



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 108 OF 2015

(Being an appeal arising from original conviction and sentence in Kitale Chief Magistrate's court in Criminal case No. 3677 of 2014 delivered by P. Biwott Senior Principal Magistrate on 2/9/2015).

JAMES MASIKA ALIAS MASAI 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(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 28th day of August, 2014 within Trans – Nzoia County intentionally caused your penis to penetrate into the vagina of L.N.W. a child aged 13 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 28th day of September, 2014 within Trans-Nzoia County intentionally caused contact between your genital organ namely penis and genital organ namely vagina of L.N. W. a child aged 13 years.**
3. The appellant was convicted and sentenced to 20 years imprisonment. The appellant has filed several grounds of appeal which I have read together with the lengthy submissions both by the appellant and respondents counsel.
4. The evidence and facts as presented in the trial court is as hereunder. **PW1, the complainant** told the court that she was 13 years old and a pupil at [particulars withheld] primary school. That on 28/8/2014 she was sent by her father to get maize from the appellant's home at around 10.00 am. She obliged and when she reached there she found the appellant tying his cows. She entered the house and the appellant locked the door and proceeded to defile her and threatened to cut her with a panga if she screamed. In the process, her aunt, Mama D forced the door open and found them in the act. She beat up the complainant who took off half naked. She left behind her jumper, blouse and panty. She went to Matunda where she stayed at the home of one Lydia. She later went to Salgaa where her cousin stays. She was picked up from there by her father. She was taken to police and later to Kitale District hospital where she was examined.
5. **PW2 Phanice Wanjala** testified that she was home at 5 pm roasting maize when a neighbour one Caleb told her that they had spotted the complainant half naked walking at around 10 am. They went to the appellant's place but she was not there. They eventually traced her to Nakuru County. The child told her that she had been defiled by the appellant.
6. **PW3 Kirwa Labbatt** the clinical officer from Kitale District hospital examined the complainant and found that her hymen was broken and there were fresh lacerations and blood in the area. He produced the treatment notes as well as the P3 form. He examined her on 22/9/2014.
7. **PW4 Beatrice Nabatia** testified that on the material day 28/8/2014 between 10.00 am to 11.00 am she was at home and she saw the complainant enter the appellant's house and she was surprised. She informed her aunt and one Rashid her neighbour. Rashid entered through the front door and she entered at the rear door. The appellant was brought out with his trousers half down and the complainant beaten by her mother. He was arrested and picked by the police.
8. **PW5 Dorcas Wanjala** testified that Beatrice called her to go and see what was taking place. They went to the scene and found the appellant half dressed as well as the complainant dress pushed upwards. According to her the girl ran away leaving her skirt behind. The appellant was brought to the police station.
9. **PW6 Rashid Ali** testified that on the same day he met Mama Rossy running towards the scene. He went to the front door and entered the house and found the appellant with his half trouser empty. Her skirt was raised up. They arrested the appellant and the girl escaped.

10. **PW7 Joseph Watua Cherana** heard people screaming and he rushed to the scene. He found the appellant being beaten and he rescued him and took him to Kitale police station.

11. **PW8 P.C. Rose Abur** carried out the investigation after the appellant had been brought by the village elder and accused of defilement. She carried out the investigations and recorded statements from the witnesses. She also produced the exhibits as well as the health card for the appellant. She preferred charges against the the appellant.

12. When put on his defence, the appellant gave unsworn testimony denying the charge. He said that he was herding cattle on 28/8/2014 at 10.00 am when he was attacked by the public and arrested. He was put in custody for 6 days . He was later charged with strange charges which he still denied.

Analysis and Determination.

13. There are 3 ingredients which are supposed to be established in sexual offences. First of all the age of the victim ought to be established, the identity of the perpetrator and that penetration must be proved.

14. From the evidence on board I do not think the age of the complainant is in dispute. Although she appeared to contradict the dates in her unsworn evidence, the same was clearly established vide the clinic card produced.

15. As to the identification of the perpetrator, it seems that the prosecution witness did not have difficulty stating that it was the appellant who was found in the act. The incident occurred between 9 .00 am to 10.00 am. Clearly this was daytime and I do not think that there could be any case of mistaken identity.

