



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APEPAL NO. 80 OF 2017

(Being an appeal arising from conviction and sentence in Eldoret Chief Magistrate's Court criminal case No. 40 of 2016 delivered by H.O. Barasa on 19/7/2017)

NICKSON KIPROTICH LAGAT.....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) and (3) of the Sexual offences Act No. 3 of 2006**. The particulars of the offence were that **on 8th day of January 2016 in Eldoret West District within Uasin Gishu County intentionally and unlawfully caused his genital organ (penis) to penetrate into genital organ (vagina) of FC a child aged 12 years old.**
2. He was equally charged with the alternative charge of **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 8th day of January 2016 in Eldoret West District within Uasin Gishu County intentionally and unlawfully caused his genital organ (penis) to come into contact with genital organ (vagina) of FC a child aged 12 years old.**
3. He was convicted and sentenced to 20 years imprisonment hence this appeal. The same has raised several grounds. However before looking at them it shall be appropriate to summarise the proceedings at the trial court.
4. **PW1 the complainant** testified that she was 12 years old and a class 5 pupil at [Particulars Withheld] Academy. She said that on 8/1/2016 at around 4.00 pm she returned a basin her mother had borrowed from the appellant. When she reached the appellant house he was preparing tea which he gave her. Thereafter he proceeded to defile her with a promise that when she grew up she would be his wife. After defiling her he gave her kshs 500. He warned her not to tell anybody.
5. Sometimes in February 2016 her private parts began itching and her mother saw her and took her to the hospital. She also told her what had happened. She reported to Baharini police post. The appellant was later arrested.
6. **PW2 PS** the mother to the complainant stated that the appellant was her neighbour. That In February 2016 the complainant was not feeling well and she took her to the hospital. Her private parts were itching. She inquired what had happened and she told her of the incident with the appellant.
7. She then took the child to the village elder and reported the matter to the police station at Baharini. She also took the child to Moi Teaching and Referral Hospital where the P3 form was filled. Later the appellant was arrested from his house by the village elder and the neighbours.
8. **PW3 John Kiptanui** the village elder at Kapchumba village participated in the arrest of the appellant on 6/2/2016.
9. **PW4 P.C. Prisca Chepkoech** from Baharini police post carried out the investigations recorded witness statements and preferred charges against the appellant.
10. **PW5 Dr Eunice Temet** from Moi Teaching and Referral Hospital produced the P3 form on behalf of Dr. Yatich. The examination revealed healed hymen tears at position 4,3, 6 and 9 O clock and white vaginal discharge. She confirmed that she had been defiled.
11. When put on his defence the appellant gave unsworn evidence denying the charge. He explained that he had been employed by PW2 as a bodaboda rider and he got involved in an accident. In the process he did not remit any money to her and threatened him. Later he was arrested by police officers. He denied the charge.

Analysis and Determination

12. It is evidently from the facts as presented to the court that the age of the minor was clearly proved by the production of notification of birth which showed that she was born on 19/9/2003.

13. As to whether she was defiled, the P3 form produced by the doctor showed that she was .

14. Was the appellant the perpetrator. In My view and despite his submissions to the contrary I find that her evidence was consistent all through. She explained how she returned the appellant's basin and in the process the appellant defiled her. What I find consistent is the fact that she told her mother, as well as the doctor and the police consistently what transpired despite the fact that it had taken sometime.

15. I find her evidence truthful and consistent and therefore believable in line with Section 124 of cap 80 Laws of Kenya especially the Proviso thereof.

16. Being their neighbour a fact which the appellant did not deny I find that the complainant was consistent. I did not in the whole evidence find any malice on the part of the minor nor her mother. The defence raised by the appellant concerning some debt he owed PW2 was not tested by way of cross-examination. He chose to give unsworn evidence and thus one would not know whether there was a grudge between him and the complainant's mother.

17. In the premises I do not find any merit in the appeal and the same is hereby dismissed.

Delivered, signed and dated at Eldoret on this 19th day of October, 2018.

H.K. CHEMITEI

JUDGE

19/10/18

In the presence of:

R. Karanja for the Respondent

Appellant present

Court Assistant – Christine

Judgment read in open court.