



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CRIMINAL APPEAL NO. 71 OF 2014

(Being an appeal arising from the judgment of Kitale Senior Principal Magistrate

J.M. Nang'ea delivered on 25/6/2014 in Criminal Case No. 817 of 2010)

EDWARD MUDANYA BAINITO.....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(3) of the Sexual Offences Act NO 3 of 2006.**

The particulars of the offence were that on **12th March 2010 in Trans Nzoia West District within Rift Valley province unlawfully and intentionally by use of your genital organ namely penis caused penetration into the vagina of M O a girl aged 14 years.**

The second count is similar in words and actions save the date is 13th March 2010.

After several hearings and re opening of the case by different judicial officers the matter was finally heard by Honourable Nang'ea. By this time the order of the witness had materially changed. However after full trial the appellant was convicted on the two counts and sentenced to 20 years imprisonment on each count and the same were to run concurrently hence this appeal.

The summary of the facts as presented is as follows;

PW1, J O M is the complainant's father. He was busy on 13/3/2010 carrying his own farming business when at around 3 pm he was called by his son P O and told that the complainant had been defiled by the appellant and was being held at Bidii chief's camp. He went there and found the appellant. The victim was later taken to the Kitale District Hospital for treatment.

PW2 Mukia Mupendwa a brick maker testified that on 13/3/2010 at around 12.30 pm he was heading back home. At a nearby house he heard someone screaming and went to check. The door was not locked and they pushed it open. They saw a man and a girl in bed. They man was lying on the girl who was by then screaming. The girl told them that the man was trying to defile her first as he had done earlier. The girl then gave them her mother's telephone number which they used to call her. The man was arrested

and taken to the Chief's camp at Bidii.

PW3 Alfred Kivisha a clinical officer examined the victim on 13/3/2010 and found that her genitalia was slightly bruised and there was bloody vaginal discharge. He did not check the hymen though. He produced the P3 form.

PW4 Dr Kiprof Jonathan a dentist produced the age assessment report which showed that the complainant was aged about 15 years.

PW5 M O, the complainant by the time she testified was 16 years. She said that on 12/3/2010 she was looking for a casual job together with her friends. She met the appellant who promised that she had some casual work for her. He then took her to his house and instead of giving her the work proceeded to defile her. He promised to give her money the following day but instead he defiled her again. He further testified that because of the smoke from bang or cigarette which the appellant smoked he felt that she was choking and she became inebriated and she screamed which attracted people outside. The appellant was then arrested and she was referred to Kitale District hospital for medical attention.

PW6 P.C. William Andayi was the investigation officer. He testified that by the time he took over the investigations the appellant was already in police custody and he proceeded to record statements from the witnesses.

The appellant when put on his defence gave unsworn statement. He said that he hired 2 workers to weed his water melons on 12/3/2010. On 13/3/2010 one of them came to complete the work. The complainant's mother and brother came to the appellant shop and claimed that he had defiled the minor and the matter referred to the area chief. He said that the complainant's mother was one of the people he had hired on 12/3/2010 and she complained because she had not hired her on 13/3/2010.

DW1 Pamela Simiyu Wanyonyi testified on behalf of the appellant. She said that on 12/3/2010 the complainant did some casual job of weeding the water melons belonging to her neighbour the appellant and that they were paid. The following day they came back but the appellant could not hire one of them. She said that the appellant then asked for change of Kshs 500. Later she heard screams from Bidii trading centre on allegation that he had defiled Martha. On cross-examination she said that she could hear the conversation taking place in the compound of the appellant.

Analysis and Determination

I have perused the lengthy submissions by both the appellant and the learned state counsel. As it can be deduced from the proceeding herein, this matter has had a chaggered history of several judicial officers handling the same. The complainant has had to testify three times which essentially may cause facts to be distorted and of course great injustice to the appellant.

Be it as it may, this being a first appeal, this court is enjoined to reevaluate the evidence afresh and come out with new and independent findings. The appellant has raised several grounds of appeal and notably the fact that the trial court did not conduct a voire dire evidence. Whereas this is crucial and essential I take Judicial notice of the fact that by the age of 16 years when the complainant testified she was in a state where the trial court was satisfied that she appreciated speaking the truth. I do not think that she was of such tender age that she did not appreciate speaking the truth. In any case this was the third time she was testifying.

The question however is whether the three ingredients of defilement namely age of the victim, penetration and identity of the perpetrator were satisfied by the prosecution. On the question of the age, it appear on record that the only credible documentary evidence is that of the dentist who opined that she was 15 years or thereabouts. That evidence was not strongly challenged and I would go by it.

The next issue is whether the appellant was properly identified. The answer is yes for the simple reason that the offence was alleged to have occurred on 12 and 13th March 2010 during daytime. None of the

witnesses including the appellant denied this. Although the appellant was a stranger to the complainant nevertheless she was able to positively identify her. In any case the arrest was done at around 12.30 pm as per the evidence of Mukia Mupendwa.

The next ingredient is whether there was penetration. The complainant said that the appellant defiled her on 12/3/2010 as well as 13/3/2010. That infact on 13/3/2010 she had gone to collect the money he had promised. She said that

“ I had screamed on 13/3/2010 because of feeling pain in my vagina. He broke my hymen. I had not had sexual intercourse before.”

She further stated in cross examination that she bled in her vagina. This bleeding was consistent with the findings of the clinical officer when he testified that there was pus mixed with blood in her vagina.

The examination was done on 13/3/2010 the same day in which the incident occurred. There is nothing to suggest that there was any interference at all for example taking bath or at all by the complainant. Although the clinical officer did not check the hymen he concluded that

“The labia majora was bruised slightly. A blunt object probably caused the bruise.”

Although the appellant submitted that there was no sufficient evidence of penetration I do not think so. Section 2 of the Sexual offences Act No 3 of 2010 defines penetration as

“ Means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

In this case I hold that there was either of the two penetration, that is either partial or complete.

The fact also that the appellant was found in the act was not strongly denied even in his own defence as well as that of his witness. Pw2 was categorical. Despite knocking the door the appellant did not open and this forced him and his friend to push it. They found both the appellant and the complainant on bed.

Although they had their clothes on, one is left to wonder what he was doing with a minor who was screaming at that time in bed. This was not his wife or a grown up woman. It defeats logic and it leads to an irresistible conclusion that he was defiling her or was in the process of defiling her.

Conclusion

Based on the above observation I find that the appellant was rightly convicted. The trial court's finding were sound on both law and fact. The appeal is hereby dismissed.

Delivered this 25th day of January 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for state

Appellant – present

Kirong – Court Assistant