



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 119 OF 2015

(Being an appeal arising from the judgment of Kitale Senior Principal Magistrate P.C. Biwott delivered on 4/11/2015 in Criminal case No. 2647 of 2014)

DANIEL WAFULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of **Defilement of a child contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the **5th day of July 2014 at [particulars withheld] village within Trans Nzoia County, intentionally caused your penis to penetrate into the vagina of M N S a child aged 17 years.**

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 **5th day of July 2014 at [particulars withheld] village within Trans Nzoia County intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of M N S a child aged 17 years.**

The appellant was convicted and sentenced to 15 years imprisonment hence this appeal. The brief facts are as follows

PW1 the complainant testified that she was a form one pupil at [particulars withheld] High School and was born on 10/6/1997. That on the material day she went to borrow a book from her friend M B at around 5 pm. As she came back home via a footpath she was accorsted by the appellant together with her friend called Ken. Ken blocked her mouth and the appellant proceeded to forcefully remove her clothes and defiled her. Thereafter they ran away and one Kibet her neighbour inquired why she was crying she informed him of what had happened. The complainant mother was equally told about the ordeal and the following morning she was taken to Matunda hospital but was referred to Kitale District hospital where she was treated. The matter was equally referred to Kiminini police station where a P3 form was issued.

PW2 E N M, is the complainant's mother. She testified that the complainant was born on 10/1/1997. That when she came back from school and there after she went asking for a book from her friend V. Later one W told her that she had been defiled and she went to Kiminini cottage hospital where one Kibet had taken her for treatment. Later they went to Kitale District hospital after being referred there. She

made a report at Kitale police station where a P3 form was issued to her and the appellant was arrested. She said that she knew the appellant who was her neighbour's son for over 15 years.

PW3 John Koima a clinical officer at Kitale District Hospital produced the P3 form which he filled on 8/7/14 which showed that she had lost her hymen and that the vagina had bruises and thus concluded that there was penetration.

PW4 W. S., testified that on 5/7/14 at 5 pm the complainant came home crying and was rough and dirty. She told her that she had been defiled by the appellant. She was taken to the hospital by one Kibet.

PW5 P.C. Michael Musyimi conducted the investigations after the report was made. He recorded the witness statements and concluded that there was sufficient evidence to charge the appellant.

The said witness apparently had the complainant's skirt and panty but was strangely not produced.

When put on his defence the appellant gave unsworn evidence denying the charge. He said that there was some bad blood between him, the complainant and her family after she refused to have them prepare chang'aa in that home. She said that PW1, PW2 and PW4 promised to deal with him for denying them the opportunity. He was arrested while going on with his chores and taken to the police station and charged. He did not call any witness.

Analysis and Determination

This being an appeal, this court is enjoined to reevaluate the evidence afresh and arrive at independent decision.

The offence of defilement ought to be proved vide the following ingredients, namely the age of the victim ought to be determined whether there was penetration and whether the perpetrator was clearly identified.

In this case the age of the minor was established to be around 18 years. She was born on 10/1/1997 and the offence occurred on 5/7/2014 which means that she was slightly below 18 years. The birth certificate produced as an exhibit was not contested at all.

The next question is whether the complainant clearly identified the assailant. From the evidence on record I do not find any difficulty in answering positively. The incident occurred at around 5 pm and thus there could be no mistaken identity. Equally the complainant as well as the appellant are neighbours for along time an issue not contested at all.

The next issue is whether there was actual defilement or for that matter penetration.

According to the complainant she was pushed down and defiled by the appellant after removing forcefully her panty. While at this his friend Ken held the complainant and covered her mouth. This evidence was buttressed by PW3 who opined that there was penetration as she had lost her hymen and there were fresh bruises on vagina (Labia parts).

The above findings by PW3 were very recent and based on the treatment notes earlier issued. The above evidence was further corroborated by PW4 who saw the complainant crying and looked dirty and rough and she further said that she had lost her slippers. Although one Kibet who took her to the hospital was not called to testify I do not subscribe to the appellant line of defence that there was a conspiracy between mother and her daughter.

The sum total of this therefore is that the evidence available indicates that the complainant was defiled by the appellant.

The appellant's alibi did not displace him from the scene. In other words the complainant evidence was weighty and believable even though there was no direct eye witness to the incident.

The above findings I hold summarises the grounds set in the appellants appeal. I do not see any inconsistency in the evidence as presented by the prosecution.

The appeal is otherwise dismissed.

Delivered this 25th day of January 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for state

Ngeywa for the Appellant

Kirong – Court Assistant