



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 21 OF 2017

(Being an appeal arising from conviction and judgment in Kitale Chief Magistrate's Magistrate in Criminal Case No. 1079 of 2014 delivered by M.I.G. Moranga – Principal Magistrate delivered on 23/2/17)

DOUGLAS MWANGI GICHEHA.....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 2nd day of March 2014 at [particulars withheld] within Trans Nzoia County, intentionally caused his penis to penetrate the vagina of S.N. M. a child aged 14 years.**

2. He was equally charged with the alternative charge of **Committing 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 2nd day of March 2014 at [particulars withheld] within Trans Nzoia County, he intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of S.N. M. a child aged 14 years.**

3. He was convicted and sentenced to 20 years imprisonment hence this appeal. The appellant has raised several grounds of appeal in his amended Petition of Appeal. However before looking at the same its suffice to summarise the proceedings or evidence as presented during trial.

4. PW1, The complainant told the trial court that she was 16 years old and a class 8 pupil at **[particulars withheld]** primary school. That on 4/3/2014 at around 11.00 am she was home with her younger brother. Her mother had gone to the church. Her younger brother was told by the appellant to go to his place. In company of her younger brother they went to the appellant's house, where he proceeded to give Kshs 20 to his brother to buy "Kangumu". When her brother left, the appellant pulled her into his house where he proceeded to forcefully remove her clothes and defiled her. She tried to scream but the appellant blocked her mouth. Afterwards she left for home but she did not tell her mother. She was however feeling unwell and her mother gave her some painkillers. She went to school on Monday but came back early for she was still sickly.

5. Eventually she informed one Mama S a neighbour who later informed PW1's mother. She subsequently informed her mother who took her to the hospital and later she reported to the police. She was examined after some few days and P3 form filled.

6. PW2 E B, the complainant's brother testified that he was 10 years old and a class 4 pupil at **[particulars withheld]** primary school. He said that the appellant called him while he was playing to go and call PW1. They both went to the appellant's house where he gave him Kshs 20 to buy "Kangumu". He left the complainant with the appellant. When he came back with the 4 "Kangumu's" he found the appellant house locked and did not see the complainant. Later he saw PW1 crying but he did not know the reason or what had transpired, he said that he ate the 4 Kangumu's with his friends.

7. PW3 D N M the mother to the complainant testified that she had gone to church that particular day leaving behind the complainant because they had not washed their uniforms. When she came back she was crying and complaining of pain on her head and abdomen. She gave her pain killers. She later came back from school but still in pain. She was informed by one mama S of what the complainant had confided to her. Shes said that the appellant had threatened to kill her if she informed anyone what had happened. She reported the matter at Kitale police station as well as taking the child to Kitale District hospital where the P3 form was filled.

8. PW4 John Koima the clinical officer produced the p3 form which had been filled by one Susan Suter. It showed that the hymen was torn and old looking. There were no bruises to the labia and there was no discharge.

9. PW5 Pharis Silali from Kitale District hospital produced the dental age assessment prepared by Dr. Kiprop which estimated the age of

the minor to be 14 years old.

10. **PW6 Corporal Felicity Rono** took over the investigating file from I.P Wabwire who had recorded statements from the witnesses as well as visiting the scene and preferred charges against the appellant.

11. When put on his defence the appellant gave chronology of how he spent his days doing his business of selling wares in different markets including Brigadier, Ndal, Tongaren and Ruguna. It was only on 17/3/2014 where he went round collecting money from his customers that he was told that he was required at Kitale Police Station. He accompanied the person who told him and when he reached the station he was incarcerated and later charged with the offence which he continued to deny.

Analysis and Determination

12. I have perused the proceedings as well as the submissions by both the appellant and the learned state counsel. The amended grounds of appeal basically attacks the way the investigations were carried out and the fact that he was not accorded fair trial by the trial court.

13. Its well settled now that three ingredients are necessary to prove the offence of defilement, namely, the age of the victim, the identity of the perpetrator and penetration.

14. The age of the complainant was not disputed. The dental age assessment produced placed her age to be 14 years old. In view of this I do not find any contention.

15. As to whether she was defiled, I have carefully analysed her evidence and I find that though she did not immediately report the incident to her mother, she appeared truthful and honest. The findings by the clinical officer as contained in the P3 form as well as the treatment documents generally showed that there was defilement.

16. This court does not hesitate, as the trial court did, that the appellant was involved in the matter. PW2 although young corroborated the evidence of PW1 that he was given Kshs 20 by the appellant to buy "Kangumu" and when he came back the door was locked and he did not know what to do but he left and eat the Kangumu with his friends. Later when he met her sister, she was crying and she did not know the reason.

17. This story of Kangumu is explained by the complainant. The closing of the house by the appellant was equally spoken of by the complainant.

18. The question of identity of the perpetrator in my view was not contentious. The appellant, Baba S, as was known by PW1 and PW2 was a neighbour and known by the children. The incident took place around mid morning hours.

19. Neither do I find any malice on the part of the complainant and her witnesses. Nothing was shown to suggest that there was any dispute between PW3, the complainant's mother and the appellant.

20. Although one Mama S did not turn up to testify, I still find that the evidence on record was sufficient to convict the appellant. He was placed at the scene. His defence of alibi was not tested in cross examination or at all.

21. Was her rights violated during trial? Not at all. Infact both PW1 and PW2 were later recalled for further cross-examination.

22. The upshot is that this appeal must fail. The appellant simply took advantage of the absence of his wife and the complainant's mother to defile her. The complainant during cross-examination did not waver in her evidence. She graphically described the scene including the fact that her clothes were placed on top of the bed and the removal of his clothes as he defiled her.

23. The appeal is unmeritorious and the same is dismissed.

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.