



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 121 OF 2014

(Being an appeal arising from conviction and sentence in criminal case No. 1777 of 2013 in Kitale Chief Magistrate's court by C.C. Kipkorir – Resident Magistrate delivered on 17/11/2014).

FRED WAFUKA WANYAMA ALIAS SAKASAKA.....APPELLANT

VERSUS

REPUBLICSTATE

JUDGMENT

1. The appellant was charged with the offence of **Defilement of a child contrary to Section 8(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the **1st day of May 2013** at [particulars withheld] village within Trans Nzoia County intentionally caused his penis to penetrate into the vagina of M A O child aged 8 years old.

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 **1st day of May 2013** 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 A O a child aged 8 years.

3. The appellant was convicted and sentenced to Life imprisonment hence this appeal. The facts as can be summarised from the evidence on record are that PW1 the complainant had been left behind by her mother at home who had gone to do some casual job of weeding at some ones shamba. The complainant who was a class 3 pupil at [particulars withheld] primary school testified that she went to the home of the appellant together with her 2 siblings. They met the appellant who gave them porridge and tea. He then closed the door behind and proceeded to undress her who apparently had not worn any panty. She felt pain and bled from her private parts. The appellant ordered them to go home and when her mother arrived she told her what had happened. She then took her to the dispensary and later to Kitale District hospital where she was treated.

3. **PW2 V K** the complainants mother testified that when she came back home at noon to prepare lunch for her children she was informed by PW1 what had transpired as she saw the child sitting but unable to stand. She notice blood in her private parts and on her clothes. She then took her to the dispensary and later Kitale District hospital after 4 days. She reported the matter to the chief as well as the police station but the appellant disappeared when he realised that he was being sought.

4. **PW3 Violet Owiro Okuyu** works at the chief office Baraton location. She was instructed by the chief to take the child in company of her mother to Kitale District hospital. She also escorted then to Kitale

police station where a P3 form was issued and later filled. She was also given an arrest warrant for the appellant who by then had disappeared. She knew him as he was a watchman at Mercy Academy.

5. **PW4 Corporal Aron Lumatete** from the AP Post Kiminini assisted in arresting the appellant on 24/7/2013 at Chwele and brought him to Kitale police station.

6. **PW5 Dr Kiprop Jonathan** produced the dental age assessment report which when he examined the complainant approximated that she was aged between 7-8 years old.

7. **PW6 John Koima** produced the P3 form which he filled on 21/5/13 and which he concluded that the **“hymen was broken and it seemed that it was done a while back. Her labia was okey.”**

8. **PW7 MP.C. Caleb Yator** the investigating officer essentially recorded statements from the witnesses and issued an arrest warrant against the appellant.

9. When put on his defence the appellant gave unsworn evidence denying the charge. He said that he was at work on the said date and therefore did not defile the complainant. He said that he knew the complainant father and was arrested on 26/7/13 at 1 am. He said that the complainant father had sold him a cow and that the wife was not happy and promised to deal with him.

Analysis and Determination

10. The court in this first appeal is enjoined to evaluate the evidence afresh and come up with an independent finding.

11. I have perused the entire evidence together with the homegrown submissions by the appellant. What is essentially contained in the grounds of appeal filed on 25/11/2014 by the appellant is general assault on the evidence on record, namely that the same did not prove beyond a shadow of doubt that it was the appellant who defiled the minor.

12. The argument in my view centered on the medical evidence as presented by the clinical officer. It could be true that the minor was defiled but her evidence was not under oath and thus there was need to corroborate the same. No eye witness was therefore called to corroborate except the mother who came and found that the child was simply sitting on the chair and was unable to wake up. This prompted her to inquire and she told her what the appellant had done. She said that the child's private parts had some blood as well as her clothes. She took her to Toll dispensary where she was treated and 4 days later taken to Kitale District hospital.

13. There were no treatment notes produced from Toll dispensary. The only medical notes were those from the Kitale District hospital which essentially aided in the filling of the P3 form.

14. Did the child speak the truth as provided under Section 124 of the Evidence Act? There was reasonable evidence to suggest that she did so as there was no evidence to suggest that she was fixing the appellant. Even at the level of the defence nothing was suggested by the appellant that she was fixing him. In my view she appeared very certain that it was the appellant who had defiled her.

15. The problem however is whether there was any penetration. The child's aid that she felt some pain when the appellant defiled her. The clinical officer however speaks of the hymen being broken but the labia was Okey. At the same time he said on cross-examination that ;

“her urine test show sexual intercourse had occurred. It shows sign of infection. I did not see a sperm.”

16. This line of evidence has troubled me indeed. Was there penetration as per the provision of Section 2(d) of the Sexual offence Act? To simply state that there was Sexual intercourse without being categorical in my view does leave some doubt. What shows that there was penetration. To simply say

that there was some infection in my view does not clearly shows the case of the infection and in particular whether it was a result of defilement.

17. There was wisdom in the drafters of the Act when they clearly stated and defined **“penetration”**. To supply state in cross-examination that there was **“Sexual intercourse”** is too simplistic. Infact the P3 form which I have read together with the accompanying notes does not conclude that there was penetration or Sexual intercourse.

18. It is now common knowledge that hymen could be broken by other sources including Sexual penetration. In this case therefore there was nothing in my view for the clinical officer not to have stated that there was actual penetration.

19. More importantly the notes from Toll Dispensary were not produced although it appears that the clinical officer relied on them. No reason was advanced .

20. This is a classic case of cross-negligence on the part of the prosecution. Infact I find the evidence of the investigating officer too simplistic. As much as there was reasonable suspicion to connect the appellant with the offence including his disappearance after the incident, sexual offences rely heavily on the medical evidence. The question of penetration was not clearly explained or even corroborated by the witnesses. Infact no clothes which PW2 alleged that they were blood stained were produced or even collected by the investigating officer.

21. The offence facing the appellant attracted life imprisonment. The same ought to have been proved beyond any shadow of doubt. The medical evidence casted doubt as they did not corroborate the minors evidence. Although she appears to have spoken the truth, I do not find that penetration a key ingredient of the offence was established.

22. This doubts therefore shall benefit the appellant. He is hereby released unless lawfully held. The appeal is allowed.

Delivered on this 27th of July 2017.

H.K. CHEMITEI

JUDGE

In the presence of;

Kakoi for Respondent present

Appellant – present

Kirong/Silvia – Court Assistants

H.K. CHEMITEI

JUDGE

27/7/2017