



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 132 OF 2012

(Being an appeal arising conviction and sentence in criminal case No. 3427 of 2010 delivered by J.A. Owiti Senior Resident Magistrate on 1/12/2012)

JACKSON MBURU MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Gang Defilement contrary to Section 10 of the Sexual Offence Act No. 3 of 2006**. The particulars of the offence were that on the **19th day of December 2010 in Trans Nzoia County in association with others not before court intentionally caused his penis to penetrate the vagina of V C T a child aged 16 years**.
2. The appellant was convicted and sentenced hence this appeal. The appellant has raised several grounds of appeal and before delving into the same it is appropriate at this juncture to summarise the proceedings at the trial court.
3. **PW1 the complainant** told the court that on 19/12/2010 at 9 pm at Matisi area, he met the appellant who grabbed him and took him to his house. With 5 others he proceeded to defile her till 22/12/2012 when she was rescued by some AP Officers. She was thereafter taken to Kitale police station as well as being escorted to Kitale District hospital. She was treated and a P3 form filled.
4. Meanwhile the appellant was equally arrested and arraigned at the said police station. The complainant minor was taken to Eldoret Children remand home. She apparently gave birth on 17/6/2011 to a baby boy.
5. **PW2 Elijah Mwangale** testified that she was an employee of Kitale Municipal Council and a community policing officer. He said that he received a phone call from unknown person concerning the incident and together with others went to the scene. They knocked the door and the appellant opened it. There were 2 young boys on the bed and the next bed was the complainant and the appellant. The complainant began crying and told them that she had been confined therein for 2 days and all the while had been defiled. They took the appellant to the chief's office at Matisi and escorted the complainant to hospital. Later they escorted the appellant to Kitale police station.
6. **PW3 Kirwa Labatt** the clinical officer based at Kitale District hospital examined the complainant and found that she had bruises on forehead and cheek. He found the hymen torn but not recent. There was hypervaginal discharge and no pus cells, yeast or spermatozoa noted on her urine. The pregnancy test was positive. She treated and recommended her for rehabilitation. On cross examination the witness confirmed that the complainant had told her that she had been defiled in September 2010.

7. **PW4 P.C. Lucy Nyaboke** carried out the investigations after the members of the public escorted the appellant to Kitale police station where she worked. She referred her to Kitale District Hospital and preferred charges after P3 form was filled. He recorded statements from the witnesses.

8. When put on his defence, the appellant denied the charge. He gave unsworn evidence stating that on 18/12/2010 he went to visit his mother at Swam. On his way back on 21/12/2010 he went to Kitale town and about 6.30 pm he was arrested by a lady on a motor bike who alleged that he resembled someone she was looking for. He was taken to the police station and later arraigned in court.

Analysis and determination

9. I have carefully perused the proceedings herein as well as the submissions by the appellant and the learned state counsel. The appellant has raised several grounds in his appeal which basically challenges the entire evidence as presented namely that the same was not corroborated, that the medical evidence was insufficient inter alia.

10. For this kind of offence to be proved, the age of the complainant ought to be established, that penetration occurred and the identity of the perpetrator with others must be proved.

11. Contrary to the submissions by the appellant the age of the complainant was proved by the dental assessment report produced as exhibit No. 3 which found that she was 16 years old.

12. Was the complainant defiled? Her evidence was backed by the medical report (P3 form) produced. The pregnancy test which turned out to be positive seemed not to have been occasioned by the appellant but presumably an earlier defilement of September 2010 as confessed by the complainant to the clinical officer.

13. The question of whether she was then defiled by the appellant on the 2 days in my view was corroborated by PW2 who found her inside the house occupied by the appellant and some other boys. The line of defence taken by the appellant did not afford the prosecution the opportunity to cross-examine him on the question of whether or not indeed the house he was in was his or not.

14. More importantly, the appellant did not shed light on where he was on the material day. This in my view was crucial so as to negate the argument that the evidence of pw2 was not truthful. Although the numbers of people who gang raped the complainant together with the appellant was not ascertained, namely whether they were 4, 5, or 6, the bottomline was that the appellant was among the group.

15. I do not find any evidence to suggest that PW2 was untruthful at all. As a member of the community policing I find that he was in a better position to get information from the informers.

16. It further appears from the evidence on record and is clearly summarised by PW3 the Clinical Officer that the complainant was a child in need of care and attention and thus the appellant with his colleagues seemed to have taken advantage of her.

17. Although there were no requirements, I find that the appellant had the duty to explain that the house in which PW2 found the complainant was not his and at least even if he had gone visiting his mother at Swam, he ought to have allowed the prosecution to cross-examine on that.

18. In the premises I do not find this appeal meritorious at all. The same is hereby dismissed.

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 court.