



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 47 OF 2014

(Being an appeal arising from conviction and sentence

in Kitale Criminal Case No. 180 of 2013 delivered

by S.K. Ngetich SRM on 4/4/2014).

JUMA WANJALA.....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 diverse dates between 5th December 2012 and 14th January 2013 at [particulars withheld] area within Trans Nzoia County, intentionally caused his penis to penetrate the vagina of P.N.W. a child aged 15 years.**

2. The alternative count was **Committing and Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on diverse dates between 5th day of December 2012 and 14th day of January 2013 at [particulars withheld] within Trans Nzoia County, intentionally caused the contact between his penis and the vagina of P.N.W. a child aged 15 years.**

3. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal which has raised various substantial issues. Before looking at them it shall be worthwhile to summarise the facts as presented during trial.

4. **PW1** told the trial court that she was a class 7 pupil at **[particulars withheld]** primary school and aged 15 years. That she knew the appellant who was a neighbour and his boyfriend. That on 12/1/2013 upto 14/2/2013 they were together in his home and had sex. They were arrested together at the appellants house. She was taken to the chief's office and later to the police and the hospital where she was examined, treated and the P3 form filled.

5. **PW2 Dr Ken Ndege** from Kitale District Hospital produced the dental age assessment of the complainant which showed that she was 15 years old.

6. **PW3 Linus Ligare** the clinical officer from Kitale District hospital produced the P3 form as well as the notes which he concluded upon examination of the complainant that the hymen was torn and old looking and pursuant to the history given she was defiled.

7. **PW4 D W** is the father to PW1 the complainant . She said she was 16years old having been born in 1997. He said that the complainant used to disappear after super until one Frank told him where he used to go instead of school. He reported to the village elder who reported to the Chief and the chief in turn notified the police. They went to the appellant's house where they found the appellant and the complainant and were arrested and brought to Kitale police station. The girl was taken to hospital for examination.

8. On cross-examination he said that they were 4 people in the house 2 men and 2 girls. He said that he knew the appellant who was working with Securicor company.

9. **PW5 APC Isaac Kerio Echapan** based at Maili Tatu AP post together with the village elder arrested the appellant with another man and the 2 girls. The complainant was sitted on bed while the appellant was in bed. He escorted them to the AP post and later to Kitale

police station.

10. **PW6 Sergeant Justin Wamburi** carried out the investigations and preferred charges against the appellant. The two pairs were brought by the AP officers. He charged one David Kazingu separately and the appellant separately. He recorded the statements from the witnesses.

11. When put on his defence the appellant gave unsworn evidence and stated that he was arrested on 14/1/2013 while in his house immediately he came back from work and brought to Kitale police station. He was accused of defiling the complainant who at that time was brought aboard a motorcycle. He said that the complainant denied knowing him.

Analysis and Determination

12. The appellant has adduced several grounds in his appeal which includes the fact that the appellant was not examined medically, the age of the complainant was not known and the witnesses were not credible and generally the evidence adduced by the prosecution was not sufficient to have convicted him.

13. I have perused the proceedings and the submissions by both the appellant as well as the learned state counsel. This being an appeal, this court is expected to analyse the facts afresh and come up with independent findings.

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

14. There are three now acceptable ingredients of this offence namely, the age of the victim, the identity of the perpetrator and whether penetration occurred.

15. Looking at the proceedings herein I have no doubt that the complainant was aged between 15 and 16 years as found by the doctor's report corroborated by the minor.

16. The evidence on record clearly shows that the complainant was arrested together with the appellant and 2 others. The arrest took place during the day. The complainant explained the number of times she had visited the appellant and had sex.

17. The medical evidence produced, namely the P3 form and the notes concluded what PW1 stated. In this regard I hold that the complainant was clearly defiled. Infact the appellant line of defence did not oust the evidence of independent witness, especially the police officer who conducted the arrest.

18. The learned state counsel submitted that the appellant ought to benefit from the provisions of Section 8(5) of the Sexual offences Act, namely that the complainant conducted herself in a way that she was a mature woman and therefore she conceded to the sexual act. I do not find this line of argument palatable.

19. There was every evidence to suggest that the minor was a school going child. Her father clearly stated that the child had made a habit of disappearing instead of going to school. I believe that based on the above, there was nothing to suggest that the appellant did not know that the complainant was not a school going child. In any event they were neighbours. The appellant in his unsworn evidence did not demonstrate that he did not believe that she was not a student and for that matter primary school.

20. Although the complainant was a truant and a teenager full of hot blood, and together with her friend experimented an adult life, it was incumbent upon the appellant who was an employee of a security company to have guided her and at worst resist her demands. It appears that he acquiesced and enjoyed the whole sexual episode. As an adult he ought to have done more to resist the act.

21. The appeal is otherwise dismissed for being unmeritorious.

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

H.K. CHEMITEI

JUDGE

11/4/18

In the presence of:

Mr Kakoi for State

Appellant – present

Court Assistant – Kirong

Judgment read in open court.