



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 95 OF 2017

(Being an appeal arising from Kitale Chief Magistrate's Court in Sexual Offence No. 188 of 2016 delivered by G.N. Sitati Resident Magistrate on 21/12/2017)

DAVID KIMUTAI KOTOKOTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

1. The appellant was charged with the offence of **Defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the 18th day of December 2016 within Trans Nzoia County unlawfully caused his penis to penetrate the vagina of J C a girl aged 9 years old.**
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 13th day of December 2016 within Trans Nzoia County intentionally touched the vagina of J C K a child aged 9 years old with his penis.**
3. The appellant was convicted and sentenced to life imprisonment hence this appeal. The appellant has raised several grounds of appeal but before looking at them it shall be worthwhile to summarise the evidence as presented during trial.
4. **PW1 S C K** the mother to the complainant testified that on 13/12/2016 she had gone for a burial and left the children behind including the complainant who was 9 years old and her first born. When she arrived home late in the evening K , one of her kids who was 4 years old told her what the appellant had done to the complainant and his brother, B. He took her to the bush area where they had gone.
5. He went looking for the appellant to no avail. When she came home she found her husband who told her that the appellant had brought the children home. By then they were hiding under the bed. She tried to discipline them but the complainant who was limping told them the ordeal the appellant had taken them through. She saw injuries on both the complainant as well as Brian.
6. She took them to Cherengany Sub county Hospital where they were treated and a P3 form filled. The appellant was arrested the same night.
7. **PW2 the complainant** stated that she was a class one pupil at [particulars withheld] and that on the material day her mother had gone for a funeral and her father had gone to the shamba. She testified that the appellant came and took her with his brother in a farm where there was maize stocks and trees he forcefully defiled her. Her brother tried resisting but he was slapped. She tried screaming but the appellant blocked her mouth. She went home and told PW1 what had transpired. She was taken to the hospital and treated.
8. **PW3 J K** the father to PW2 stated that he had gone to the farm on 13/12/2014 at 4.00 pm and had left the children at home. When he came back at about 5.00 pm both the complainant and K were missing. He was told that the appellant who was a neighbour had gone with them. He later brought them back and told him that the children had followed him. The children had injuries and were dirty. They told him what the appellant had done to them. They pursued the issue through Nyumba Kumi and had the appellant arrested.
9. **PW4 Kirwa Labatt** produced the P3 form on behalf of Musa Chepkieny who had filled it. The conclusion was that there was swelling in the vaginal wall, lacerations and minor bleeding. He also produced the treatment notes.
10. **PW5 P.C. Mary Kinyanjui** was the investigating officer. She received the report from PW1 who had been accompanied by PW2. He accompanied the child to Cherengany hospital and issued them with P3 form which was filled. She also recorded statements from the witness.

11. When put on his defence the appellant gave unsworn evidence denying the charge. He said that he had a contract to ferry murrum from Kewa (Moi's Bridge) to Maili Nane. He worked till 13/12/2016. When he went to his sisters place who told him that there was a lady spreading romours that his mother had died as a result of being HIV positive.

That he was annoyed and wanted to assault her but she ran into her house. He was later arrested at around 8.00 pm as he slept in his house. He was hit on the head and lost consciousness. He denied the charges. He did not call any witness.

Analysis and Determination

12. Having read the evidence on record as well as the submissions by both the learned State counsel and the appellant, the duty of this court is to reevaluate the matter afresh so as to arrive at a fresh and independent finding.

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

13. The three well known acceptable ingredients of defilement offence are, the age of the victim, the identity of the perpetrator as well as prove of penetration.

14. On the first ground, the complainant PW2 from the certificate of birth produced showed that she was born on 20/4/2006. Clearly therefore the complainant was a minor.

15. As to whether she was defiled, I think her evidence was clear and categorical. I think the description in Kiswahili of how the appellant defiled her was graphic and full of details. Although her brother, Brian was not called to testify, I find her testimony believable.

16. More importantly PW4 produced both the medical treatment documents as well as the P3 form. It must be emphasized that the examination was almost done on 13/12/2016 and the P3 form filled on 14/12/2016.

17. In my view therefore, the evidence of PW1, PW2 and PW3 corroborated each other.

18. As to identity of the perpetrator, I do not see any suggestion to indicate that it was a case of mistaken identity. The incident took place around 5.00 pm or thereabouts and thus there was enough light. The appellant was a person well known to the complainant, he was a neighbour. The appellant did not lead any evidence to show that he was a stranger to the complainant or her family.

19. There is no malice which one can deduce from the complainant nor her parents against the appellant. His unsworn evidence did not specify which 'mother' had spread romours that his mother died as a result of being HIV positive.

20. The appellant has raised as a ground in his appeal that failure to call the clinical officer who filled the P3 form was fatal. I do not think so. PW4 testified that the officer who filled the P3 form was well known to him and they had worked together. Moreover, the appellant did not raise any objection to the production of the said exhibits.

21. Neither do I find it necessary to call the arresting officer or for that matter to produce the clothes stained with blood or sperms.

22. In the premises I do not find the appeal meritorious. I found the trial court's findings appropriate and well grounded in facts and the law. The appeal is dismissed.

Delivered, signed and dated at Kitale this 27th day of September, 2018.

H.K. CHEMITEI

JUDGE

27/09/18

In the presence of:

Mr. Kakoi for the Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court