



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL CASE NO. 112 OF 2016

Being an appeal arising from original conviction and sentence in Kitale

Chief Magistrate's Court Sexual Offence No. 56 of 2015 delivered

by M.I.G. Moranga Senior Principal Magistrate on 1/12/16)

I A E.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant as charged with the offence of **Defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on the 23rd day of March 2015 at night in [particulars withheld] of the Trans Nzoia County, intentionally caused his penis to penetrate the vagina of C.N. , a child aged 11 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 23rd day of March 2015 at night in [particulars withheld] of Trans Nzoia district of Trans Nzoia County, intentionally touched the vagina of C.N a child aged 11 years with his penis.**

3. He was convicted and sentenced to 20 years imprisonment hence this appeal. The facts as presented in the lower court were as follows.

4. PW1 the complainant aged 11 years old and an orphan was sleeping with her 2 young siblings in their house that night. Her grandmother who was their guardian had left for Lodwar. After supper they went and slept, at around 8 pm the appellant came to the house where they were sleeping in the sitting room. He had a tin kerosene lamp. He then proceeded to defile her with promises that he would buy her whatever he wanted. She felt great pain but she could not scream as the appellant laid heavily on her.

5. The following day she did not go to school. She went to one Mama N and explained to her what had transpired. She did not take any action and she went to the village elder. Again no action was taken and she went to the chief, one Protus who took action by arresting the appellant. One C took her to the hospital and later the childrens home by one C T. She was treated and P3 form filled at Kitale District hospital.

6. PW2 Catherine Nasimiyu Wanyama Kundu, in charge of Kilengo children's home is a voluntarily Childrens Officer. She was called by the Assistant chief on 24/3/2015 at 1.00 pm and informed of the incident. She went and took the child to the police as well as to the hospital for treatment. She also informed the headteacher of [particulars withheld] primary school where the complainant attended. Later the appellant was arrested.

7. PW2 Protus Wekesa Simiyu the assistant Chief [particulars withheld] sub location testified that the complainant went to his office on 23/3/2015 and informed him of what had transpired. He said that the child had difficulty walking and that her uncle had defiled her. The witness said that he knew the appellant who engaged himself with causal jobs. He called the children officer who took her to the hospital.

8. PW4 Kirwa Labatt the Clinical Officer from Kitale District hospital examined the child and filled the P3 form. He found that she was in pain and her private parts, her genitals were swollen and painful. Her hymen was intact and had no discharge. He concluded that she had been defiled.

9. **PW5 P.C. Timothy Kinya** from Cherengany police station carried out the investigations after the appellant was brought to the station. He recorded statements from the witnesses and preferred charges against the appellant.

10. **PW6 Dr. Mercy Oyeke** from Kitale District Hospital and a dentist carried out a dental age assessment of the complainant and concluded that she was 15 years old.

11. In his unsworn evidence the appellant denied the charge arguing that he could not defile her sister's daughter. He said that he had prepared tea for her that morning and had gone to school without any difficulty. He said that she had stolen some maize and sold the same to Mama W who brews changaa and that she admitted having received money from her. That he was just following up that issue when he was arrested and charged with the offence of defilement.

Analysis and Determination

12. This being the first appeal, this court is enjoined to re evaluate the evidence afresh and come up with new and independent finding.

(See Okeno Vs Republic) (1973) E.A. 32.

13. The three ingredients expected to be established in such offence are now clearly spelt out, namely, the age of the victim ought to be proved, the identity of the perpetrator and that penetration ought to have occurred.

14. The age of the minor was not disputed. The dental age assessment report produced placed her at age 15 old. This was not contested.

15. As to the relationship between the appellant and the complainant, this again was not disputed. The appellant even in his unsworn defence confirmed that she was her sister's child.

16. The question is whether the complainant was defiled and if so who was the perpetrator. The clinical officer (PW4) produced the report which corroborated what the complainant and PW2 stated and even the chief.

17. They all agree that the minor was in pain and had difficulty walking. PW4 examined her and noticed that her genitals were swollen. Despite her hymen being intact her swollen genital or private parts caused her to walk with difficulty. He concluded that there was penetration.

18. **Section 2 of the Sexual Offences Act 2006** defines penetration as;

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

19. In my view, I find that the fact that the hymen was intact, there was partial insertion which still constitutes ingredient of penetration.

20. Did the appellant commit the offence? Although the complainant was the only eye witness as her siblings were young and sleeping, I do not see any reason why she should target her uncle unfairly or maliciously. It appears that she clearly saw him with the help of the tin kerosene lamp which he used. He also spent time with her (about 5 minutes) while talking and promising to buy her some goodies.

21. I do not see any reason to doubt her and I believe she spoke the truth. More importantly the following morning she reported the matter to Mama N as well as the village elder who did not take any steps. She went to the assistant chief Protus who apparently took action by arresting the appellant.

22. Clearly, because of her pain and the fact that she did not even go to school, the complainant despite her tender age had enough courage to take the steps she took. If it was someone else, and not the appellant I do not see any other reason why she did not say so.

23. Significantly, I find the appellant defence did not oust the complainant's line of argument. The defence was laying blame on the minor for being unruly and stealing from her uncle but I do not think this holds water. In any case, he did not accord the respondent the opportunity to cross-examine him on these allegations.

24. The Proviso to Section 124 of the Evidence Act apply in this case. The same states:

“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 talking the truth,”

25. The appeal is unmerited and the same is dismissed.

Delivered, signed and dated at Kitale this 12th day of April 2018.

H.K. CHEMITEI

JUDGE

12/4/18

In the presence of:

Mr Kakoi for the State

Appellant – present

Court Assistant – Kirong

Judgment read in open court.