



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 5 OF 2017

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court in Criminal Case No. 4678 of 2014 delivered by P.W. Wasike Resident Magistrate on 24/01/2017)

EMMANUEL MUNYASIA WANYONYIAPPELLANT

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 facts were that on the **28th day of November 2014 within Trans Nzoia County intentionally caused his penis to penetrate into the vagina of B W N a child aged 9 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 **28th day of November 2014 within trans Nzoia County intentionally caused contact between your genital organ namely penis and genital organ namely vagina of B W N a child aged 9 years**.
3. After full trial the appellant was convicted and sentence hence this appeal. Before dealing with the grounds of appeal set herein its worthwhile to summarise the proceedings as they occurred at the trial court.
4. **PW1, the complainant** told the trial court that she was 10 years old and a class 3 pupil at [particulars withheld] primary school. That on 28/11/2014 at around 1 pm while at home with her sister P and her friends S and B, the appellant whom she called Baba Morgan told her to accompany her to the shop to buy some good things. The appellant on their way gave her kshs 50 to buy mandazi and pulled her to the forest where he proceeded to defile her. When he finished defiling her, she looked at her private parts and saw blood and whitish substance.
5. She went on to state that the appellant smeared some milking jelly on her and wiped her private part using her panty which she went with it. He told her not to inform her mother and father. She told her mother in the evening when she came home. The following day they went to Sikhendu police post and later referred to the hospital where she was treated.
6. On cross-examination she said that she knew the appellant's name as Baba Morgan as he had a child by that name. She said that she was given kshs 50 at home not while on the road. He said that there are many people and houses where they stay. He said that the appellant cuts trees using a power saw.

7. **PW2 John Koima** a clinical officer produced the P3 form filled by her colleague Susan who found that she had whitish substance on her private parts and that her hymen was torn and labia bruises but no vaginal discharge. He concluded that there was penetration.

8. **PW3 R N N**, the complainant's mother testified that when she came home on 28/11/2014 at 7.30 pm she found the complainant sleeping and said that she was sick. She gave her Panadol. Later as she sent her she realised that she was not walking well. On inquiry she told her what the appellant had done to her. She checked her private parts and she saw some blood and dried whitish substance on her thighs.

9. In the morning she took her to the village elder, one Baptista as well as to a nurse who referred them to District hospital as well as the police. On cross-examination she said that she had a case at Kitale police station with one J W the brother to the appellant over some assault allegation. She denied that the case was a way of revenging. She said that the accused appellant disappeared when the police looked for him and that he was arrested at night.

10. **PW4 P.C. Nelvine Purity Nabwire** carried out the investigations after receiving complainant from pw3 who reported with the child. She booked the report at the O.B. and referred them to Kitale District hospital. She visited the scene a week later and found the grass flattened. They arrested the appellant on 3/12/2014 and charged him with the offence.

11. **PW5 P.C. Peter kwatenge** produced the minor's birth certificate showing that she was born on 26/4/2005.

12. When put on his defence the appellant gave sworn evidence denying the charge. He said that from 27, 28 and 29th November 2014 he had gone to split timber with one Pastor Bernard Wafula Wanyani at Mukuyuni. He said that there was some dispute between the complainant mother PW3 and his brother which ended up at the police station. The incident had occurred on 6th November and was implicated. His brother had been assaulted and was admitted at the hospital. According to him the child was coached so as to implicate him. This was a revenge mission. He said that he was arrested in his house as he was waiting at his house for his arrest.

13. **DW2 J W** is the brother to the appellant. He said that on 6/11/2017 he had a quarrel with his wife who was selling some maize to one George Wanyama the father to the complainant. The said George and his son assaulted him. His son used a panga. He was taken to Cottage Hospital and later Kitale District hospital. The appellant, his brother assisted him with the matter all through. Later there were rumours that he had defiled the child. The case according to her was changed to implicate the appellant instead of him.

14. **DW3 B W W** a pastor and a mason as well testified that he knew the accused very well. That on 28th November 2014 he had some work at Mukuyuni wherein he invited the appellant who worked till 4pm on 28th November 2014. He said that he was with the accused from morning on the material day. He said that they undertook the job at the farm of one Bonventure Kaniala.

