



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL NO.20 OF 2015

ELIUD NYONGESA WAMALWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

1. The appellant had been charged in PM Criminal Case No.736 of 2011 in Kimilili with the offence of defilement. The particulars thereof were that between 10th June 2011 and 11th June, 2011 at [particulars withheld] Village, Kibingei Sub-location in Kimilili he unlawfully and intentionally penetrated and defiled a minor aged 7 years.
2. The prosecution called 6 witnesses, the Minor M.N. as PW2, the mother J N as PW1, PW3 was E W, W M W was PW4, PC Esther Chelelet as PW5, & **PW6 was Kwendo Zakayo** a clinical officer who produced the P3 form.
3. The prosecution case in brief was that on the 10th of June, 2011 the complainant left school for lunch at 1pm and on the way she met the accused who called her to his house with an offer of a ndazi. Later he defiled her and kept her overnight where he defiled her again. The following day he took her to Kimilili where PW3 saw them enquired where her sister had slept and on being told where she slept and that she had been defiled by the appellant PW3 took her to her mother who examined her and noted that the victim had injuries and took her to hospital. PW1 also reported the matter to the police but did not follow up the matter until the 20th of June 2011 as the Appellant had disappeared.
4. **PW2** in her evidence stated that she left for lunch alone and met Eliud the appellant who held her hand promised to give her a mandazi and she followed him to his house. He gave her a ndazi, undressed her, placed her down and had sex with her 3 times. She felt pain. She was at his home till morning. He had sex with her again in the morning. **PW3 E W** also a minor aged 14 years stated that on 10th June, 2011 PW2 did not return home and she went to search for her at their sister's in vain. Next day she checked at another sister's PW4 where she saw the complainant who told her she had slept at the accused. They went to PW4's house and PW4 told them to go to PW1 whom they informed of the incident. PW1 examined PW2 and took her to hospital. The above information is corroborated by PW4 who said that on 11th June, 2011 at about 5pm
- PW3** went to her house with PW2 who walked as if she was injured. They told her that, PW1 had been defiled by the appellant. She took PW2 to their mother, who following day took PW1 to hospital.
5. **PW6 Kwendo Zakayo** a clinical officer filled PW1's P3 form on 21st July, 2011 after 11 days. He testified that he examined PW1 and concluded treatment notes. On examination, PW1 had no injuries, no

bruises or tears but she had pus cells. He formed the opinion that the child had been defiled. Although he did not assess her age, he looked at PW1's dedication card and noted that PW1 was born on 27.11.04

6. At the close of the prosecution case the Appellant was placed on his defence. He denied the charges alleging that he had been framed and did not know why he had been accused falsely. He called a witness **DW2 Judith Namalewa Kochin** who had no idea about the allegations before court and did not give any useful information.

7. The appellant was convicted and sentenced to life imprisonment. Being aggrieved by the judgment he preferred this appeal on grounds that; there was no age assessment of the victim, his constitutional rights were violated; there was contradiction in the prosecution case concerning the victim's name, he was not brought to court within 24 hours of his arrest, no penetration was proved and the court failed to consider S.124 of the Evidence Act.

8. Most of the complaints came by way of submissions and were not in the grounds of appeal nonetheless in this judgment I will consider the same.

9. It is true the appellant was brought to court after 48 hours. The appellant raised the issue as soon as the charge was read to him. The court summoned three police officers who explained the cause of the delay as being the appellant's disappearance after the incident, secondly after reporting the minor's mother did not pursue the matter and that after arrest on information received from the minor's relatives they pursued the minor and the mother for further investigations; filling of P3 form after which they charged the accused. I am of the view that the above explanation is reasonable. The police wanted to ascertain through medical evidence first and since the accused had disappeared they had to hold him pending receipt of the information.

10. The only reference in terms of the complainant's name is by one of the officers who appeared before court to explain why the accused was not brought to court within 24 hours he was not a witness in the case and the reference to a wrong name therefore does not go to the core of the evidence of the offence that faced the appellant.

11. As regards the age all witnesses gave the age of the minor as 7 years. PW6 considered the victim's dedication card that had her date of birth. He also checked her dental formula and imperative speech. The appellant did not seem to have an issue of the complainant's age at the trial and for him to raise the same on appeal is an afterthought and late in the day. There is however adequate evidence on the age which the Court does not fault.

12. The appellant laments that the court did not consider section 124 of the evidence Act. However the evidence of PW2 is corroborated by PW1, PW3 and PW4. PW3 and 4 saw PW2 walk as if she had injuries. They took PW2 to PW1 who examined her and saw PW2 had discharge and took her to hospital the following day. She reported to the village elder and the police. The treatment card date 12th June, 2011 a day after the alleged offence indicates that she had been allegedly 'raped'. She walked with difficulty, had pus cells and discharge, there was no hymen, although she had no bruises or tears. The remarks given by PW6 were that this was a possible case of defilement, where examination done after several days.

13. I agonized over the findings of PW6 that the victim had no injuries, no tear or bruises as against the evidence of the victim that she had sex with the appellant three times on 10th of June, 2011 and once on 11th and wondered whether penetration occurred?

14. Although upon examination PW2 the victim had no hymen although no tear or bruises found, she had pus cells and walked as though she had been injured. This coupled with the victim's evidence where she was clear that the appellant had defiled her. The evidence struck me to be truthful and in replying on the same I affirm the decision of the trial Court. Both the conviction and sentence were safe.

Appeal is therefore dismissed.

DATED and DELIVERED at BUNGOMA this 16th day of November, 2017.

ALI-ARONI

JUDGE