



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 11 OF 2018

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's court Sexual Offences NO. 98 of 2015 delivered by M.I.G. Moranga Pricnicpal Magistrate on 20/2/2018)

ISAAC RUTO NDIWA APPELLANT

VERSUS

REPUBLIC PROSECUTOR

J U D G M E N T

1. The appellant was charged with the offence of **Defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 21st day of May 2015 within Trans Nzoia County, intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of BCC a child aged 16 years.**

2. The alternative charge was **Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 21st day of May 2015 within Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of BCC a child aged 16 years.**

3. The appellant has filed this appeal citing several grounds as contained in the petition dated 5/3/2018. Before looking at this it shall be worthwhile to summarise the proceedings at the trial court.

4. **PW1** told the court that she was a class 6 pupil at [particulars withheld] Academy. That she was sent by her mother to buy soap on 21/5/2015 at around 2.30 pm at Mama Kevin's shop. When she was on her way back she was called by the appellant who had a black paper bag and told her that it had been sent by the complainant's father. The appellant then proceeded and pulled her inside his house and defiled her. She went home crying and informed her sister and her mother. Her mother together with some other women examined her and found that she had been defiled and they went to the appellant's house.

She was then taken to the hospital and later the matter reported at Endebess police station.

5. **PW2 RC** is the mother to the complainant. She said that she was born in 1999. she said that she had sent her to buy soap and when she came home she was crying, she told them that she had been raped by the appellant. They went to the scene and together with other people confronted the appellant. She then took her to the hospital and later the matter reported at the police station. She conceded that at times the complainant loses her consciousness and at times she would remove her clothes and walk naked.

6. **PW4 Doctor Blastus Gakundi** produced the P3 form which he had filled and which he found that the hymen was broken and fresh looking. On cross-examination concerning her intellectual capacity the doctor said that she suffered from what he called panic disorder which nonetheless does not interfere with her memory.

7. **PW5 Josephine Wasike** clinical officer from Endebess District hospital produced the treatment notes for the complainant which showed that she had tenderness in her upper public region and there was whitish discharge, had bruise in perineum and hymen was not intact.

8. **PW6 P.C. Margaret Namusasi** from Endebess police station carried out the investigations , recorded statements and preferred charges against the appellant.

9. When put on his defence the appellant gave sworn evidence denying the offence. He said that a lady PW2 came on 21/5/2015 claiming that her daughter had been defiled by a certain young man whom he was staying with. He denied that he raped the complainant. He knew the complainant who was her neighbour. He said that PW2 had threatened him with a panga to show her who had defiled the complainant.

10. **DW2 Kimel Naiwas Naibei** testified that he saw the appellant weeding his shamba on 21/5/2015.

11. **PW3 P.C. Margaret Namusasi** from Endebess police station produced the O.B. Report made by PW2 and which did not mention the names of the appellant.

Analysis and Determination

12. I have perused the proceedings carefully and in particular the submissions by both the counsel for the appellant as well as the respondents.

13. The 3 ingredients of this kind of offence is that the age of the victim must be established, the identity of the perpetrator must be established and that penetration must be proved.

14. The bond of contention herein is on the question of age. I find that the question of penetration was proved by the prosecution through the production of the documents, namely the treatment notes as well as the p3 form.

15. But how old was the complainant? The state has rightfully conceded to this appeal on this ground. The trial court from the record when the defence demanded ordered for an age assessment to be done. The same was done but the report disappeared and could not be produced by the prosecution.

16. I think the whole issue of the complainant age became suspect as whereas the minor stated that she was born in 1996 her mother stated that she was born in 1999. The birth certificate produced was prepared 4 months after the incident on 28/9/2015, whereas the incident occurred on 21/5/2015.

17. Although the certificate of birth is usually accepted as proof of age, I do not think it is the only piece of evidence. The dental age assessment is more accurate in my view.

18. However in light of the suspicion herein, and inconsistencies shown I do not think it would be prudent to rely on the birth certificate on record.

19. Moreover, I do not think that the mental status of the complainant could not go unchallenged. She readily admitted that there are occasions she would loose her mind remove her clothes and run naked. This position was confirmed by her mother. Although Dr Gakundi discounted this, and stated that it does not affect her memory, it however weighs in on the question of whether she would be trusted to speak the truth as envisaged by the proviso to Section 124 of the Evidence Act Cap 80 Laws of Kenya.

20. In the premises I think a benefit of doubt ought to go to the appellant. The age of the complainant was not proved to the required standard. Presuming that she was born in 1996 then she would have been 19 years at the time of the incident.

21. The appeal is hereby allowed. The appellant set free unless lawfully held.

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

H.K. CHEMITEI

JUDGE

27/9/18

In the presence of:

Mr Kakoi for the Respondent

Mr Nyamu for Appellant absent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.