



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 8 OF 2018

(Being an appeal arising from conviction and sentence in Kitale

Chief Magistrate's Court in Sexual Offence No. 29 of 2017

delivered by P.C. Biwott Senior Principal Magistrate on 14/2/2018)

DAVID WAFULA WAKHUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Defilement of a child contrary to Section 8(1) (3) of the Sexual offences Act No. 3 of 2006**. The particulars of the charge were that **on the 24th day of February, 2017 within Trans-Nzoia county intentionally caused your genital organ namely penis to penetrate into the vagina of F.N.M. a child aged 14 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 offence were that **on the 24th day of February, 2017 within Trans-Nzoia county intentionally caused th contact between your genital organ namely penis and the genital organ namely vagina of F. W. M. a child aged 14 years.**
3. The appellant was convicted and sentenced to 20 years imprisonment hence this appeal.
4. The facts and evidence surrounding the offence are clear and straightforward.
5. **PW1 the complainant** told the court that she was 14 years old and a class 5 pupil [*particulars withheld*] primary school. That on 24/2/2017 they had gone for school games and she had hurt her leg. While they crossed the forest with her friends she was chased by the appellant. She was unable to run fast and she was caught up by the appellant who proceeded to undress and defiled her. In the process she managed to escape and raised alarm. People came and arrested the appellant. She was thereafter taken to Mt. Elgon hospital for treatment and later Kitale District hospital.
6. **PW2 Ameklen Kopa Ezed** a casual labourer at Kibomet forest while working there at noon on 24/2/2017 heard some girl screaming. She run to the scene and they saw her half naked. She described to them the defiler and they managed to apprehend him. He was arrested and taken to the police station.

7. **PW3 Pharis Silali** from Kitale District hospital dental department carried out an age assessment of the minor and found that she was 14 years old. He produced the dental report.

8. **PW4 Amajadol Douglas** a teacher at *[particulars withheld]* primary school confirmed that the complainant was his pupil and that on the material day they had gone for school games. At 10.00 am he was informed of the incident and he went to the scene where he found the suspect already arrested. The complainant was half naked.

He took her to Mt Elgon hospital for treatment. He also identified the P3 form filled in respect to the complainant.

9. **PW5 Kirwa Labat** a clinical officer from Kitale District hospital produced the P3 form which he filled after examining the complainant. He concluded that the hymen was freshly torn, a cut at perineum and fresh bruises on the labia. The genitals had blood stains. He concluded that there was penetration. He produced the same as exhibit.

10. **PW6 Cpl Felicity Rono** carried out the investigations and preferred charges against the appellant who had been apprehended and rearrested by the OCS from the members of the public.

11. When put on his defence the appellant gave unsworn testimony denying the charge. He said that he was a herder and on that day he was from Wamuini to see his brother Kevin Wafula. He was arrested on his way by men from the forest who were screaming. He was accused of defiling the chased. He lost consciousness and found himself at Kitale police station.

Analysis and Determination

12. The duty of this court is to analyse the evidence and afresh and come up with independent conclusion as enunciated in the case of Ekeno Vs Republic (1972) EA 32. The caution however is that this court did not have the opportunity to witness the demeanor of the witnesses unlike the trial court.

13. The three ingredients of the offence of defilement after reading the proceedings and the evidence produced during trial were easily proved in my view. First of all the fact that the complainant was defiled was not in dispute. Her evidence and that of the clinical officer as shown in the treatment notes as well as the P3 form attest to this. Further PW3 explained that he found her half naked which agrees with her evidence.

14. Her age was clearly proved by the produced of the dental age assessment report.

15. As to whether it was the appellant who defiled her, I find the same to be on the affirmative for the following reasons. First the incident took place at around 10.00 am. This was daytime and the child was able to clearly see her assailant.

16. She then managed to extricate herself from the appellant while screaming and raising alarm. PW2 arrived at the scene and were able together with other bodaboda riders to give chase. The appellant was then arrested within the time and place where the complainant was defiled.

17. I have looked at the defence offered by the appellant. The same has no much probative value as it was not tested vide cross-examination. Secondly it cannot be a case of mistaken identity for the simple reason that there were no other people present at the scene except the appellant. There was no reason to doubt the alarm and evidence raised by the complainant.

18. As a matter of fact the child described to PW2 that the assailant had a black trouser and black jacket a fact not disputed by the appellant even during cross-examination.

19. The sub total of all these is that the appellant was squarely placed at the scene. He did not even bother to call his brother Kevin Wafula to confirm that he was from seeing him.

20. I have read his submissions on record and I do agree with the learned State counsel that the conviction was sound in both law and facts.

21. The appeal is hereby dismissed. The prison term shall however run from 1/3/2017 when he was arraigned in court, noting that the trial was concluded while in custody for he was unable to obtain the surety under the bond terms provided .

Orders accordingly.

Delivered, signed and dated at Kitale this 18th day of December, 2018

H.K. CHEMITEI

JUDGE

18/12/18

In the presence of:

Mr. Kakoi for Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.