REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 118 OF 2015

(Being an appeal from Judgment in Kitale Sexual Offence case NO. 26/15 by Senior Principal Magistrate P. Biwott delivered on 21/10/15)

EMMANUEL PAPA WASIKE ….....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

J U D G M E N T

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 were that **on the 12th day of January 2014 within Trans Nzoia County intentionally caused your penis to penetrate into the vagina of B C a child aged 15 years.**

The alternative charge was **committing an indecent act with a Child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.**

The particulars of the offence was that o**n the 12th day of January 2014 within Trans Nzoia County intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of B C a child aged 15 years.**

The appellant was convicted and sentenced to 20 years imprisonment hence this appeal. The prosecution evidence as presented can be summarised as follows:

PW1 B C a child aged 15 years and a form two student at [particulars withheld] Secondary school testified that she was born in 1999. She said that on 12/1/2014 at around 9 am while at home, one Elizabeth Nanjala requested her to go to Kiminini for purposes of fitting a cloth for her sister who was same age with the complainant. She said that they boarded a boda boda and had covered her head. They then turned off Kiminini road an went to a certain house where Elizabeth opened the door which had been locked using a padlock. She apparently had the key.

There was nobody in the house. Shortly thereafter Elizabeth left and promised to come back but she locked the door from outside.

As she peeped through the window the complainant saw the said Elizabeth and the appellant arguing and Elizabeth was complaining that Kshs 500 was too little.

Immediately thereafter the appellant entered the house and ordered the complainant to undress which she

refused. He then forcefully removed his clothes and defiled her for 2 hours. She threatened to stab her with a knife which he had in the event that she screamed.

After the ordeal she walked home where she arrived at 5 pm. After 5 months she realised that she was pregnant and she had to take off to her grandmother out of fear of her parents. Unfortunately she gave birth but the child died.

Afterwards she told her mother that the appellant was responsible for the pregnancy. Apparently the appellant with who was living in a rented room of the complainant's parents had taken off and was apprehended later.

PW2 J N a sister to PW1 said that on 25/5/14 she went fetching water at home and when she came back she did not find the complainant. She heard that she had gone to their grandmother's place at Naitiri. She reported her pregnancy to the teacher and later to the police. She said that the appellant had disappeared and that he was her tenant to and had known him for over 5 years.

PW3 Elizabeth Nanjala Wanyonyi testified that she knew the appellant who was buying maize from M W's place who was the father to PW1. She said that the appellant had purchased maize for 2 months in that area.

PW4 R N is the grandmother to PW1. She testified that the complainant went to her place while pregnant till she delivered at Sotel dispensary but the child died. She said that she did not ask her about the man who impregnated her.

PW5 John Koima the Clinical Officer from Kitale District Hospital produced the P3 form of the complainant. She said that she was 5 months pregnant at the time she went to the clinic. He also produced the P3 form and the antenatal form.

PW6 Mary Mercy from Kitale Police station investigated the matter. She produced the P3 form and birth certificate of the minor. She preferred the charges against the appellant after recording statements from all the witnesses.

When put on his defence the appellant gave unsworn evidence denying the charge.

He said that he did not even know the complainant.

He described how he was arrested on 21/1/2014 at around 4.30 pm at Koikoi Sokomoko as he was heading home by two strangers. He was then taken to Saboti police post. He complained that his money and phone were also taken away by the attackers who included the complainant's father.

At the hearing of this appeal the appellant attacked the trial courts finding on several fronts as per his home made grounds of appeal. Fundamentally he argued that no DNA was conducted as is expected and that it is possible that the child was not his. He further stated that the court failed to conduct vore dire evidence yet the complainant was a minor . Finally he argued that he was never supplied with the witness statements.

The learned State Counsel supported the conviction and sentence. He argued that there was no requirement in such offences that a DNA test is a prerequisite. He conceded that if truly the appellant was not supplied with witness statements then there was a constitutional breach.

<u>Analysis and Determination</u>

This being a first appeal, the court is enjoined to analyse and evaluate the evidence afresh with a view of arriving at an independent new decision with a caution that it did not have the benefit of seeing the witnesses first hand like the trial court ***(See Ekeno V Republic (1973) E.A. 32)***

The only evidence on record linking the appellant with the offence is that of PW1. The other witnesses came after the fact. What is cardinal however is whether her evidence falls under the provisal to **Section 124 of the Evidence Act** which states:

"Notwithstanding the provisions of Section 19 of the Oath and Statutory Declaration Act, where the evidence of alleged victim admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

"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 satisfied that the alleged victim is telling the truth."

From the evidence on record , is it then possible that the complainant was lying? From the graphic description of what transpired from the time she met Elizabeth to the whole incident of defilement I do not find any suggestion that she planned to fix the appellant. She was able from the window to see and hear the appellant and Elizabeth bargaining, where Elizabeth complained that Kshs 500 was less. Thereafter the appellant came in and locked the house and proceeded to defile the complainant. The consequence was pregnancy.

My above observation is further buttressed by the appellant own defence where he argued that he did not know the complainant.

On the same breath he testified that among the people who arrested him included the complainant's father. How did he get to know the complainant's father? Unless he was a person he knew.

Further the witness confirmed that he was a tenant to PW3 whereas PW2, the complainant's sister said that he knew him for over 15 years and he was her tenant. Infact the appellant did not cross examine the said PW2 implying therefore that all that she said was true.

If then the appellant was known to PW2 for over 15 years how come he denied knowing the complainant yet they were staying in the same compound? In my opinion this was purely an escapist move.

It is also worthy to note that it was alleged by the witnessed that the appellant after the incident disappeared.

This fact was never contracted by the appellant or at all. If this was not true then the appellant would have tested the veracity of such testimony through cross-examination.

On the issue of lack of witnesses statements, although there is nothing to show that the appellant was supplied with the same, there is nothing on record to suggest that he suffered any prejudice. The record clearly shows that he never expressed any difficulty in cross examining the witnesses. Further he alleged that he was not granted adequate time during the prosecution of his defence , but what is on record clearly shows that on 11/9/2015 when the prosecution closed its case the appellants was granted till 7/10/2015 to offer his defence. This in my view was sufficient time.

As regards lack of D.N.A. undertaking, there is no requirement as such that such an exercise be undertaken. The crucial issues are penetration and age of the victim. In this case there was sufficient evidence that the complainant became pregnant as a result of the defilement by the appellant. This was sufficient proof that the necessary ingredients of defilement were established.

All in all I think I have sufficiently shown that the appellant with the assistance of one Elizabeth took the complainant to the scene and paid for it. He also has to be pay for his inequity. There was nothing at all to suggest that there was mistaken identity . PW1 knew the appellant very well as a tenant of PW2 and they were neighbours. Neither is there any evidence to suggest that there was malice on the part of

the complainant to implicate the appellant. Her action of running away to her grandmother could be excused as she feared repercussions from her parents.

The age of the complainant was clearly proved by the prosecution through documentary evidence produced.

In the premises I do not find this appeal meritorious. The same is dismissed.

Delivered this 31st day of October, 2016.

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H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for State

Appellant - present

Kirong – Court Assistant