



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 108 OF 2016

(Being an appeal arising from conviction and sentence in

Kitale Chief Magistrate's court in Criminal case Jo. 3004 of 2012

delivered by P.W. Wasike Resident Magistrate on 16/11/2016)

BENARD SIMIYU WAFULA.....1ST APPELLANT

CAROLINE ACHIENG.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellants were charged with the offence of **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 were that on the 4th day of November 2012 at **[particulars withheld]** within Trans-Nzoia County, intentionally caused his penis to penetrate into the vagina of F. N.N. a child aged 14 years.
2. They were equally charged with the alternative count of **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on the 4th day of November 2012 at **[particulars withheld]** within Trans-Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of F.N.N. a child aged 14 years.
3. The 2nd appellant was charged with the 3rd count of **Benefiting from prostitution contrary to Section 15(a) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on diverse dates between 3rd November 2012 and 25th day of November 2013 at **[particulars withheld]** within Trans-Nzoia County, knowingly committed F.N.N., a child aged 14 years to remain in her house to be sexually abused by B S W.
4. Both appellants were convicted and sentenced appropriately hence this appeal. The appellant has raised several grounds of appeal and before looking at them it shall be worthwhile to summarise the evidence as presented during trial.
5. PW1 a minor testified that she was 15 years old and had just cleared class 8 at **[particulars withheld]**

primary school. She explained how she was dupped by the 2nd appellant on 2/11/2012 whom she referred to as Mama S into engaging herself in sexual activity with the 1st appellant. She said that she was given Kshs 100 on 3/11/2012 by the 2nd appellant and on 5/11/2012 Kshs 50 and Kshs 10 on 11/11/2012. In all these occasions she had sexual intercourse with the 1st appellant. She graphically explained how on various days she had sexual intercourse with the appellant.

6. Her school teachers became suspicious for she had money and when they sent for her parents she went to school with the 2nd appellant who pretended to be her aunt.

7. Later on 2/12/2012, the 1st appellant went to her home but was unable to have sexual intercourse with him as her parents arrived and he took off.

8. The matter was subsequently reported to the chief and both appellants were arrested. The complainant was taken to Kitale District hospital and P3 form filled.

9. **PW2 P N K** the father to PW1 testified that the complainant's school headteacher called him and informed him that her child was having some money which was unusual.

10. He was told of how PW1 had come with someone who introduced herself as her aunt. They interrogated the complainant who was opened to them and told them the full story. Her father said that on 2/12/2012 at 2.00 pm when he came back from church, there was commotion in the house and upon checking, they saw the 1st appellant escaping.

11. The prosecution thereafter failed to summon any other witnesses and when placed on their defence the 1st appellant gave unsworn evidence. He said that he was 17 years old and that he was arrested on 4/11/2012 at **[particulars withheld]**. He denied the charge.

12. The 2nd appellant gave unsworn evidence denying the charge. She explained how she was arrested on 4/12/2012.

Analysis and Determination

13. I have perused the evidence on record as well as the submissions on record.

This court shall be inclined to allow this appeal solely on the grounds that there was no medical evidence produced to support the charge. Although the complainant was graphic in her description of the several; days defiled by the 1st appellant, there was no such evidence to corroborate the same. It was alleged that she was taken to Kitale District hospital but no such documentary evidence was produced. There was no reason why the clinical officer or the medical personnel failed to turn up in court. In the absence of any medical evidence it becomes very difficult to establish whether there was penetration, a ground necessary to establish defilement.

14. Secondly, there was no evidence of the complainant's age. Although no birth certificate was produced, the court would envisage a situation where any reasonable supporting document could be produced in support. It was not enough for the complainant and her father to simply state from the dock that she was a minor especially in such a situation where it has not been argued that documentary evidence cannot be produced. Infact, as submitted by the appellants' counsel, there was nothing to stop her father producing her birth certificate which he alleged that it was in his possession.

15. For the above reasons the appeal ought to succeed. Although the trial court had the advantage of the complainant's demeanor and her witnesses, it was not enough to show that she was defiled in the absence of medical proof.

16. That goes hand in hand with the 3rd charge faced by the 2nd appellant permitting a child to remain in

the premises for prostitution purposes could not in my view be sufficient unless it is shown that there was such sexual intercourse. Mere allegations that she gave out some money was not enough.

17. Consequently, the appeal succeeds. The appellants are hereby set free unless lawfully held.

Delivered, signed and dated at Kitale this 24th day of May 2018.

H.K. CHEMITEI

JUDGE

24/5/18

In the presence of:

M/s Kakoi for State

Appellant – present

Kirong – Court Assistant

Judgment read in open court.