



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 99 OF 2015

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal case NO. 5203 of 204 delivered by P.W. Wasike Resident Magistrate on 28/7/2015)

FREDRICK SHITUBI BULINDAAPPELLANT

VERSUS

REPUBLICRESPONDENT

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) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the **16th day of March 2014** at **[Particulars withheld] village within Trans Nzoia County, intentionally caused your penis to penetrate into the vagina of M N W a child aged 12 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 charge were that on the **16th day of March 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 W a child aged 12 years**.
3. The appellant was convicted and sentenced to Life imprisonment hence this appeal. The summary of the evidence as presented during trial were as follows;
4. **PW1 the complainant** told the court that she was 12 years old and class 7 pupil at **[Particulars withheld] Academy**. On **16th March 2014** at around 7 pm she was sent by her mother to buy vegetable oil at the nearby shop. She found the shop closed and on her way back she met the appellant who pulled her to his house and proceeded to defile her the whole night. She said that she screamed but no one came to her aid. In the morning the appellant released her and she went home and told her mother. She was taken to the Administration Police Camp and later to Kitale police station as well as Kitale District hospital where she was treated. On cross-examination she said that she could not scream as there was a knife thereby and that the appellant could have harmed her.
5. **PW2 M N W** the complainant's mother confirmed that she was unwell and had send the complainant to buy cooking oil from the shop that evening. She did not come back and at around 8.30 pm she began looking for her in vain. The following morning she came looking dirty and with mud and her face was swollen and blood stain on clothes. On checking her private part she saw dirt and semen. He informed Moses Barasa, Pauline and Mercy and they went looking for the appellant. He tried to escape but was arrested and taken to the Administration Police Camp. She then took the complainant to the hospital.

6. **PW3 Nixon Barasa** testified that PW2 came to his house on 16th March 2014 at 8pm and told him about the disappearance of the complainant. They searched for her in vain. In the morning at around 6 am she saw the complainant pass at her door and after about 30 minutes she had some noise. She went out and saw PW2 holding the appellant hands who tried running away but was arrested and taken to the police station. He said that the child appeared to be in pain as she could not sit or walk properly.

7. **PW4 P.C. Michael Michir** attached to Kitale police station Gender and Child protection Unit testified that he received the report and carried out the investigations. He recorded statements and preferred charges against the appellant . He also produced the complainant birth certificate which showed that she was born in the year 2003.

8. **PW5 Linus Ligare** from Kitale District hospital produced the P3 form which he filled courtesy of the treatment documents earlier filled when the complainant was treated. He concluded that the hymen was torn and was old looking and there was pus emissions smeared on her panty. He concluded that she had been defiled.

9. When put on his defence the appellant gave unsworn statement denying the charge. He said that he woke up on 17th March 2014 at 5 am and went to water vegetables and while at the farm 10 people came and arrested him and took him to the Administration Police Camp nearby. He was later taken to Kitale police station and questioned and later fingerprints taken and charges preferred against him.

Analysis and Determination

10. The court has perused the entire proceedings as well as the appellants written submissions as well as the homegrown grounds of appeal.

11. Essentially three grounds ought to be established for the offence of defilement to be proved. The first one is the age of the victim, the identity of the perpetrator and the fact that penetration occurred in the process.

12. Having perused the evidence herein its clear that the complainant was born on 20th July 2003 meaning that by the time of the incident she was 12 years old or thereabouts. This was not controverted.

13. The next issue is whether the identity of the perpetrator was established. In my view and basing on the evidence of the complainant, I do not doubt. Although she encountered the appellant at 8 pm or thereabouts, she stayed with him overnight. This was a person she well knew. He was a neighbour.

14. As to whether she was defiled or not, I think the medical evidence produced and the evidence of PW2 her mother clearly corroborated that of the complainant. The clinical officer testified that the hymen was torn and he also saw some pus. PW2 saw semen on the complainant's panty. The whole incident including medical examination took place within 24 hours. By the time of examination she had not taken bath. In view of this I find that actual defilement did occur.

15. Was the appellant responsible? I think the answer is on the affirmative. The complainant knew the appellant very well. There was no reason in my view why the complainant could maliciously target the appellant. The explanation of PW2 and PW3 in which they claimed to have looked for her that night corroborates the complainant's evidence that she was locked up in the appellant's house and was unable to free herself. I find that the trial court believed the complainant's evidence and I do uphold the same.

16. The appellant has raised two fundamental issues which I find important. The first issue relates to his age. According to him by the time of the incident he was below 18 years and therefore a minor. I have perused the proceedings and I find that in the initial stage he told the court that he was born in 1995 and the court found that he was therefore about 18 years. In his submissions he stated that he was born in 1998 and that owing to the fact that he was acting in person, he was unable to proof this point.

17. Secondly and most important he alleges that the section in which he was sentenced was erroneous,

namely that he would have been sentenced under Section 8(3) and not 8(2) of the Sexual Offences Act No. 3 of 2006. I find this argument valid. He should there have been sentenced to serve a minimum of 20 years imprisonment and not life.

18. For the above reason I find that the charge ought to be under section 8(3) of the Sexual Offences Act and not 8(2) of the said Act.

19. I find that the prosecution clearly established that it was the appellant who defiled the complainant. These were people who knew each other. PW3 stated that when confronted the appellant attempted to run away but was apprehended.

20. In the final analysis the sentence is hereby reduced from life imprisonment to 20 years imprisonment which shall run from the date of sentence by the trial court.

21. Meanwhile and in the interest of justice to the appellant I shall order that an age assessment be undertaken to establish his actual age. The results thereof be transmitted to this court within 60 days from the date herein. Whatever the outcome of the same this court shall give further directions.

Orders accordingly.

Delivered this 27th day 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