complainant stated that she woke up to find someone holding her. She recognised her as Daudi who went ahead to identify himself . He drew a knife and threatened her.

20. What I am unable to appreciate is whether there was any form of light that enabled her to see the assailant. Although she mentioned that the door was opened, she did not mentioned whether there was any light even emanating from outside.

21. Equally, when she was carried to the field, what kind of light was there? Was there any security light or moon light? Is it possible that there was a case of mistaken identity?

22. What about the trouser that was allegedly left by the appellant? Where did it go if at all they were together with the blanket.

23. The appellant equally told the court that while she escaped from the appellant she met one Patrick whom she told that the appellant was chasing her. This Patrick in my view was a critical witness as he was the one who met the complainant while being chased by the appellant. Infact it is still the same Patrick who took the complainant to the hospital.

24. I find that the above issues needed clarification on the part of the prosecution. I take notice of the fact that the complainant being of tender age could at times confuse issues or mix them up especially in such stressful encounters. It was imperative therefore that the adults who included Patrick and who literally rescued the complainant ought to have testified. Equally going by the unsworn evidence given by the appellant concerning a quarrel she had with the complainant's mother, it was perhaps worthwhile to have the evidence of one Mama Njeri buttress what PW2 was stating.

25. Needless to say I find that there was no proper identification of the perpetrator. Waking up from sleep at that hour and going through the ordeal she went through may cause sufficient confusion in the mind of a victim, more so a minor. Infact there was no evidence to suggest that she identified the voice of the perpetrator and thus concluded that it was the appellant.

26. In ***Wamunga Vs Republic (1989) KLR 426*** the court stated that;

“ It's trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

27. For the foregoing reasons I shall grant the appellant the benefit of doubt. Had Patrick testified and at least the trouser allegedly left behind produced, this court would have concluded otherwise. For now I find that it was unsafe to convict the appellant especially where identification was not proper.

28. The appeal is hereby allowed, the appellant set free unless lawfully held.

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 read in open court