



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 29 OF 2012

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal Case No.690 of 2011 delivered by T.A. Odera Senior Resident Magistrate on 8/2/2012)

JOSEPH NYAMWEYA OMBATI.....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 Section 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the diverse dates between 19th and 24th day of March 2011 within Trans Nzoia County, intentionally caused his penis to penetrate into the vagina of M K M a child aged 16 years.**

2. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal. Before looking at the grounds raised therein as well as both parties written submissions it's worthwhile at this juncture to summarise the proceedings at the trial court.

3. **PW1 the complainant** testified that she was a Form 2 student at [particulars withheld] Secondary School and was born in 1994. She said that the appellant was her boyfriend.

On 19/3/2011 she had differed with her mother over the use of her phone for she found boy's messages in the said phone.

Earlier the appellant had told her to accompany him to Eldoret to collect a pool table. She left home that evening and spent the night in the house of her cousin Y. The following day he went to Kipsaina where they spent 3 nights with the appellant. They had sex that night and according to her this was her first time.

4. On the 4th day she told her to go home where she met her mother. The following day her mother took her to the police station and subsequently to Kitale District hospital where she was treated and P3 Form filled. Later the appellant was arrested and charged.

5. On cross-examination she said that she learned later that the appellant had a wife.

6. **PW2 G M** the complainant's mother testified that the complaint was born in the year 1994 April and was therefore 16 years old. She said that on 19/3/2011 at 8 pm she sent her to buy a candle at the market. She came back and told her that she was going to get a dress from her sister but she did not come back

home. She searched for her in vain. She reported the matter to Kitale police station. On 24/3/2011 she came home and the following day she did not allow her to go to school. She took her to Kitale police station where she was referred to Kitale District hospital. She confessed to the nurse on what had transpired. After P3 Form was filled the matter was reported to the police and later the appellant arrested.

7. **PW3 Linus Ligare** the Clinical Officer from Kitale District hospital filled the P3 form and found that the complainant's hymen was torn and was old looking. He also produced other treatment notes.

8. **PW4 P.C. Joseph Wachira** from Kesogon Police Base received the information when the complainant, her mother and aunt reported to the police station. Through an informer she managed to arrest the appellant and preferred the charges.

9. When put on his defence the appellant gave unsworn evidence. He stated that while working as a barber on 26/3/2011 two people came asking for one Joseph Ngugi. He told them that he was Joseph Nyamweya but he was arrested and spend 2 nights at the police station. He was later charged with the offence which he continued to deny.

Analysis and determination

10. I have carefully perused the proceedings from the trial court as well as the written submissions in support and opposition to the appeal. This court is enjoined to re-evaluate afresh the proceedings and come up with new and fresh finding.

11. For this offence to be established the prosecution ought to prove that the complaint was a minor, that the perpetrator was clearly identified and that penetration indeed occurred.

12. In his amended grounds of appeal, the appellant has raised several grounds namely,

a) That his age was not determined

b) That penetration was not proved

c) Voire dire evidence was never conducted

d) The case was generally not proved to the required standard as he was denied the opportunity to cross-examine the Witnesses.

13. Having read the proceedings I do not think that the age of the complainant was in doubt. Although the dental age assessment prepared by Dr. Kennedy Ndege was produced by the investigating officer I do not find any prejudice suffered by the appellant. In any case PW2, the complainant's mother had said that she was born in April 1994.

14. As to the identity of the perpetrator, I am satisfied that the evidence on record does not suggest otherwise. The minor whose evidence was not controverted during cross-examination clearly demonstrated that she spent three days at the hands of the appellant. This was a person whom she identified as her boyfriend.

15. The appellant has submitted that penetration was not proven. On the other hand PW1 said that she had sex with the appellant. The same was corroborated by the evidence of PW3 the Clinical Officer. Although the appellant has submitted that there was no visible injuries found in the complainant's private parts I think this would be reading too much on the requirement that penetration ought to be proven. The drafters of the Act did not anticipate that in a situation where there was no other injuries on the victim's private parts, then penetration cannot be said to have occurred.

16. It was sufficient in my view for the Clinical Officer to have found that there was penetration. There was no evidence to suggest that the complainant may have had sexual activity elsewhere save with the

appellant.

17. The appellant has equally pleaded that he was a minor at the time of the incident and the he did not undergo age assessment. Far from the truth, the record shows that the findings from the Moi Teaching and Referral hospital shows that at the time of the incident he was an adult.

18. The appellant has raised an issue that the voire dire evidence was not conducted during trial. Ordinarily the purposes of the voire dire evidence is to test whether the witness who is always a minor could appreciate the issue of taking of oath before trial and thus how the trial court would always conduct the entire trial.

19. In as much as this could be a valid issue, I do not see how it affected the matter facing the appellant. The complaint was 16 years old and the trial court I belief did not see any reason for such line of evidence. In any case it appears from the proceedings that the minor clearly understood her environment and her evidence was consistent.

20. Were any Constitutional rights of the appellant denied? He has argued that he was not granted the right to cross-examine the witnesses. The appellant it appears requested for the proceedings to begin afresh. I do not see any cogent reasons why he decided to make such request. The trial court did not accede to the request. PW4 testified and instead of cross-examining him the appellant walked away. I do not see any reason why he decided to walk way. There was nothing to indicate that he was denied the opportunity. Infact when he came back after the ruling, he did not ask to cross-examine the said PW4 or at all.

21. In view of the above observations I do not think that the appellant can be allowed to benefit from his own folly. Article 50 of the 2010 Constitution which deals with fair hearing must benefit both the complainant and the appellant. In my view the appellant orchestrated the situation and failed to cross-examine the witness and he cannot be allowed to benefit over the same in this appeal. The appeallant is estopped from relying on this ground.

22. Needless to say PW4 who was the investigating officer was simply narrating what had transpired during the investigation. Although he was not cross-examined by the appellant the earlier evidence of PW1, 2 and 3 were sufficient to convict the appellant.

23. In the premises I do not find the appeal meritorious. The appellant took advantage of a truant young teen who had issues with her mother. The appeal is otherwise 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 Clerk – Kirong/Silvia

Court: Judgment delievered in open court.