



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 94 OF 2015

GEOFFREY MASINDE OMWENGAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. 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 were that on the **27th day of April 2014 at [particulars withheld] village within Trans Nzoia County intentionally caused your penis to penetrate the vagina of S N a child aged 15 years**.

2. The alternative count 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 are that on the **27th day of April 2014 at [particulars withheld] area within Trans Nzoia County intentionally caused contact between your genital organs namely penis and genital organ namely vagina of S N a child aged 15 years**.

3. The appellant was convicted and sentenced to 20 years imprisonment hence this appeal. The summary of the facts and evidence as presented during trial are as hereunder;

4. **PW1 the complainant** told the court that she was 15 years old and class 6 pupil at [particulars withheld] Primary school. That the appellant was her boyfriend. On 27/4/2014 at 11 am she had gone to fetch water when the appellant called her to his house. He proceeded to promise her that he could buy her socks, shoes and would even take her to boarding school. He then gave her contraceptives and proceeded to have sex with her. In the course of time a police officer came and arrested them inside the house and took them to the police station. The complainant was taken to Kitale District hospital where a P3 form was filled. She also identified her clinic card which showed that she was born on 16/4/1999.

5. **PW2 F N** the mother to PW1 stated that she was away that day when she got an anonymous call whereby she was informed that PW1 was in the house of the appellant. He called a police officer to go and check. He went and found them and he proceeded to arrest the appellant whom she found at the police station. On cross-examination by the appellant she said that she usually has the security officers telephone number for security purposes.

6. **PW3 Kirwa Labatt** a clinical officer from Kitale District hospital filled the P3 form with the aid of treatment notes from Dr Kibole whom they had worked together. He said that on examination she found that the hymen was broken and old looking. There were also traces of blood as the complainant had her periods.

7. **PW4 PC. Rose Sabul** took over the investigation from P.C. Fidelis Wanjiku. She simply reiterated what already her colleague had done.

8. **PW5 Corporal Aron Lumatete** attached to Toll AP Post at Kiminini told the court that he received a police call from PW2 while on her way in Bungoma. He was instructed to check her daughter who was in a house belonging to a teacher. He went and found the house which was locked from inside. He Knocked and the appellant opened the door. On getting inside he insisted on checking the bedroom where he found the complainant hiding under the bed. She confirmed that she was a pupil at [particulars withheld] primary school in class 6. He arrested both of them and took them to AP camp and he called the girls mother. He then organised for one Charles Ewoi to escort her to Kitale Police Station. The appellant told him that he was teaching the child.

9. **PW6 APC Charles Ewoi** escorted the complainant to Kitale police station.

10. When put on his defence the appellant denied the charge and in his unsworn testimony he said that he was coming from Toll at around 5 pm when he met some people running away as they were being chased by police officers. In the processes he was also arrested and accused of drinking changaa. The police demanded Kshs 1000 as a bribe which he did not have. He was then taken to Kitale Police station and later charged with the offence which he still denied. On cross-examination he said that he was a mason and he was arrested as he came from his work but he could not tell the owner of the house he was constructing.

Analysis and Determination

11. I have perused the proceedings herein as well as the written submissions by the appellant. The court is enjoined to re evaluate the evidence afresh and come up with a fresh independent findings.

12. The appellant has raised several grounds of appeal which includes fundamentally the fact that there were contradictory evidence which overally, if considered the trial court ought to have acquitted him.

13. The ingredients of defilement offence is now clear, namely that the age of the victim must be determined, actual penetration ought to occur and the perpetrator ought to be identified.

14. In this respect the age of the minor was proved by the production of the clinic card Exhibit No. 1. Although the appellant has argued that a certificate of birth ought to have been produced, I do hold that a clinic card, such as the one produced is sufficient prove to establish age. In any event the appellant did not object to its production during trial.

15. Did the prosecution proof identity of the perpetrator? The answer is on the affirmative. The incident took place at 11 am. This was during the day. Secondly and more importantly PW5 found both the appellant and the minor in the house. He said that the minor was found under the bed inside the bedroom and the door was locked. I do not think there was any reason for the said witness and in particular being a law enforcement officer to maliciously connect the appellant with the offence. He simply got notification from PW2 the complainant's mother and just as any other police officer is expected, he proceeded to the scene where he found the victim as well as the appellant.

16. When juxtaposed against the appellants line of defence that he was on his way from work and was mistakenly arrested for being in possession of changaa, the same cannot hold water. As stated earlier the appellant was even unable to tell the court during cross-examination whose house he was working on as a mason that day.

17. The next issue is whether there was actual defilement. The complainant explained how she proceeded to have sex with the appellant after being promised to be taken to boarding as well as being bought shoes and socks. She said that they undressed and proceeded to have sex in his bedroom.

18. PW3 stated that during examination he found that the hymen was broken and old looking and that

she was in her periods. A closer look at his defence does not categorically state that she was penetrated. To simply state that the hymen was old looking does not clearly mean that there was penetration. I am at pains to understand whether the “old hymen” was caused by the sexual intercourse between the two. Of course PW5 did not find them at the act so to speak. He found the complainant under the bed. The complainant did not state so.

19. The P3 form filled does not in my view conclude that there was actual penetration as envisaged under the Provision of Section 2 of the Sexual Offences Act

20. In the circumstances and considering the evidence of PW1 and PW5 I find that the charge of defilement was not clearly proved. There were no lacerations or such other injuries considering that this was a minor who had not engaged herself perhaps in sexual activity.

21. But for the fact that the child was found in his house by PW5 and she attempted to demonstrate that she was defiled, I shall allow the appeal only to the extent that the main charge was not proved but the alternative count was established.

The charge is hereby reduced to that of Indecent Act with a child contrary to section 11(1) of the Sexual Offence Act. The appellant is hereby sentenced to 10 years imprisonment. The same to run from 30/4/2014 when he was first arraigned in court. This court takes cognizance of the fact that the appellant has been in custody since then.

Delivered this 27th day of July, 2017.

H.K. CHEMITEI

JUDGE

In the presence of;

Kakoi for the Respondent

Appellant – present

Kirong/Silvia – Court Assistants

H.K. CHEMITEI

JUDGE

27/7/2017