



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 79 OF 2016

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal Case No. 1449 of 2014 delivered by P.W. Wasike Resident Magistrate on 22/03/2016.)

JOSEPH MULONGO APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The appellant herein was charged with the offence of **Defilement 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 are that on the 12th day of April 2014 at *Particulars withheld*, within Trans Nzoia County, intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of L. K a child aged 11 years.
2. He was equally charged with the alternative count of **Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the 12th day of April 2014 at *particulars withheld* within Trans Nzoia County intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of L. K a child aged 11 years .
3. The appellant denied the charge and after full trial he was convicted and sentences to life imprisonment.
4. Before looking at the grounds as set out in the appeal it is worth summarising the evidence as presented during trial.
5. **PW1** told the court that she was a class 5 pupil at *particulars withheld* primary school and aged 12 years. That on 12th April 2012 she was sent by her grandmother to *particulars withheld* to buy sugar. When she came back she met the appellant who pretended that he wanted to send her instead the appellant took her to some forest, remove her clothes and proceeded to defile her. The appellant further held her throat and she was not able to raise any alarm. He then told her to leave threatening to stab her with a knife if she tells anybody.
6. At home she did not tell anybody including her uncle. Her grandmother after 2 days noticed that she was not walking properly and that is how she spilled the beans. She told her that though she did not know the assailant she knew him physically. She led her grandmother till the place where he was and with the assistance of Kenya Police Reservist, managed to arrest the appellant. She was then taken to the hospital for examination and treatment.

PW2 Dr Charles Machere from Endebess District hospital produced the report on behalf of Dr Kagundi who examined the complainant on 14/4/16 and noted that her panty was blood stained, her private parts swollen, red, bruises, her virginity broken and had dirty emissions from her private parts. He concluded that she had been defiled.

7. **PW2 A. K** the complainant grandmother testified that she had send the complaint to buy sugar but she delayed. She however did not tell her where she had gone but on 14/4/2014 at 12 pm she saw that she was standing with her legs apart. On inquiry she told her what had transpired and who had defiled her. She went with her to *particulars withheld* where the child pointed the appellant to her and even held his hand. She also went with the child to the scene where she saw that the lantana plants were still flattered. The appellant was then arrested by Kenya Police Reservist. She took her to the police station and later to the hospital where the P3 form was filled. She further testified that she refused payments from the appellants father who wanted her to drop the charges.

8. **PW4 Martin Kasisi** a Kenya Police Reservist assisted in arresting the appellant after seeing a crowd which were beating him. He rushed him to the police station where the complainant together with her grandmother came and recorded statements. He said that he knew the appellant who was doing casual jobs within the area.

9. **PW5 P.C. Simon Maranga** testified on behalf of his colleague P.C. Maurine John who had passed away. He said that the appellant was arrested at Sokomoko trading Centre after being accused of defiling the minor on 12/4/2014. The said officer recorded statements and gave the complainant P 3 form filled at Endebess District hospital.

10. When put on his defence the appellant gave unsworn testimony denying the charge. He simply said that he bakes bricks and on that material day he was preparing the soil for the same. He was arrested and taken to Kolongolo police station where he was charged.

Analysis and Determination

11. Having heard the appellant and read his submissions as well as the evidence on record and this being an appeal, the court is enjoined to evaluate the evidence afresh and come up with an independent findings. The trial court of course had the benefit of witnessing the parties during trial including their demenour.

12. The ingredients of the charge of defilement are clear, namely, the age of the victim ought to be proved, the perpetrator must be identified and actual defilement or penetration ought to be proved.

13. The only primary evidence available is that of the minor. Although there was no other eye witness it appear that the minor was able to identify the assailant clearly. From the evidence on board the minor after 2 days of hiding the incident from her grandmother was able to take her to *particulars withheld* where she picked out the appellant. In my view the whole exercise was flawless. The complainant as well as the grandmother were clear on their mission when they were looking for the appellant. The minor clearly stated that she did not know the offender by name but she knew him physically. I am satisfied therefore that the appellant was clearly identified by the complainant. In any case the incident took place during day time at around mid morning and it was not difficult for her to recognise her assailant.

14. Did the incident occur ?

The answer is yes. The child graphically demonstrated through her evidence how the defilement occurred. I have no reason to doubt her. Further it was only two days later that PW2 realised what had taken place and she took her to hospital.

15. I have also read the P3 form which clearly corroborates what took place. The doctor was able to see the blood on her panty although the same was not produced.

16. The other ingredient is the age of the minor. This issue has been raised by the appellant in his grounds of appeal and it is worth discussing it.

17. The minor stated that at the time of the incident she was 11 years old though at the time of trial she was 12 years. The doctor opined that she was 14 years old. The P3 form indicates the age of the minor to be 11 years old.

18. There was no evidence to suggest that the minor was 11 years, 12 years or even 14 years. Her grandmother did not allude to the age of the minor. The prosecution requested for age assessment on 24/4/2014 but the same was not availed.

19. This question of the victims age is very critical and sensitive. There was nothing including the usual items like birth certificate, baptismal card or anything else to show her age . In the absence of such evidence, oral evidence cannot suffice. The charge facing the appellant was serious and it merited serious cogent evidence.

20. This question of age also would guide the court in arriving at the sentence. Leaving it open may prejudice either of the parties. In the present case, the victim was a child in my view aged between 11-14 years. A child is defined under the Children Act Cap 141 Section 2 as

“ Any human being under the age of 18 years.”

21. Consequently and in line with the above observation I shall deem that the complaint was around 12 years at the time of the incident or thereabouts. I find this reasonable taking into consideration the average age between 11 as per the charge sheet and the 14 years by PW2. This shall not prejudice both the appellant and the complainant.

22. Having stated so and contrary to the grounds of appeal which attacked the entire prosecution evidence in a nutshell, I find that the trial court rightfully convicted the appellant. Though there was no eye witness to the incident, the minor spoke the truth in line with Section 124 of the Evidence Act Cap 80 Laws of Kenya. Her evidence was convincing and truthful. There was no reason for her to have singled out maliciously the appellant.

23. In the premises the appeal is disallowed. However I shall temper with the sentence by reducing the same from Life Imprisonment to 20 years imprisonment. I note that the appellant conducted trial while in custody. The 20 years period shall run from 17/4/2014 for avoidance of doubt.

Orders accordingly.

Delivered this 27th day of July 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for the respondent

Appellant – present

Kirong/Silvia – Court Assistant

H.K. CHEMITEI

JUDGE

27/7/2017