



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 12 OF 2017

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court S.O. No. 9 of 2015 delivered by M.I.G. Moranga – Principal Magistrate on 15/2/2017.)

JOSEPH WEKESA FUCHAKA APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **defilement of a child contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006.**

The particulars were that on the **10th day of January 2015 within Trans Nzoia county, intentionally caused his penis to penetrate into the vagina of N M M a child aged 5 years.**

2. He was equally charged with **committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act o. 3 of 2006.** The particulars of the offence were that on the **10th day of January 2015 within Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of N M M a child aged 5 years.**

3. The appellant was convicted and sentenced to life imprisonment hence this appeal which is premised on several grounds.

4. The summary of the case as at the trial court was as follows PW1. The complainant told the court that she was a class one pupil at **[particulars withheld]** primary school. On the material day, she was at her aunt's place when the appellant came asking for water to drink at around 10 am. After giving him water she requested that she follows him so that he could give her kshs 10. He took her to a nearby bush where he proceeded to defile her. She felt pain but she did not scream or cry. He then left with the sack which he had placed on the ground. She went home and played with her friends including one W.

4. At 11 am her mother came and she told her what had transpired between her and the appellant. She examined her and took her to Referral hospital where she was treated.

5. **PW2 O N** the brother to the complainant and a minor also gave sworn evidence and stated that she had been sent by her mother to get one cow which had been left behind and also some stick for beating dry beans pods. He went with one K to get the stick and in the processes found the appellant lying on top of the complainant with a sack on the ground. His trouser had been moved to his knees. When he saw him he quickly wore his trouser and took off towards the gate where he was carrying wood. He ran home and

informed her mother. Apparently according to him the complainant did not see him.

6. **PW3 S M N** the mother to the complainant told the court that she took her cows for grazing at around 10 am on 10/1/2015. She was with PW2 his son. She went back to the house after tethering the cows but did not find the complainant whom she had left at home with the small child . She told O to get a stick for beating the beans. He then came back running and said that she had found the complainant crying having been defiled by some man who worked at his uncles place. She rushed to the scene and found the appellant. She screamed and one Isabella joined her. She examined the complainant and found sperms on her private parts. She took her to Kitale District Hospital. Members of the public arrested the appellant . She was issued with a P3 form at the district hospital and other treatment documents.

7. **PW4 I M M** testified that on the material day, she was at home when she heard PW3 her sister screaming. She rushed to where she was and on the way met the complainant who told her that she had been defiled by the appellant. She met the appellant whom she beat him up using a stick. The appellant was later arrested and taken to the AP Centre by some youths.

8. **PW5 M M M** is the father to the complainant. He was told by O (PW2) what had transpired. He knew the appellant who worked for his brother P K. He produced the child's birth certificate dated 24/6/2009.

9. **PW6 P.C. Mary Mmasi** carried out the investigation after the report was made at Kitale Police station. She also produced the treatment documents from Bidii Health Centre as well as the birth certificate of the complainant. She interrogated the appellant and preferred the charges. She equally testified that she visited the scene.

10. **PW7 Koima John** the Clinical Officer from Kitale District hospital produced the P3 form which he had filled after examining the complainant.

11. He concluded that;

“ Her hymen was missing she had injuries to the labia and vulva. She had a foul discharge from her vagina.”

12. When put on his defence the appellant gave unsworn evidence denying the charge. He admitted that he used to work at the farm of M P which included pruning of trees. He denied the offence totally.

Analysis and Determination

13. In his grounds of Appeal filed on 21/2/2017 the appellant contended that he was convicted on uncorroborated and contradictory evidence, he was not positively identified, the age of the victim was not clear and that the injuries sustained by the complainant was not commensurate to the charges facing the appellant.

14. This being the first appeal this court is enjoined to reevaluate the evidence afresh as it was pronounced in ***Okeno Vs Republic (1972) E.A. 32***. This court has to draw its own conclusion.

15. I have read the submissions by both counsels for the appellant and the Respondent. It is now common knowledge that in Sexual Offences what need to be proved is the age of the victim, the identification of the perpetrator and whether indeed penetration occurred.

