



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APEAL NO. 13 OF 2016

(Being an appeal arising from conviction and sentence in Kitale Sexual Offence case No. 134 of 2015 delivered by V.O. Adet Senior Resident Magistrate on 15/2/2016)

S R E.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Defilement contrary to Section 8(1) (4) of the Sexual Offences Act No. 3/2006**. The particulars of the offence are that on the **12th day of July 2015 at [particulars withheld] village in Trans Nzoia East District of the Trans - Nzoia County intentionally caused his penis to penetrate the vagina of E. A. E. a child aged 17 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 were that on the **12th July 2015 at [particulars withheld] village within Trans Nzoia County intentionally touched the vagina of E.A.E. a child aged 17 years with his penis.**
3. The appellant after full trial was convicted and sentence to 10 years imprisonment hence this appeal.
4. The appellant has raised several grounds Of appeal but before dealing with the same its worthwhile to summarise the evidence as presented during trial.
5. **PW1 the complainant** told the court that she was 17 years old and a class 8 student at [particulars withheld] primary school. That on the material day, 12th July 2015, she was at home as the rest of her family had gone to church. After cleaning she decided to rest in the sitting room. The appellant whom she said was her in law came and forcefully had sex with her after closing the door. In the cause of the events PW2 C who had gone to church came and found the door locked. She knocked and the complainant opened. The appellant then left but he refused to talk to C. The complainant narrated to PW2 what had transpired. They reported the matter to the police station the following day where they were advised to go to the hospital where the P3 form was filled.
6. **PW2 C E K** stated that they were in church on 12th July 2015 when at around 12 noon she was sent to get utensils from home as they had visitors. While accompanied by J W they found the door locked from inside. They then knocked and the door was opened and the appellant came out first. She inquired

from the complainant whom after being canded she told her what had transpired. She went to the church and informed the complainants mother. The following day they reported the matter at Kipsaina Police station and were issued with a P3 form which was filled. She later recorded statement at the police station.

7. **PW3 J N** accompanied PW2 to pick utensils at her home. They found the door locked and the complainant was inside. They also found the appellant inside the house. On inquiring she said that it was not the first time she had defiled her.

8. **PW 4 Kirwa Labatt** examined the complainant and filled the P3 form which he concluded that the hymen was torn but no bruises on her private parts.

9. **PW 5 Senior Sergeant George Ebungo** was the investigating officer. He recorded statements and preferred charges against the appellant. He also produced the complainant birth certificate which showed that she was born on 26th December 1998. He said that the appellant was brought by one Khaemba who was a Kenya Police Reservist (KPR).

10. When put on his defence the appellant gave unsworn defence denying the charge. He said that he was a charcoal vendor and on 21st July 2015 he was carrying firewood with his bicycle heading to Kipsaina Centre. He was stopped and arrested by 2 people who introduced themselves as Kenya Police Reservists and took him to Kipsaina police station. He was placed in the cells and later charged. He denied the charges.

Analysis and Determination

11. This being a first appeal this court is enjoined to reevaluate afresh the evidence on record and come up with independent findings. (*see Ekeno Vs Republic 1972 EA 32.*)

12. The appellant has raised several issues on his grounds of appeal but basically centres on the credibility of the prosecution's evidence. Majorly he argues that the evidence was not water tight enough to have warranted the court to convict him. I have also read the written submissions by the appellant as well as the entire proceedings and perused the exhibits produced, namely the certificate of birth and the P3 form.

13. For the offence of defilement to be proved the prosecution ought to establish the age of the complainant, the identity of the perpetrator and penetration ought to have occurred. In the instant case the age of the minor was not contested. She was born on 26th December 1996 as per the certificate of birth.

14. Did she identify the perpetrator? The answer is on the affirmative. The appellant did not dispute that the complainant was not her in law. These therefore were people who knew each other. PW2 and PW3 knew the appellant.

15. Was the complainant defiled? The answer is yes. Both the medical reports produced clearly showed that the hymen was torn. Although they went to the hospital after changing clothes and bathing, I am convinced that her evidence was corroborated medically.

16. I further do not doubt that the appellant defiled the complainant. The complainant evidence was corroborated by PW2 and PW3. Although he was not found in the act, the fact that the door was closed at that moment leaves a lot to be desired. Although in his defence he did not explain where he was on the material day he did not cross-examine the said witness on the fact that he was not at the scene.

17. Neither do I find any collusion on the part of the minor and the witness to fix the appellant. These were close relatives and I have not found anything on record to suggest bad blood between them.

18. In the premises this appeal ought to fail. The same is hereby dismissed.

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