



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 38 OF 2017

(From original conviction and sentence in Sexual Offence No.135 of 2015 delivered by V.O. Adet Senior resident Magistrate on 30/3/2017.)

LEVY OSONGOAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. The Appellant was charged with the offence of **Defilement Contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on the 20th day of July 2015 at [particulars withheld] within Trans Nzoia County intentionally caused his genital organ namely penis to penetrate into the genital organ namely Vagina of M.A. a girl aged 12 years.**
2. He was charged with the alternative count of **Committing an Indecent act with a child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006**. The particulars were that **on the 20th day of July 2015 at [particulars withheld] within Trans Nzoia County intentionally touched the genital organ namely vagina of M.A. a child aged 12 years.**
3. He was convicted and sentenced to life imprisonment hence this appeal which has raised substantial issues. The brief summary of the facts as presented in the lower court were as follows;-
4. **PW1 the complainant** told the court that she was 14 years old and a pupil at **[particulars withheld]** primary school in class 7. That on 20/7/2015 at 6 pm she went to get milk from Makunga farm. As she was heading home, he met the appellant who carried her on his shoulder to a maize field where he proceeded to defile her. Despite screaming nobody came to her aid. After leaving him, she met her mother on the way where she explained her ordeal. Later together with her brother N they went to the appellant home where the appellant upon serious questioning and threats to carry out test admitted the offence. They then went to Maili Saba police base and later to the hospital (Kitale District hospital) where he was treated and P3 form filled. An age assessment was later undertaken and confirmed that she was 14 years old.
5. The witnesses also identified the blood stained skirt that she wore that day.
6. **PW2 A A M** the complainant's mother testified that she had sent her to collect milk at around 6 pm. She said that as she came back she heard some noise from the maize plantation and heard her saying that someone was raping her. She saw her coming out of the maize plantation and explained to her what had transpired. She went to the scene and saw the disturbed vegetation. She went to one Mama Rael who had

seen the appellant. They tried to get information from the appellant who denied. They saw the appellant closely and noticed that there was soil and grasses on his elbow and knees. They tied and took him to Maili Saba police post and took the complainant to Kitale District hospital and they went to Sibanga police post the following day. The said witness did not know the appellant prior to that day.

7. **PW3 Pharis Silali** from Kitale District Hospital dental department examined the complainant and formed an opinion that she was 14 years old.

8. **PW4 Dr Kirwa Labatt** from Kitale County hospital produced the P3 form which he filled after examining the complainant. He found that there was no visible marks or wounds. The hymen was torn and old looking. There was laceration on the vaginal wall – six o'clock view.

9. **PW5 CPL Edwin Siuma** an Administration Police Officer attached to Endebess County Commission office testified that the accused was brought to Maili Saba by PW2 at around 11 pm and placed in custody. He booked him in and the child taken to hospital.

10. **PW6 P.C. Caroline Busienei** from Sibanga patrol base carried out the investigations from 21/7/2015. The appellant was handed over from Maili Saba Ap Camp. She organised for the filling of the P3 form, recorded statements from witnesses and preferred charges against the appellant.

11. When put on his defence the appellant gave sworn evidence and stated that on 22.7.2015 he was at his working place at MAILI Saba stage when he was approached by 2 people who told him to take them to Maili Nane. They later told him to take them to the police station where he was placed in the cells. He denied the offence.

Analysis and Determination

12. The appellant has raised several grounds of appeal which include interalia that there were contradictions in the prosecutions evidence, the complainant's age was not ascertained and that the appellant defence was not taken into account.

13. I have read the written submissions by both the counsel for the Respondent and the appellant. Substantially, three issues have to be proved in the circumstances of this case namely, the age of the victim, the identity of the perpetrator as well as whether penetration occurred

14. The age of the complainant in my view was not in dispute contrary to the averments by the appellant. The dental age assessment report produced placed her age to be 14 years. There was no objection by the appellant on the said report. Even in his own submissions I have not seen any other contrary opinion.

15. As to identity of the perpetrator, the incident occurred at 6 pm. It is not disputed that the complainant came from collecting milk from Makunga farm. She testified that the appellant carried her shoulder high to the maize plantation. Nobody saw the incident, Its only when she was on her way home that she met her mother.

16. Is there possibility of mistaken identity? Apparently the complainant referred her mother to one Mama Rael who did not turn up to testify. It appears also from the evidence on record that PW2 pursued the appellant until she ensured that he was placed in the cells at around 11 pm that day.

17. In view of the fact that the incident took place during daytime though there was no any other eye witness, I do not find any case of mistaken identity. More importantly the appellant in his sworn evidence did not offer any explanation of where he was on 20th July when the incident occurred. Granted that he was not bound to assist the prosecution in its case, at least there ought to have been an explanation on where he was just as he explained how he was arrested on 22nd.

18. This goes hand in hand with the question of whether the appellant defiled the minor. I find the P3 form as well as the treatment notes and history sufficient proof that she was indeed defiled. Although the

hymen was broken and old looking, courtesy of her sexual engagement with her cousin its apparent that the fresh laceration was consistent with the defilement.

19. I do agree with the appellant that the essential witness who included Mama Rael and N ought to have been called to testify but I nevertheless did not see how the evidence by the complainant and her mother broke the chain of events or at worst malicious. It appears that immediately after the incident at around 6 pm the whole motion of tracing and arresting the appellant went on upto around 11 pm that night. The following day the complainant was examined . At the same breath, it would have been appropriate for the complainant's bloodstained trouser to be produced but still the evidence on record in my view clearly indicated that the minor was truthful.

20. The upshot of this is that the three ingredients were established. It is the appellant who defiled the complainant while heading home after collecting milk from Makunga farm.

21. The appeal is otherwise dismissed.

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.