



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 46 OF 2016

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Sexual Offence case No. 14 of 2015 delivered by C.N. Mugo – Resident Magistrate on 28/4/2016)

RICHARD MURUNGAAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on diverse dates between **20th March and 13th April 2014** at **[Particulars Withheld] farm within Trans Nzoia County intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of E N W a child aged 15 years**.
2. The alternative count was **Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**.
3. The particulars were that on the diverse dates between **20th March and 13th April 2014** at **[Particulars Withheld] farm within Trans Nzoia County, intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of E N W. a child aged 15 years**.
4. The appellant was convicted and sentenced to 20 years imprisonment hence this appeal. Before delving into the substance of his grounds of appeal it is worthy to summarise the evidence as presented during trial.
5. **PW1 the complainant** told the trial court that she was 12 years old and a pupil at **[Particulars Withheld] primary school**. That on 20/3/2014 at 9 am she was at church, called Great Hope when together with her friend J L they met the appellant and one Samuel who was her boyfriend. They went to his place where they stayed for one month. During this period they engaged in sexual activities, both protected and unprotected. On 15/4/2014 while they had gone to bath at the home of Samuel's aunt, they were arrested by Kenya Police Reservist. They were then taken to Cypress Administration Police Camp and later escorted to Endebess police station and Kitale District hospital where she was examined and age assessment taken.
6. **PW2 J L K** equally a friend to PW1 and pupil at **[Particulars Withheld] primary school in class 7** gave the same testimony as PW1. She however said that Samuel was his boyfriend. The 4 of them

during that period engaged themselves in sexual activity till when they were arrested as they went to bath at Samuel aunty's place. They were taken to the police station and later to the hospital.

7. **PW3 M C W**, the mother to the complainant testified that the complainant disappeared on 20/3/2013 and was arrested on 10/4/2014. She told her that she was living with the appellant together with her friend PW2. She further stated that she had gone to visit PW2's mother who also was looking for her. According to her the complainant on that material day had gone to church.

8. **PW4 Pharis Silali** produced the dental age assessment report for the complainant which showed that she was aged 15 years.

9. **PW5 Dr Charles Macharia** from Endebess sub County hospital produced the P3 form on behalf of the complainant which was filled by Dr. Kakundi. The conclusion was that the hymen was broken and there was foul discharged. He concluded that there was penetration.

10. **PW6 P.C. Simon Kirui** took over the investigation on behalf of P.C. Francis Muchiri who had carried out the same. After carrying out the investigations he preferred charges against the appellant.

11. When put on his defence the appellant gave unsworn evidence in which he basically explained his movements on 18/3/2014 where he went to work at Mwamba. He also with his friend Antony went working at ADC farms. On 13/4/2014 he went buying drugs for his sickly mother but was arrested by police officers who were on alcoholic raid. They demanded Kshs 14,000 which he did not have. They refused to take kshs 1,500. He was then taken to Endebess police station and later charged. He still denied the offence.

Analysis and Determination

12. I have carefully read the proceedings together with the appellant's submissions. This is the first appeal and this court ought to re evaluate the evidence and come up with fresh decision.

13. For the offence of defilement to be proved, three elements are considered. Firstly the age of the victim ought to be determined, there ought to be penetration and the identity of the perpetrator ought to be established.

14. In the instant appeal the appellant has raised several grounds which basically attacks the finding of the court on the question of the evidence presented which to him did not meet the threshold required.

15. I have no doubt in my mind that the appellant knew the complainant very well. No where in his unsworn evidence did he argue otherwise. The period in which he stayed with her did not feature anywhere in his evidence. The issue of identity was well established. The evidence of PW1 and PW2 corroborated each other.

16. The age of the complainant was also not in dispute . Although in her testimony she said she was 12 years, the evidence of her mother PW3 and that of the dental officer corroborates each other. She was therefore 15 years at the time of the offence.

17. As to whether penetration occurred, the complainant clearly stated that during the period in question they had sex with the appellant throughout the nights. Apparently the 4 of them were in the same house. The doctor corroborated this as the hymen was broken and that there were no other significant findings. In the premise I am persuaded that indeed the complainant was defiled.

18. Part of the issues raised by the appellant was that key crucial witness were not called. In my view although the investigating officer P.C. Michir did not turn up as he had been transferred, P.C. Kirui was equal to the task. In any event he had already concluded his investigations.

19. In the premises I do not think this appeal is meritorious. The trial court found that the case had been

proved beyond any shadow of doubt which I agree. The appellant who apparently was married although his wife had taken off was well aware that he was dealing with a minor. There is nothing to show that he was not aware. He simply took advantage of some young delinquents experimenting their entry into puberty.

20. The appeal is dismissed. I note that the appellant was in custody throughout the trial period from 22/1/2015 till the date of judgement despite being granted bond. That period be taken into account when the 20 years period in jail is being computed.

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