



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 110 OF 2015

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal Case No. 2116 of 2014 delivered by P.W. Wasike Resident Magistrate on 22/9/15)

AMM.....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) (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the **30th day of May 2014 in Trans-Nzoia County, intentionally caused his penis to penetrate the vagina of R.C. T. a child aged 14 years.**
2. He was equally charged with the alternative charge of **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 **30th day of May 2014 in Trans-Nzoia County, intentionally touched the vagina of R.C.T. a child aged 14 years with his penis.**
3. The appellant was convicted and sentenced to 20 years imprisonment hence this appeal.
4. The facts and evidence as presented at the trial court was that **PW1** aged 14 years old at the time of the incident and born on 6/2/2000 was a form one student at [Particulars Withheld] secondary school.
5. In the morning of 29/5/2014 at 7 am her mother organised to be taken to school via a motorcycle ride by the appellant. She testified that the appellant did not take her to school but instead took her to Mailinne Sibanga centre. He then disappeared till 12 pm and he took her near a church and left her to fuel his motorcycle. It started raining and she sheltered at the church veranda. He stayed till 7 pm when he arrived and took her towards Kitale town. He took her to a room where he proceeded to defile her after locking her in. he threatened to kill her if she raised any alarm and kill himself as well.
6. He later the following took her to Chepareria after she prompted her. They went to the house of one James Bett where she gave James wife a phone number for her father. Her father arrived and the appellant was arrested. She was taken to Chepareria hospital.
7. **PW2 PC** was the mother to the complainant. She testified that she called the appellant to take the minor to school in the morning at 7 am. He did not pay and he inquired from the neighbours and was told that he did not come back home. He sent to his grandfather's place but did not get her. She called a

teacher at the school who told her that the complainant had not reported. She went to the school on 31/5/2014 and confirmed so. They tried calling the appellant's phone but it was switched off.

8. Her husband was called by someone and told that she was at C and they went there. She had already reported at Sibanga police post. The police then gave them homeguards and they traced the minor. They arrested the appellant and the minor was found. She told them that the appellant had locked her in a house she did not know and defiled her. She took the P3 form and had it filled. She said that she had picked the complainant from school for she was unwell. She said that she knew the appellant, as a neighbour and family friends.

9. **PW3 Kirwa Labatt** the clinical officer based at Kitale District hospital filled the P3 form. He found her private parts with bruises and lost her virginity.

10. **PW4 Kimeli Kipkemboi Nicholas** took over the matter from Philip Siele who carried out the investigations. He said that the report was booked on 30/5/2014 after PW2 had reported the disappearance of her daughter. They eventually traced her to Chepareria where members of public assisted in arresting the appellant. He said that the girl had requested the appellant to take her to Chepareria to a house of one James whom she knew and a relative. The witness equally produced the birth certificate of the complaint.

11. When put on his defence the appellant gave sworn evidence and stated that he was a businessman dealing with charging of batteries as well as a barber. He said that on 29/5/2014 he was in his place of business when police in civilian clothes arrested him and took him to Sibanga patrol base. He was incarcerated and later charged. On cross-examination he stated that he knew the minor and her parents. He denied the charge.

Analysis and Determination

12. I have perused the entire pleadings in detail as well as the exhibits produced. This court did not have the benefit of conducting the trial and thus it ought to come up with fresh and independent findings. **See Okeno Vs Republic (1973) EA: Pandya V Republic (1957) EA 336.**

13. I have equally perused the submissions by both counsels for the appellant and the state. What is evidently clear is that for this offence to be established, there must be proof of age of the victim, identity of the perpetrator and whether penetration occurred.

14. As regards the issue of the age, the birth certificate produced and not contested by the parties is clear on her age. At the time of the offence the complaint was aged 14 years.

15. As to whether there was penetration the evidence of PW3 was corroborated by the P3 Form which showed that there was every possibility that she was defiled.

16. Did the evidence on record show that it was the appellant who defiled the minor? Although there was no direct eye witness I am persuaded that indeed the appellant committed the act. He has not denied the fact that he knew the complainant and her family. Neither did he deny that he had a motorbike. Further I do not doubt the prosecution witness who claim that the appellant was arrested at Chepareria. In my view he did not offer any sufficient evidence to deny this in his defence.

17. In any case how did the complaint find herself in Chepareria yet she was meant to be in school? I think he simply took advantage of the trust bestowed upon him by the complainant's mother.

18. I do agree with the submissions by the appellants counsel concerning the contradictions in the evidence of the complainants. The bottom line though is that the minor was traced to Chepareria having been taken there by the appellant.

19. I would have dismissed this appeal save for one issue which I have had to grapple with and that is the question of the appellant's age at the time of the incident. It appears from the proceedings that the court

considered him to be a minor all through and that is the reason why at some point he was kept at the Juvenile Remand home. Apparently an age assessment was done and the same brought to court and “placed” in the court file.

20. As a result of this “placing” the court determined that the appellant was aged above 18 years. I respectfully do not think that simply putting the report which had great ramifications without introducing it and having the maker produced is the proper channel. In my view the maker in this case Dr. Kiprop Jonathan ought to have produced it and be questioned or cross-examined before the same could be admitted.

21. More importantly it appears that the appellant by then had not even obtained any identity card.

22. Equally its common knowledge that the age assessed is always an estimate. In such borderline case where there was no other documentary for instance a birth notification or even a clinic card or any such supporting document I think it would be in order to grant the appellant a benefit of doubt. In other words he could even be less than 18 years by a slight margin. In short what Dr Kiprop Jonathan found was an estimate.

23. Having stated so I shall grant the appellant such benefit. I believe that the period he has spent in custody from 3/6/2014 is sufficient to have taught him a lesson.

24. The appellant is therefore set free unless lawfully held.

Delivered, signed and dated at Kitale this 11th day of December, 2017.

H.K. CHEMITEI

JUDGE

11/12/17

In the presence of:

M/S Kakoi for the Respondent

Appellant – present

Court Assistant – Kirong/Silvia

Court: Judgment read in open.