



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 14 OF 2016

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal Case No. 2601 of 2014 delivered by C.N. Mugo Resident Magistrate on 18/2/2016)

ISAAC WAFULA WANYONYI.....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) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on diverse dates between 21/6/2014 to 1st July 2014 at [particulars withheld], within trans Nzoia County, intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of E. N. W. a child aged 13 years.**
2. He was equally charged with the alternative charge of **Indecent Act with a child contrary to Section 11(1) of the sexual Officer Act No. 3 of 2006**. The particulars of the offence were that **on diverse dates between 21st June 2014 to 1st July 2014 at [particulars withheld] within Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of E.N.W. a child aged 13 years.**
3. The appellant has filed this appeal pursuant to the conviction and sentence by the trial court. Before looking at the merits or demerits of the same its appropriate at this stage to summarise the proceedings from the trial court.
4. **PW1 the complainant** told the court that she was a class 7 pupil at [particulars withheld] primary school. He said that on 28th June 2014 at 8 pm she was sent to the market to buy oil by her mother B N. She then met Isaac who took her to his house where she stayed for one week as his wife. She further stated that on the said 28th June 2014 she had sexual intercourse with her and although she felt pain she did not scream as he had threatened to beat her. She later left for her home and was taken to Endebess District hospital where the P3 form was filled.
5. On cross-examination she said that the appellant locked him in the house when her mother went looking for her.
6. **PW2 P W N** is the father to the complaint. He said that on 21st June 2014 at 6.30 pm he sent the complainant to the shop but she did not come back. He sent his son M N to look for her but it was all in vain. They looked for her for one week until one Emos a neighbour directed to a good Samaritan who had

known where the complainant was. They later on 28th June 2014 found the complainant who was apparently brought by the appellant's father.

7. Yet again the complainant left the home and joined the appellant and was traced after 3 days. They traced the two at a place called Molem. Both the appellant and the complainant had been arrested and taken to Endebess police station. The girl was then taken to hospital for examination. He said that the complainant disappeared for a week till 28/6/2014 and again for 3 days between 29th June 2014 to 1st July 2014.

8. **PW3 Dr Kakundi Blastus** from Endebess District Hospital examined the complainant and filled the P3 Form. He said that she was aged 12 years and on examination she found that the hymen was broken, discharge on her private parts and he concluded that there was penetration.

9. **PW4 Pharis Silali** produced the dental age assessment report for the complainant prepared by Dr. Jonathan Kiprop which showed that she was aged between 14-15 years.

10. **PW5 Corporal Miriam Chichi** was the investigating officer. She said that on 5th July 2014 at 8 am a man, Woman and school child came and made report at the station. Both the appellant and the complainant were already in the cells. She took the complainant to the hospital and after her investigation she preferred charges against the appellant.

11. When put on his defence the appellant offered no evidence as according to the records, he had nothing to say.

Analysis and Determination

12. The appellant has raised several issues in his grounds of appeal which I find them to be the standard grounds I have observed the appellants relying on them. However I think in his written submissions which I have perused he has expanded the same and they generally attack the evidence as presented by the prosecution.

13. The learned state counsel's submission captures the ingredients of the offence namely that the age of the victim ought to be established, the perpetrator must be identified and that penetration must be proved.

14. In terms of the age of the complainant, the same was clearly proved by the production of the dental age assessment. Although she stated that she was 12 years old and her father said that she was 13 years I shall take the view that at the time of assessment she was aged between 14-15 years old.

15. As to whether she was defiled, I find that the medical report produced especially the P3 form clearly found that she had been defiled.

16. What however I have agonised is whether the appellant was the perpetrator. Of course the appellant did not offer any defence. This was within his legal right. It appears that the complainant allegedly went to the house of the appellant on 28th June 2014 and stayed for one week till the time one M wife leaked the information.

17. The complainant apparently did not mention the second time she disappeared as alleged by her father. She went away and allegedly stayed with the appellant for 3 days. As a result of this line of evidence, the charge sheet had to be amended.

Whereas I do not have a problem with this, what is baffling however is how she failed to explain himself concerning the second time. Is it possible that she went elsewhere and not to the appellant?

18. More significantly where are the witnesses that saw the appellant with the complainant. If it is alleged that the wife of the appellant's brother leaked out the information after the appellant and the complainant

stole Kshs 5000/- cash as well as the cheque of Kshs 400,000/-. Why didn't she come to testify?

19. How did the appellant and the complainant find themselves in the police cells? Was it because of the "eloping" or theft? Clearly the said witnesses ought to have been called. Nobody saw the appellant with the complainant. The appellant need not have filled the gaps left by the state.

20. Did the complaint appeared to be truthful? In my views, she spoke half-truths'. She did not explain how she ran away the second time, till her father revealed.

21. I have equally perused the P3 form and the pregnancy tests showed that it was positive. If this is the case, was it possible for the pregnancy test to be discovered within a week? In my view this leaves a lot to be desired.

22. The sum total of my finding is that there are grey areas as explained above which ought to have gone to benefit the appellant. The charges facing the appellant were grave and spending 20 years in prison or any other period always ought to be done when there is no shadow of doubt. I find the shadow herein to be an evening shadow; very long. The complainant cannot benefit from the proviso to Section 124 of the Evidence Act. She never appeared truthful.

23. Equally key adult witnesses did not turn up to testify. It appears that the appellant sister in law had a grudge against him for allegedly stealing her money. I suppose this was the reason why he found himself in police cells at Endebess police station.

24. In the premises the appeal is hereby allowed. The appellant is set free unless lawfully held.

Delivered, dated and signed 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 court.