



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL CASE NO. 166 OF 2011

(Being an appeal arising from conviction and sentence

in Kitale Criminal Case 249 of 2011 delivered by

M.N. Gicheru – Chief Magistrate on 11/12/2011)

MICHAEL KIPKEMBOI TALAAM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Assault causing actual bodily harm** contrary to **Section 251 of the Penal Code**. The particulars of the offence were that **on the 9th day of June 2010 at [particulars withheld] farm in Trans Nzoia County, unlawfully assaulted C L thereby occasioning her actual bodily harm.**
2. The second count was **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 are that **on the 9th day of June 2010 at [particulars withheld] Farm in Trans Nzoia County, intentionally caused his genital organ namely penis to penetrate into the genital organ namely Vagina of C L a child aged 16 years.**
3. The appellant was convicted and sentenced to serve 1 and 15 years imprisonment respectively hence this appeal. Before determining the same its prudent to summarise the evidence as presented during the trial.
4. **PW1 the complainant** told the trial court that she was 16 years old and illiterate. That on 6th June 2010 at noon she was at **[particulars withheld]** and sick suffering from Malaria. As she went to **[particulars withheld]** she met the appellant who beat her and injured her on the face and lost consciousness. She regained her consciousness after it was dark. She went home and was taken to the hospital by her father. She realised later that the appellant had defiled her. She told her parents that she could identify the suspect if he saw him as he had white hair at the forehead and a mark .
5. **PW2 L son of M** is the complainant's father. She confirmed that the complainant was married at the time she was testifying. He testified that the complainant came home at 7 pm crying and had marks on her body. She told him that she had been assaulted. She had injuries on the head and abdomen.

6. He reported at [particulars withheld] and took the complainant to Anderson, a private hospital and later Kitale District hospital where she was examined. Later the appellant was arrested when the Complainant pointed to her.

7. **PW3 Joseph Tadinu** a Kenya Police Reservist testified that on 22/1/2011 at 4.30 PM the complainant came and told the police at Kapkoi that she had seen the person who defiled her. The witness arrested him and took him to the police post.

8. **PW4 Francis Barchebo** a clinical officer at Kitale District hospital produced the P3 form dated 10/6/2010 from Kapkoi police patrol base .

9. The injuries shown were on the head, the left side which had healed, it was 7 months old. On defilement the hymen was torn and old looking. She was already 7 months pregnant. He also produced the age assessment report by Dr Ndege which showed that she was approximately 17 years.

10. **PW7 P.C. Jabal Abdi Abdalla** from Endebess police station testified that on 10/6/2010 he was at Kapkoi patrol base when the complainant came with her father. They reported that she had been defiled by someone whom she could identify if she see. He booked the report in the OB. She described the suspect as blackman (Pokot) with a patch of white hair and a mark on the face. Later on she made a report that she had seen the appellant who was then arrested. The witness knew the appellant prior to this incident having committed other offences.

11. When put on his defence the appellant gave unsworn evidence. He testified of his difference with other Kenya Police Reservist as well as Police officers at Kapkoi patrol Base. He admitted having been charged with other offences of assault and malicious damage to property. He was ordered to serve C.S.O. He was arrested and accused by the complainant of defiling her but he denied knowing the complainant. He said that he had problem with police officer at Endebess.

Analysis and Determination

12. Having read the entire proceedings as well as the submissions by both parties in this appeal, I find that the crucial issue to determine is whether there was proper identification of the perpetrator by the complainant. It is of course appreciated that the incident took place at around 4 pm or thereabouts. The complainant stated that she was beaten up by the assailant and lost consciousness. When she woke up, she realised that she had been defiled. She went home and informed her father. This was around 7 pm.

13. She was then taken to the private hospital at Anderson and later taken to Kitale District Hospital. The only document produced by the prosecution was the P3 form. The medical notes referred to by the Clinical officer were not produced.

14. The complainant was adamant that the person who assaulted her was having white hair and a mark on the face. This was not controverted. Several months after the incident she pumped into the appellant at Kapkoi market and she identified him. She was consistent in the line of evidence. She told her father as well as the police officers the physical appearance of her assailant.

15. In my view, therefore I find that she spoke the truth. The incident occurred at a maize field at 4.30 pm and this was daytime which gave her sufficient time to recognise him.

16. The P3 form showed that she had been assaulted on the left side of the scalp. This was consistent with what the complainant had said .

17. I find the identification to be free from any error as the circumstances obtaining were favourable – ***See Wamunga Vs Republic (1989) KLR 426.***

18. The other count facing the appellant was defilement. Having stated that the complainant clearly identified the assailant the next question is whether or not he defiled her. Again its her word against his.

19. Its admitted that the complainant was 17 years as at the time of the incident. The dental report by Dr Ndege speak as much and the same is uncontroverted. The complainant by the time she testified in court was already married and carrying a 7 months pregnancy.

20. The P3 form showed that the hymen was torn and old looking. It was not explained that the cause of the pregnancy was the appellant or her husband. Its difficult therefore to assume as the complainant did not even admit during the trial that she was pregnant till the clinical officer told the court.

21. More significantly, the P3 form was filled on 24/1/2011 several months after the incident. No other notes earlier used when the injuries were fresh were produced. PW4 the clinical officer on cross examination stated as follows;-

“ ----- she had a hospital document. I used it to fill P3. I summarised it as for a P3. I have a copy of the notes. The notes are from a hospital. I did not see the rubber stamp. The date is not shown on the notes shown to me in court. I did not record anything on the P3 that is outside the notes. The complainant had already been treated. There is a note on attempted rape. Mine is defilement”.

22. This is the crux of the matter. Where are those notes which apparently did not even have a rubber stamp? How come the notes showed attempted rape and on the same vein the witness concluded that it was defilement?

23. I believe had those initial treatment documents produced by the maker, it would have shed light on whether the complainant had been defiled or not. Perhaps the initial medical officer who examined the complainant did not find that there was any defilement but merely an attempt.

24. The above observation in my view should grant the benefit of doubt to the appellant. He admitted that he was a habitual offender and he already had problems with the police. This does not absolve him from blame. He ought to reform and live an ordinary law obeying citizen.

25. Consequently, I do find that the first charge of assault was proved to the required standard. I do not find any reason why the complainant would accuse the appellant falsely. In any case it was admitted that they did not know each other.

26. On the second count of defilement I think the benefit of doubt should go to the appellant. There could be a strong suspicion that he committed the offence. Although the court can convict without any corroboration, in the sexual offences, I find that the material placed before court was not sufficient. At any rate the same was watered down by lack of the primary key documentary evidence which had been used when examining the complainant. Simply relying on a P3 form filled about 7 months later without any supporting treatment notes was too simplistic and unreliable. For the foregoing reasons the appeal is allowed only to the extend that the 2nd count of defilement is hereby set aside.

27. The first count of assault is upheld.

28. Presuming that the appellant had served the one year imposed upon him on 22/12/2011 by the trial court, he is hereby set free unless lawfully held.

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

H.K. CHEMITEI

JUDGE

12/4/2018

In the presence of:

Mr Kakoi for the State

Appellant – present

Court Assistant – Kirong

Judgment read in open court.