Analysis and determination

15. I have perused the entire pleadings as well as the parties written submissions. The appellant has raised one fundamental issue which runs across his 4 grounds of appeal namely, that the evidence as adduced by the prosecution did not meet the threshold of convicting the appellant. In other words, there was glaring inconsistency in the prosecution evidence, which warrants this appeal to be allowed.

16. This court is enjoined to re-evaluate the appeal afresh with full knowledge that it did not participate in the trial – **See Okeno Vs. Republic (1972) E.A. 32.**

17. For the offence of defilement to be proved, three solid ingredients are necessary namely, the age of the victim, penetration and identification of the perpetrator. In this regard and as clearly submitted by the

respondent and not opposed by the appellant the age of the minor was not in dispute. The birth certificate produced showed that she was 10 years old.

18. As to the question of defilement the medical evidence produced including the P3 Form was conclusive.

19. The question however is whether the evidence tendered clearly pointed out the appellant as the perpetrator. There was no eye witness to the incident except the minor. She testified that she was lured by the appellant from her home towards the shop where he had promised to buy for her some good things. Unfortunately they did not reach the shop. He defiled her in a forest which was called Ndombi's. Later in the evening she told her mother what had transpired during the day.

20. Apparently the other 3 children who were with the complainant were not called to testify. Was she really with them at that time? Did they leave to get quavas as the complainant stated?

21. I have perused the testimony of PW3 her mother who said that when she examined the child she saw blood and whitish substance on her thighs.

22. Earlier on the child had testified and stated as follows:-

“ ----- I slept on my back facing up. He slept on my stomach side. He put a plastic on his urinating thing it looked like a balloon and put on his thing for urinating and he slept on me and I felt pain down here (point to her vagina area) at the urinating part of my body. He then came out. I looked at my vagina it had blood and some whitish things. He told me I should not tell mother and father. He smeared me with some jelly for milking. He had it. He then wiped my private part using my panty and he went with it. I then went home.”

23. My appreciation of the balloon the child mention must have been a condom. If the appellant had used it what was the whitish substance which I presumed to be sperms. Of course one does not expect the child of such tender years to know but assuming that she saw him put on his penis then naturally the sperms would be inside the said “balloon” not on the child's thighs.

24. More importantly is the alibi raised by the appellant. His witnesses confirmed that they were splitting wood as from 27th but more importantly on the said day, 28th November 2014. In my view this alibi was not displaced by the prosecution evidence. There was no contrary evidence to suggest that the appellant was present at the scene. In my view had the other children who were with the complaint called to testify perhaps they would have counteracted the alibi evidence by the appellant.

25. At the same time, the appellant argued that the whole case was fabricated by the complainant's mother who had personal differences with DW2, the appellant brother. It was not denied that indeed there was a pending criminal dispute between the appellant brother and PW3 and their family at large. It was not disputed that DW2 had been assaulted by PW3's relatives a matter which was still pending at the police station.

26. Looking at the evidence of PW1 and PW4 there was some discrepancies which in my view ought to have corroborated each other. One of this is the scene of the incident. Whereas the complainant states that the same is a forest, her mother stated that;

“The trees are not so many a person can be seen while at it. It is near a road.”

26. PW3 said in respect to the scene that;

“We have blue gum trees at both sides of the road. The children call it a forest.”

27. Clearly this was not what one can call a forest. From the evidence on board it appears that one could see the activities taking place. Infact it is at the roadside. Is it possible that the appellant defiled the

complainant at 1 pm in a place where it is admitted that there are houses and people?

28. The appellant has argued that there are material witness who were not called to testify. In my view the village elder Baptista, the nurse who first saw the complainant as well as the children namely S and M. The last 2 would have started if indeed they saw the appellant that day.

29. In my view the charges facing the appellant were grave. I find that from the evidence on record it would have been necessary to involve all the witness otherwise it would be assumed that their evidence would have been adverse. See *Bukenya Vs Uganda (1972) EA 549.*

30. It appears even from the appellant's evidence that contrary to the allegations that he hide after the incident, as per the testimony of PW3, the appellant was simply in his house. The police as well as Kenya Police Reservist (KPR) found him in his house. Infact he testified that he was waiting for them.

31. In the premises I shall allow this appeal, set the appellant free unless lawfully held.

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

H.K. CHEMITEI

JUDGE

11/12/2017

In the presence of;

M/S Kakoi for the Respondent

Appellant – present

Court Assistant – Kirong/Silvia

Court: Judgment read in open court.