



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 64 OF 2017

(Being an appeal arising from conviction and sentence in Kitale

Chief Magistrate's Court Sexual Offence No. 129 of 2016 delivered

by M.I. G. Moranga Principal Magistrate on 1/9/2017)

SAMMY MADEGWA Alias MZEE MOJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the 2nd day of September 2016 within Trans-Nzoia County, intentionally penetrated his penis into Vagina of L.N.N a child aged 9 years.**
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 of the charge were that on the 2nd day of September 2016 within Trans-Nzoia County, intentionally caused contact between his penis into Vagina of L.N.N a child aged 9 years.
3. The appellant was convicted and sentenced to life imprisonment. He has raised about 3 grounds of appeal which the court shall turn to shortly.
4. The briefs facts and evidence as presented during trial were that **PW1 S W N** who is the mother to the complainant testified that she was 10 year old having been born on 3/3/2007. On 2/9/2016 she had gone to her shamba at Kinyoro and left her children behind. She was called by Judith Wafula and informed of the incident. By then the child had been taken to the hospital. The child was found to have been defiled and the child told her that it was the appellant who had defiled her. The child was treated and issued with a P3 form which was filled. The matter was reported at Serena police post. The appellant was arrested by Administration Police Officers.
5. **PW2 the Complainant** testified that she was a class 2 pupil and that on the material day she was at home with her siblings and that they had closed school. Her mother had gone to Kinyoro. She went to fetch water alone and on the way she met the appellant who removed the jerrican she was carrying water on her head and poured the water. He then took her to his house and removed her clothes and defiled her. she felt pain and screamed but nobody came to her rescue as there was noise from a nearby posho mill.
6. She went home and told Mama Mulongo what had happened and that it was the appellant who had defiled her. 2 days later she was taken for treatment.
7. **PW3 J W N** is a sister to PW1. She testified that on 9/9/2016, her sister had left her children under her care so that she ensures that they went to school. Unfortunately the complainant did not wake up to go to school as she said she was sick. She took her to hospital where she was examined and the doctor found that she had been defiled. She called her mother who came immediately. The child told her that it was the appellant who had defiled her. She said that the appellant was a person known to her. The appellant was later on the same date arrested.
8. **PW5 Linus Ligare** the clinical; officer from Kitale District Hospital produced the P3 form which he had filled in respect to the complainant. He found that her hymen was torn and it was new. Other tests were negative but there was pus cells in the urine.
9. **PW6 P.C. Peter Khwatenge** from Children Protection Unit Kitale police station carried out the investigation and recorded statements

from the witnesses. He issued them with P3 form and charged the appellant. Later under the Provision of Section 150 of the Criminal Procedure Code, he was recalled to produce the minor's birth certificate.

10. When placed on his defence the appellant gave unsworn evidence denying the charge. He said that he was a farmer dealing with maize and vegetables broker. He said that on 9/9/2016 he had gone to see one of his customers and when he came back he heard that he was required at the AP Camp over an allegation that a lady had lodged a complaint that he had her debt. The lady came and said that the appellant had defiled her child. He was then arrested and taken to Kitale Police Station and later charged with the offence which he continued to deny.

Analysis and Determination

11. The court has carefully read the proceedings from the lower court as well as the written submissions herein by the parties. The grounds set by the appellant in his appeal essentially points out to the fact that the case against him was not proved beyond the required standards. He specifically attacked the late production of the birth certificate by the prosecution.

12. The three ingredients of defilement are now well known, namely, the age of the victim, the identity of the complainant and that penetration was proved.

13. Although the birth certificate was produced at the penultimate stage of the proceedings, Section 150 of the Criminal Procedure Act empowers the court to summon any other witness provided that the accused or his advocate is granted chance to cross-examine the said witness. In this regard I find that the birth certificate had earlier on been identified and marked. It was already in the court file but inadvertently not produced.

14. More importantly the appellant was granted the opportunity to cross-examine the said witness. Consequently I did not see any prejudice suffered by the appellant.

15. Having stated so the minor was born on 3/3/2007. Clearly therefore she was a minor for all intend and purposes. The age was therefore proved.

16. Defilement or penetration was equally proved. The evidence of PW1 and the minor coupled with that of the clinical officer attest to this. Though she was taken to the hospital after about 4 days, nevertheless there was sufficient proof that she had been defiled.

17. Who was the defiler? There was no other eye witness to the incident. Did PW2 Spoke the truth? Was her evidence believable?

18. The proviso to Section 124 of Cap 80 – provides as follows;

“ ----- Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

19. I have examined the evidence of PW2, the complainant against what she told PW1 and PW3. Both seemed to tally. She was clear that she had gone to fetch water and on her way coming home she was accosted by the appellant. The appellant was a person well known to her. His residence was within the vicinity and the witness knew him. Infact PW3 stated that they were neighbours and he would infact cook food for him and her children would visit him.

20. Her evidence in my view was clear and straightforward and I do not see any inconsistency. The injuries she suffered were consistent with what was found by the medical officer.

21. His defence did not oust the prosecution evidence. As a matter of fact had he allowed himself to be cross-examined perhaps it would have yielded something.

22. In the premises, I do not find this appeal meritorious. The same is therefore 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.