16. The complainant had been sent by her parents to pick maize from the appellant. The appellant then took her to the house and locked her and began sexually assaulting her. In the nick of time PW2, PW4, PW5 , PW6 and PW7 found him in the act. All the above witness agree that the appellant was found in his house with the minor complainant.

17. The complainant then after being busted left her clothings which were later handed over to the police and produced as evidence.

18. Infact the complainant was seen in town that day half dressed and efforts to trace her later were fruitless.

19. The appellant was arrested at the scene and saved from the beatings by members of the public . He was thereafter taken to the police station.

20. Clearly therefore, I do not think that the entire array of witness maliciously framed the appellant. I do not find any reason to doubt that he was not found at the scene. Although there could be minor contradictions on tine as submitted by the appellant counsel, I do not think the same cast any doubt that the appellant was not at the scene as demonstrated by the prosecution witnesses.

21. The next issue is to determine whether the complainant was really defiled, in other words, whether penetration occurred.

22. PW1 stated that;

“ James penetrated my vaginal with penis after removing my blouse, sweater and panty. He did not remove my skirt. I lay in bed facing up as he penetrated me. He threatened to cut me with a panga if I screamed.”

23. PW4 stated that;

“ ----- Rashid entered from the front. I was in the rear door. I heard Rashid shouting at James, James was brought out with trousers half way down.”

24. The same was stated by PW5 as well as PW6 pw4 the clinical officer found that;

“ Her hymen was broken lacerations were there and fresh. There was blood in the area. Moderate pus cells were there.”

25. On cross-examination he said;

“ I examined her for P3 form on 22/9/2014. Days had lapsed. I cannot tell if another person defiled her in between. I did not examine.”

26. I have perused the treatment notes and the P3 form produced. Both were filled on 22/9/2014. This was about 25 days after the incident. The big question is how comes the clinical officer found that there were fresh lacerations as well as some blood, in her private parts? I find this to be contradiction. Ordinarily, the general examination which can be termed conclusive could be upto the region of 72 hours. In the case at hand the minor took off to Matunda then to Salгаа in Nakuru where she was picked from.

27. One can therefore agree with the appellants counsel submissions that the defilement appear very fresh and not 25 days old as explained by the minor and the witness.

28. Having looked at both the medical evidence as well as the evidence of the key witnesses including the complainant, I am persuaded that the appellant indeed attempted to defile the minor. The evidence of being found with his trouser half way his knees and the child's clothes left behind testify to this conclusion.

29. I am however unable to conclude that there was penetration. This inability is caused by the finding of PW3, the clinical officer who found fresh evidence even after the complainant disappeared for 25 days.

30. Consequently, and in light of the above I find that the proper charge which ought to face the appellant should have been attempted defilement. The appellant in his unsworn defence was unable to explain what he was doing in a locked house with a minor with half of her clothes removed and his trouser on his knees half-way. There could be every possibility that the child may have had sexual intercourse elsewhere before being examined on 22/9/2014 by PW3. Nonetheless the appellant was found in the act.

31. The other issue raised by the appellants counsel including lack of key witnesses like Lydia from Matunda who hosted the minor in my view does not change the fact that sufficient evidence was presented to show that the appellant was found with the minor as explained above.

32. Consequently, under the **Provision of Section 179 of the Criminal Procedure Code Cap 75** I shall alter the charges from Defilement to Attempted Defilement pursuant to the Provisions of Section 9)1) (2) of the Sexual Offence Act No. 3 of 2010.

33. In Light of the above the Minimum sentence is 10 years imprisonment. I shall therefore set aside the 20 years sentence meted upon the appellant and order that he be sentenced to 10 years imprisonment from 24/9/2010 noting that he spent most of his time in custody.

34. The appeal is otherwise dismissed save for the above orders and directions.

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

H.K. CHEMITEI

JUDGE

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In the presence of:

Mr Kakoi for State

Appellant – present

Court Assistant – Kirong

Judgment read in open court.