16. The minor though young gave sworn evidence. The age in my view was clearly exemplified by the production of the birth certificate dated 24/6/2009 which shows that she was born on 15/3/2009. The same was clearly produced without any objection from the appellant. Contrary therefore to the appellant's assertion I find that this element was clearly established.

17. What of the identification of the perpetrator? The incident took place at 10 am. PW1 explained how the appellant came to her home asking for water and later lured her to the nearby bush with a promise of

giving her Ksh 10. She then described how he laid her on the ground having spread the sack which he had used to carry wood.

18. From the rest of the witnesses including PW2 it appears that the appellant was literally found at the scene. PW2 stated that PW1 did not see her.

He went home and informed PW3 her mother. The whole incident appears to have occurred within the homestead of the complainants parents and relatives. Apparently the appellant does not dispute that he was apprehended within the same compound at that particular time.

19. Consequently in terms of identification I do not think that the witness failed to recognise the appellant. It was largely agreed that he worked at the home of one Pius doing casual work and in particular dealing with timber/trees. He did not deny the same.

20. The counsel for the appellant submitted that there was glaring contradictions on the evidence of PW1 and others. At some point she seemed to deny that she knew the appellant while at some instance during her testimony she admitted knowing the appellant. A total reading of the examination in chief as well as cross—examination and re-examination clearly shows that she knew the perpetrator who was the appellant. The child did not point out that it could have been someone else. It was day time and chances of mistaken identity in my view was very remote.

21. The next issue to determine is whether there was penetration. The complainant stated that the appellant placed his “chuli” in the place where I urinate she felt pain but did not scream or cry. Thereafter she wore her clothes and went to play with her friends including 'W' .

22. PW3 stated that she examined the child and found sperms on her vagina and thighs. Her undergarments had sperms.

23. PW4 asked the child if she could walk and she answered in the affirmative. She walked with her to the place where the appellant was. She observed and saw some watering substance on her thighs.

24. PW7 the Clinical Officer stated that her hymen was missing and she had injuries on her labia and vulva. This issue of missing hymen was not mentioned however in the P3 form.

25. Its noted also that the P3 form was filled 2 hours after the incident. Taking into consideration the nature of the injuries which was occasioned to the 5 year old minor and the fact that by the time she was taken to the hospital she had not changed clothes or taken bath, is it possible that the whole ordeal took place without any blood being noticed or for that matter shed?

26. If the hymen was broken or missing as the clinical officer stated, why was there no traces of blood as is naturally expected. I think it is not enough to simply state that the hymen was missing. Is it possible that the hymen was not there after all? In other words, the same had been torn prior to the incident?

27. I am deliberately lying emphasis on this to show that, for a 5 year old child to be defiled, then she goes about the business of playing with her friends as if nothing had happened is not very normal. In fact when her aunt asked her if she could walk she readily admitted so and infact walked to where the appellant was.

28. in view of the above observations I find that the proper charge which ought to have been preferred against the appellant was attempted defilement. I say so because , I am not convinced based on the evidence on record and taking into account the age of the minor that there was penetration, if there was, then I do not think the child would have been able to simply go and play with the rest of the friends after the ordeal however strong she could be.

29. I am satisfied that the appellant was properly identified. He was placed at the scene. Though the complainant may have contradicted herself, I find that the overall reading of her evidence and that of the

witnesses counteracted the argument that the evidence was not corroborated. Neither do I see any malice on the part of the complainant and her witnesses. The appellant was simply a normal casual labourer working for M P a fact which he has not denied. By offering unsworn evidence, he denied the prosecution the opportunity to cross-examine him on other details.

30. In the premises I shall dismiss this appeal but proceed to order that the main charge be and is hereby reduced to Attempted defilement contrary to Section 9 of the Sexual Offences Act NO. 3 of 2006.

31. Having stated so, this automatically affects the conviction. Section 9(2) thereof provides a sentence of not less than 10 years.

31. From the proceedings on record it appears that the appellant has been in custody all through despite being given a bond of kshs 120,000/-. It appears that he has been in custody for a period of about 4 years or thereabouts. I have equally read the probation report dated 7/2/17 which was ordered by the trial court.

32. In the premises I find that the period served by the appellant coupled with his age and the large family left behind, sufficient to have earned him a lesson.

33. He is hereby released unless lawfully held.

Delivered, signed and dated on 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.