



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 39 OF 2014

(Being an appeal arising from conviction and sentence in

Criminal Case No. 1640 of 2013 delivered by P.W. Wasike

Resident magistrate on 1 / 4/ 2014).

ELIAS NYONGESA MAKOKHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on diverse dates between **August 2012 and 24th September 2012 at Matisi area within Trans Nzoia County intentionally caused his penis to penetrate the vagina of S C a child aged 13 years.**

2. He was also charged with the alternative charge of **Committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006**. The particulars of the Offence were that **on diverse dates between the month of August 2012 and 24th September 2012 at Matisi area within Trams Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ of S C a child aged 13 years.**

3. After full trial the appellant was convicted and appropriately sentenced. He has filed this appeal citing several grounds which included the fact that the evidence as presented did not proof the charge to the required standard, the crucial witnesses were not called; the medical evidence was insufficient and the court failed to take into consideration the appellant's defence.

4. Before dealing with the above grounds suffice it at this juncture to summarise the evidence as presented during trial.

5. **PW1 the complainant** testified that she was a class 3 pupil at [particulars withheld] Primary School. She said that sometimes in August 2012 on a date she cannot recall the appellant came to her home and decided to send her. On her way he forcefully took her to a maize plantation and defiled her. She could not raise any alarm as he blocked her mouth. He also tore her panty and proceeded to defile her. She went to her aunty S place who advised her to shower. She however did not tell her mother.

6. Later after a week she was send by her mother to purchase vegetables but on her way she met the appellant who carried her to a maize plantation and defiled her. He also assaulted her on the head and she bled. She told her mother who notified the chief.

7. On 24/9/2012 she found the appellant holding a panga and wanted to cut her mother for the reason that she was maligning him. Her mother went and reported the incident at the chief's office.

8. The complainant was then taken to Kitale District hospital where she was examined and treated. A P3 form was equally filled and dental age assessment undertaken.

9. **PW2 P.C. Grace Itheba** carried out the investigations after the complainant and the mother reported the incident at Kitale Police station. According to her the complainant was raped by a known person on 3 occasions. She then after receiving the P3 form duly filled, the age assessment report as well as PRC form and issued warrants for the appellant to be arrested.

10. **PW3 I C** the Complainant's mother testified that she was told by S on 28/9/2012 concerning the defilement incident. She took the child to Kitale District hospital. She checked her private parts and she saw some dirt.

11. **PW4 Kirwa Labatt** produced the P3 form on behalf of Francis Barchebo his colleague who had examined the minor who concluded that;

“----- No external injury on her body. P3 filled and were after incident. Her private parts, no physical injury on outer and inner. Her vaginity broken and old looking ---’

On cross-examination by the appellant he said;

“ No fresh injury noted. She had previous sex. No evidence of sex.”

12. When put on his defence the appellant gave unsworn testimony where he said that he was arrested by police on 10th July in the company of his colleagues going to Zea to collect maize cobs from Kenya seed. He was detained for failing to pay Kshs 1000/-. He was thereafter charged with the offence after being threatened by a police officer who even slapped him.

Analysis and determination

13. I have extensively read the written submissions on record both by the appellant and the learned state counsel. This being the first appeal the court is enjoined to re –evaluate the evidence afresh and come up with independent finding noting that it did not have the luxury of conducting the trial.

14. For the offence herein to be established one must proof the age of the victim, the identity of the perpetrator and that penetration indeed occurred. I have no doubt in my mind that the age of the minor was not in dispute. The dental age assessment indicated that she was found to be 13 years old which is not far from the 12 years the mother suggested.

15. On the question of identity of the perpetrator I do not find any reason to suggest that the complainant was not known to the appellant. It was alleged that the incident occurred three times and that they were neighbours living in rented premises. PW2, the complainant's mother did not deny the fact that they knew each other. Neither did the appellant deny that he knew the complainant and by extension her mother.

16. On the question whether the complainant was defiled, save the evidence of the complainant, there was no other eye witness to the incident. The closest person that was informed of the incident was one Susan, the complainant aunt who apparently failed to turn up to testify. There is no indication that she recorded her statement with the police.

17. In this instance the Proviso to Section 124 of the Evidence Act clearly come into play. The same

states that;

“ ----- Provided that where in a criminal case involving a Sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

18. I have combed through the complainant's evidence both in chief and cross-examination as well as compare it with the rest of the evidence on record and I find several issues which creates some doubt in my mind.

19. Although she said that she was raped/defiled thrice I am unable to find consistency. Taking into consideration that's she testified on oath, she ought at least to have been consistent on this.

20. More fundamentally where did she keep the panty that was torned? Did she take it with her? If she did, did she show S her aunty that day.

21. Another disturbing issue is the lack of evidence by the said S. Why did S fail to testify yet she was the one whom the minor trusted apparently more than her mother. If she is the one who advised her to shower, why fail to turn up in court at the critical moment.

22. Equally, if the incident was reported at Matisi Chief's office, why did the Chief or any other person failed to testify.

23. She, (the minor) alleged that she was beaten by the appellant on the head and she bled. She went home and washed the head. When her mother came, she informed her. The injuries which I presumed were visible and fresh ought to have been captured in the P3 form. Infact PW4 testified that there was no other injury on her body.

24. PW3 her mother did not mention this incident in her testimony. Nowhere did she say that she saw injury on the minors head that evening and she reported the incident to Madam Chief.

25. At the same time PW4 did not tell the court that the appellant wanted to cut her using a panga on 24/9/2012. In my view this was a major incident which PW4 ought to have corroborated PW1. Infact PW4 testified that she had no difference with the appellant.

26. PW1 also stated in her evidence in chief that;

“This is the Makokha (points to accused). He slept with me 3 days. On last time I notice blood in my private part (vagina). I told aunty who told my mother, then I was taken to hospital.”

27. On the Contrary her mother states that she saw some dirt in her private parts.

28. I have equally examined Exhibit II, the Post Rape Case form which I presumed was filled when the evidence was still fresh. The same states as follows in respect to the issue of the place of assault.

“House of assailant Makokha in Matisi corner pt was lured with money to come to assailant's house at night time on 24/9/12. Was raped by man on floor. Held down on floor by assailants.”

29. This is contradicts the complainant's evidence that she was defiled in a maize field.

30. All in all, I find the evidence of the complainant not strong enough to be believed. She has left caps which unfortunately, her mother and more particularly one Susan ought to have filled.

31. The appellant's evidence was a sham. The same could not be believed. It had no relations at all to the charges facing him. However the inconsistencies on the part of the complainant's in my view creates a doubt which ought to be in favour of the appellant.

32. Considering the gravity of the charges facing the appellant it was incumbent for the prosecution to have tightened its case. More importantly, the failure by S to testify in my view was grievous. Her evidence would have corroborated that of the minor. For now the benefit of doubt ought to be in the appellant's favour.

33. The appeal is allowed. The appellant set free unless lawfully held.

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

H.K. CHEMITEI

JUDGE

11/1217

In the presence of:

M/S Kakoi for the Respondent

Appellant – present

Court Assisatnt – Kirong/Silvia

Court: Judgment read in open court.