



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 33 OF 2016

(Being an appeal arising from conviction and sentence in Chief Magistrate's Court Kitale in Criminal case No. 45 of 2015 delivered by P. W. Wasike Resident Magistrate on 5/4/2016)

JOSEPH MWANGIAPPELLANT

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(3) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the diverse dates between **22nd February 2015 and 25th February 2012** at **[particulars withheld] Kapenguria within Trans Nzoia County intentionally caused your penis to penetrate into the vagina of Z W M a child aged 15 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 offence were that on the diverse dates between **22nd February** at **[particulars withheld] Kapenguria within Trans Nzoia County intentionally caused contact between your genital organs namely penis and genital organ namely vagina of Z W M a child aged 15 years**.
3. The appellant denied the charge and after full trial he was convicted and sentenced to 20 years imprisonment hence this appeal.. The brief summary of the evidence as presented at the trial court was as hereunder;
4. **PW1 the complainant** told the court that she was in class 5 at **[particulars withheld] primary school**. That on **22nd February 2015** at around 8 pm she went to buy pencil at some shop . She met the appellant who pulled her to his house. He then proceeded to undress and defiled her. She spent the night in his house, The following 2 days the appellant would lock the house after defiling the minor.
5. In the process she saw one J through the window and she sent her to tell her mother. Many people then came and rescued her. The appellant was arrested and taken to the police station. He was also assaulted by the members of the public. The complainant was taken to the hospital in Kitale District hospital where a P3 form was filled.
6. **PW2 JN** a standard one pupil at **[particulars withheld] Academy** testified that she was going to the toilet when she was called by PW1 through a window. She was send by PW1 to tell her mother. She obliged but her mother told her to go to school. On cross-examination she was categorical that the

complainant was in the appellant house.

7. **PW3 R M** the mother of PW2 confirmed that she was told by PW2 that PW1 was in the house of the appellant. She did not want to check as she thought PW1 would run away. She went ahead and told PW1 father as she had heard of her disappearance.

8. **PW4 D M K** is the father to PW1. He testified that the child disappeared on 22nd February at around 7.30 pm when she went to the shop to buy a pencil. He looked for her in vain. He reported the disappearance to the school as well as the police station.

9. On 25th he was informed by Rachel of what her daughter had told her, namely that the complainant was in the house of the appellant. He reported to the Administration Police post but he was told to keep monitoring. Later he was called by his wife and told that there was commotion in the plot and that the appellant was being beaten by a mob. He went and found the complainant hiding inside the house and was wearing a biker and a headscarf. The appellant was escorted to Kitale police station but the appellant had to be taken to Kitale District Hospital since he had been injured. The minor was examined, P3 Form filled and was treated as well. The p3 form showed that she had been defiled.

10. **PW5 Pharis Silali** produced the dental age assessment of the complainant which showed that she was 15 years old.

11. **PW6 Kirwa Labat** the Clinical officer from Kitale District hospital produced the treatment notes and the P3 form which showed that her private parts were dirty, virginity missing, and had some whitish discharge at her private parts. There were also bruises on her thighs.

12. **PW7 P.C. Rose Sabul** based at Children Protection Unit at Kitale police station carried out the investigations and preferred charges against the appellant.

13. When put on his defence the appellant gave unsworn evidence denying the charge. He said that he was a carpenter and the complainant father asked him to make a bed and that he was to pay the same later. The wife to D M came and borrowed him Kshs 2000 which he did not have. On 25/1/2015 while in his place of work he was arrested by 3 people who included the said Mr M. He was beaten and cut with a panga. The people who beat him ran away when the children who were nearby screamed. He was taken to the hospital and was admitted from 25/2/2015 to 9/3/2015. Thereafter he was taken to the police station and charged.

14. **DW2 Emma Muthoni** the appellant sister testified that she received information that the appellant had been attacked and she stayed with him for 3 weeks in the hospital. On cross-examination she said that she was not present when the appellant was beaten.

Analysis and Determination

15. This court has perused the proceedings together with the submissions by the parties herein. This being a first appeal the court is enjoined to reevaluate the evidence afresh and come up with a fresh independent finding. *See Okeno Vs- Republic (1972) EA . 32.*

16. The substance of the appellant's appeal basically attacks the entire prosecution evidence on record. He attacks the medical evidence so far presented, namely that there was no penetration proved and that he was not medically examined and that no members of the public were called to testify.

17. The three ingredients of establishing the offence of defilement are that the age of the victim ought to be proved, penetration must be established and the perpetrator must be proved.

18. As to the age of the complainant the evidence of Pharis Silali the dental professional clearly established that the child was 15 years. The same was corroborated by her father.

19. Was the complainant defiled? The answer is on the affirmative. The testimony of the complainant was corroborated by the P3 form and the treatment notes produced. The hymen was broken and there were laceration on the private parts and thighs of the complainant. There was no doubt that she was defiled.

20. Did the appellant defile the minor? From the evidence on record, it appears that there was no eye witness except the minors evidence. She graphically described what happened for the 3 nights and days she spent under the hands of the appellant. Clearly, the appellant was a person well known by the complainant as well as the neighbours. Pw2 knew him to be a fundi making cooking sticks. The appellant did not deny that he did not know the complainant or her parents. They therefore knew each other very well.

21. The evidence of pw1 though she was a minor of tender age in my view corroborated that of the complainant. it appears that PW2 triggered the rescuing of the minor. when she told her mother PW3, who in turn told PW4. The complainant's father, who then relayed the information to the Administration Police officers who told him to monitor.

22. The only missing link however is how the appellant was apprehended while in his house. Be it as it may, it appears that the members of the public descended upon him beat him up and was admitted for along time in hospital. Meanwhile the complainant was rescued from the appellant house.

23. In line with the above evidence I have no doubt that it was the appellant who defiled the minor. The issue of the bed and the sum of kshs 2000 advanced in his unsworn testimony does not hold. In any case the same was not raised when he cross-examined PW1's father.

24. I note that the appellant's defence was unsworn. The court of Appeal in Mary Vs Republic Criminal Appeal No. 24 of 1997 noted that ;

“An unsworn statement is not , strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case.”

25. The same was not subjected to any cross—examination to test its veracity. In my view even the evidence of DW2 was of no probative value as she was not at the scene and only came to take the appellant to the hospital.

26. This appeal must fail. The same is dismissed.

Delivered this 27th day of July, 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for the Respondent present

Appellant – present

Kirong/Silvia – Court Assistants

H.K. CHEMITEI

JUDGE

27/7/2017