



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 89 OF 2017

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court in Sexual Offence No. 4 of 2017 delivered by G.N. Sitati Resident Magistrate on 3/11/2017)

GEOFFREY AREBA NYAMBANE.....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) (2) of the Sexual offences Act No. 3 of 2006**. The particulars of the charge were that **on diverse dates between 1st January 2016 and 20th August 2016 in Trans-Nzoia County, intentionally caused penetration between his penis and vagina of B.N.N. a child aged 5 years.**
2. He was equally charged with the alternative charge 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 offence were that **on diverse dates between 1st January, 2016 and 20th August, 2016 in Trans Nzoia County, intentionally caused contact between his penis and vagina of B.N.N. a child aged 5 years.**
3. The appellant was convicted and sentenced to Life imprisonment hence this appeal. The evidence as was tendered during trial was that **PW1 John Koima** the clinical officer from Kitale County Hospital using the post rape care form examined the complainant on 5/1/2017. He found that the complainant's hymen was torn at 3' and 9' O'clock and had old tags (growth) at 3' and 9' O'clock. There was also some whitish discharge. He concluded that there was penetration.
4. **PW2 AM** an aunt to the complainant testified that she stays in Nairobi while the minor stays with her grandmother at Kitale [Particulars Withheld] area. She testified that she came home in August, 2016 to visit her parents and while they talked and cracked jokes in the presence of the appellant as well as the child, the latter leaned on the appellant which she found very strange.
5. She took the complainant outside and upon inquiry she confirmed to her that the appellant had been defiling her. When questioned the appellant allegedly conceded. She then took the child to Nairobi Women Hospital where she was examined and found to have been defiled. She later came back to Kitale and reported at Kitale police station and the appellant was arrested and charged.
6. **PW3 the complainant** stated that she was 7 years old and staying with PW2 in Nairobi. She narrated how the appellant had defiled her on his bed and when PW2 came she told her what had been going on and she took her to Nairobi.
7. **PW4 P.C. Peter Khwatenge** from Kitale police station carried out the investigations after the matter was reported at the station. He recorded statements from the witnesses and issued P3 from to PW2 for filling. He later preferred charges against the appellant.
8. When put on his defence the appellant gave sworn evidence denying the charge. He said that he was a student at [Particulars Withheld] primary school and that the only reason PW2 fixed her was because he was getting support for his education as opposed to PW2's children. He then explained how he was arrested on 9/1/2017 and charges preferred against him.

Analysis and Determination

9. The court has perused the proceedings herein as well as the submissions by counsels on both sides. The three ingredients for the offence of defilement are now obvious, namely, the age of the victim, evidence of penetration and who was the perpetrator.
10. In this regard the first 2 have clearly been fulfilled. The child at the time of the incident was 5 years old and the birth certificate produced states as much. Even if the birth certificate was procured after the defilement had occurred still the court would have taken judicial notice of the fact that indeed the victim was less than 11 years in age.

11. The evidence of Post Rape care form as well as the physical examination of the child clearly shows that he was defiled.
12. The big question is whether it was the appellant who did so. In my considered view I find that the evidence tendered on record does not wholly suggest that it was the appellant who defiled the minor.
13. The above position is informed by the following grey areas in the prosecution evidence. First of all if the incidence took place between 1/1/2016 and 20/8/2016, about 8 months or thereabouts, would any reasonable adult at the time especially the grandmother failed to notice this? Even if the child did not say, for fear of the appellant, wouldn't the person who was 5 years unable to notice that she had injuries on her private parts.
14. More importantly, biologically its clear that her body was not well developed. There would definitely be a tear and the child would have walked with difficulty. I refuse to believe that a child of tender age would wait for 8 months to let the cat out of the bag.
15. Equally and more puzzling why did PW2 take the child to Nairobi Women hospital and not any County or government hospital within Kitale. Infact the County Referral hospital, would have been the nearest place top take her unless she thought that the personnel at Nairobi Women Hospital were more qualified, which she actually suggested, than those at Kitale.
16. I equally find the discovery by PW2 of the incident very suspect. She stated that she saw the child abnormally "leaning" on the appellant while they cracked jokes in between the talk. Surely, does she suggest that the 2 were "lovers." Would a 5 year old lean on the appellant "suggestively" ?
17. Why, further, did the grandmother or even the grandfather not called to testify If anything and as PW3 suggested, they seemed to be accomplice of some kind. However PW4 did not offer any explanation that they were called and failed to attend court.
18. Whereas I had no problem with the production of Post rape Care form, I do not find any treatment notes to show that when the complainant was taken to Nairobi Women Hospital she was treated. Surely she must have been prescribed some drugs or some form of treatment . In my view to merely have the form as well as the P3 form was not sufficient enough and that is why I find that failure to take the child to the County Referral Hospital at Kitale was suspect.
19. Finally I find the evidence of the appellant plausible. It appears that there was a disquiet about his education which PW3 did not approve.
20. For the foregoing reasons I do allow the appeal and order the appellant to be set free unless lawfully held.

Judgement read, delivered, signed and dated at Kitale this 26th day of September, 2018.

H.K. CHEMITEI

JUDGE

26/09/18

In the presence of:

Mr Kakoi for Respondent

Mr Kaosa for the Appellant – absent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.