



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT Kitale

CRIMINAL APPEAL NO. 24 OF 2017

(Being an Appeal arising from conviction and sentence in Kitale Criminal Case No. 1252 of 2014 delivered by M.I.G. Moranga Principal Magistrate on 3/3/2017)

ISAAC NGISHU NGOSHI.....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 8(2) of the Sexual Offences Act No. 3 of 2006 . The particulars were that **on the 31st day of March 2014 within Trans Nzoia County, intentionally and unlawfully caused his penis to penetrate the vagina of DJC child aged 6 years.**
2. He was equally charged with the alternative charge of **Committing an Indecent act with a child** contrary to Section 11(1) of the Sexual Offences Act . The particulars were that **on the 31st day of March 2014 within Trans Nzoia County, intentionally caused the contact between your genital organ namely penis and the genital organ of Vagina DJC a child aged 6 years.**
3. The appellant was convicted and sentenced to life imprisonment hence this appeal. The learned state counsel has conceded to this appeal and prayed for retrial.
4. The facts can be summarised as hereunder. **PW1 LJM** the father to the complainant testified that he was at his place of work on 31/3/2014 when at around 4 pm he was called by his neighbour one Emmy who told him that the complainant had been defiled by the appellant. The complainant was at PW1 parents and he went there. He went and the child told him of what had happened and he began looking for the appellant and found him in the neighbour's home splitting firewood. He was escorted to Kapkoi police post and the child escorted to the hospital. A P 3 form was issued as well .
5. **PW2 the complainant** gave unsworn evidence. She said that she was at [Particulars Withheld] nursery school (top class) and that she was 6 years old. She said that while at home with her young sibling SM the appellant went to the Kitchen and laid her on the floor and blocked her mouth and laid on top of her . She said that the appellant promised her a sweet.
6. **PW3 Linus Likare** from Kitale District Hospital produced the P3 form after examining the child on 1/04/2014 and found that her hymen was broken and fresh looking. She concluded that the child had been defiled.
7. **PW4 Felicity Rono** took out investigations from Inspector Nabwire who had carried out the investigation and preferred charges against the appellant.
8. When put on his defence the appellant gave unsworn evidence denying the charge. He said that he was cutting firewood on 31/3/2014 at the home of one Nakhumicha when PW1 and others started beating him till he was unconscious. He was taken to Maili Saba police post but the police demanded that he be taken to hospital first. He was taken to Kitale District hospital and returned to the station. He was later charged.

Analysis and Determination

9. I have perused the entire proceedings and as rightly conceded by the learned state counsel, the court after the new Magistrate took over did not accord the benefit of Section 200(3) of the Criminal Procedure Code to the appellant. The same states as follows;

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by the predecessor the accused person may demand that any witness be re-examined and reheard and the succeeding Magistrate shall

inform the accused of that right.”

10. Apparently, by the time the new Magistrate took over counsel for the appellant had left the scene. The appellant was acting in person.
11. I would have conceded to this request by the respondent taking into considering the nature of the charges that faced the appellant.
12. However reading the proceedings further does not convince me that the prosecution was serious in this case which had grave consequences both to the complainant as well as the appellant.
13. First of all, it does not come out clearly from the child whether the appellant indeed defiled her. To simply state that;

“ He came to the Kitchen. He laid me on the ground/floor. He blocked my mouth with his had. He laid on top of me.”

14. As much as the child was restless and uncomfortable, I find that the next question should be, what did he do after laying on top of her? It is not very difficult for a child who underwent pain to explain the next step albeit with fear. Was there penetration? That is the Material question and more importantly the key ingredient in such an offence.
15. I am not further amused by the absence of Emmy, the lady who broke the news by phone to PW1. What happened to her? Why did she fail to turn up in court? It is not enough to state that the child spoke the truth and was therefore believable. The provision to Section 124 of the Evidence Act in my view come into play in such situation where there was no other eye witness or at all.
16. More fundamentally SM, the young sibling to the complainant was in the Kitchen at that particular time. It was not shown to the trial court whether she was too young to testify of what she saw.
17. The P3 form paints a very grave picture. It appears that there was penetration and the child underwent a lot of pain. Nonetheless the child did not testify so. Indeed I find no difficulty in the child stating that she felt pain during and after the act.
18. Infact neither PW1 nor any other witness testified that the child had any difficulty when they found her or at least when she was taken to hospital. The court would take such judicial notice that a 6 year child who has been defiled would obviously be in such a great pain during and after the ordeal.
19. Pursuant to the above observations I shall allow this appeal, set aside the conviction and the sentence and order the appellant to be released unless lawfully held.

Delivered, signed and dated at Kitale this 11th day of April 2018.

HK. CHEMITEI

JUDGE

11/4/18

In the presence of:

Mr Kakoi for State

Appellant – present

Court Assistant – Kirong

Judgment read in open court.