



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 2 OF 2013

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court criminal case No. 1149 of 2012 delivered by P. Kulecho Resident Magistrate on 6/12/2012)

GEOFFREY WANYONYI SIMIYU.....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(3) of the Sexual offences Act No. 3 of 2006**. The particulars of the offence was that **on the 7th day of May 2012 within trans Nzoia County, intentionally and unlawfully caused his penis to penetrate the vagina of SAO a child aged 14 years**.
2. The appellant was convicted and sentenced to serve 20 years imprisonment hence this appeal. The substance of the grounds of appeal is that there were glaring inconsistencies on the prosecution evidence which ought not to have led to a conviction.
3. The summary of the evidence as presented is that **PW1 the complainant** testified that she was 14 years old and a pupil at **[particulars withheld]** primary school in standard 5. On 7th May 2012 at 2.00 pm she was heading home from her aunty's place. On the way she met the appellant who was a neighbour and had a motorbike. She hiked a lift. On the way near F2 forest he changed course and forcefully took her to the forest and defiled her. She screamed and a good Samaritan came to her rescue. The appellant fled the scene.
4. **PW2 TMC** the mother of the complainant testified that PW1 had left to visit her sister on 6th May 2012. She was at home on 7th May 2012 expecting her at around 4.00 pm as it was opening day. She called her sister who told her that she had left at 1.00 pm. She waited in vain and she began calling the complainant's friends and school mates. She did not arrive that day.
5. On 8th the following day as she prepared to go to report at the police station the complainant came weeping and told her of her ordeal with the appellant the previous day. A village elder advised her to report the matter at Endebess police station. She was then advised to take her to the hospital where she was treated. On examination she saw semen on her private parts. He knew the appellant who had rented a house in the neighbourhood for about 2 months.
6. **PW3 P.C. Esther Bitok** from Endebess police station gender Section carried out the investigations and preferred charges against the appellant. The child took them to the scene where they recovered a torn under pant as well as her skirt.
7. **PW4 Dr Kiprop Jonathan** produced the dental age assessment of the complainant prepared by Dr. Ken Ndege which showed the complainant age to be 14 years.
8. **PW5 Francis Barchebo** produced the P3 form in respect to the complainant prepared by Linus Ligare and which found that the hymen was torn.
9. When placed on his defence the appellant stated that he used to see the complainant and her mother who were her neighbours at **[particulars withheld]** . She said that she owed PW2 Ksh 100 which he had not paid. On 7th May 2012 he said that he was on duty from 6.00 am till 8.00 pm. She said that on 8th May 2012 her child was sick and he decided to take her to Endebess District hospital and on her way he was arrested by Kenya Police Reservist (KPR), one David, who was in the company of PW2. He was told to accompany the Kenya Police Reservist (KPR) to the police station where he was detained and later charged with the offence. He still denied. He said he was Stephen Wanyonyi Wafula Simiyu and not Geoffrey Wanyonyi Simiyu who was his colleague. He denied that he knew how to ride a motorcycle.

Analysis and Determination

10. The court has perused the entire proceedings herein carefully as well as the written submissions by the parties. It is now generally accepted that the three ingredients of this nature of offence are that the age of the victim must be established, that there was penetration and the identity of the perpetrator established.

11. The age of the minor was established through the dental age assessment report which is deemed generally accurate. She was found to be 14 years.

12. As to whether she was defiled, her evidence and that of the clinical officer attest to this. There was also production of a torned panty.

13. There was no eye witness to the offence. The alleged good Samaritan who came to the rescue of the complainant was not identified or even called. It became therefore the complainant's word against the appellant.

14. The proviso of Section 124 of the Evidence Act states that in the case of the Sexual Offences involving minors, the court shall accept the minors evidence without corroboration if it finds that she was truthful.

15. I have perused the evidence as presented by the minor and I find glaring inconsistencies she stated that she left her aunt's place on 7th May 2012 and within that day she hiked a lift on the appellant motorcycle but instead. She was taken to the forest and defiled. Other than concluding her evidence that the appellant took off after the good Samaritan rescued her she did not explain what transpired thereafter.

16. Her mother (PW2) on the other hand testified that she waited for the complainant on 7th December 2012 but she did not turn up. She stated in her evidence in chief that

“ The next morning on 8th I woke up and prepared to go and report at the police station, before I could set off I saw S coming, weeping, I asked her what the problem was. She told me she had been coming on the day before and saw one Stephen whom she asked for a ride. That the said person had instead commandeered the motorbike to the forest where he had defiled her.”

17. This contrast the evidence of the minor that she was rescued on 7th and seemed to have arrived home that day.

18. PW3 on the other hand stated that PW1 was rescued by the good Samaritan and taken to a nearby hotel. Again there was no mention of being taken to a hotel by the complainant.

19. Infact when questioned by the trial court, PW3 stated that the hotel lady brought the victim to the station.

20. This contrast again with the evidence of PW2 who stated that she was advised by a village elder to take the child to Endeless police station.

21. Where then did the complainant spent her night of 7th May 2012? There is nothing to show her movements from the time of leaving the defilement scene to the period she arrived home on 8th May 2012.

22. More significantly, the good Samaritan was not called to testify. Ideally this was a key eye witnesses who should have been called by the prosecution.

23. I have further read the P3 form produced as exhibit 2 by the prosecution. What is curious is the information given to the clinical officer which states inter alia that;

“ ----- she also alleges has had sex with the same person before date unknown”.

24. In my view I do not find that the complainant was truthful enough. There was every probability that the story was made having delayed in arriving home on 8th May 2012.

25. If for instance she left her skirt at the scene as well as her pant, she must have been naked when she was rescued by the good Samaritan. Nothing was said about this. The hotel owner who was called should have been called to testify at least on the complainant's conduct by the time she was rescued.

26. For the above reasons I shall grant the appellant the benefit of doubt. The appeal is allowed. Let him be released unless lawfully held.

Delivered, signed and dated on 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.