



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 51 OF 2015

(Being an appeal from Judgment of Kitale Chief Magistrate J. M. Nange'a delivered on 10/4/2015 in Criminal Case No. 2668 of 2014)

JOSEPH SALANO BUSISA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was charged with the offence of **Defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual offence Act No. 3 of 2006.** The particulars were that **on the 2nd day of July 2014 at [Particulars Withheld] area within Trans Nzoia County intentionally caused your penis to penetrate into the anus of J A M a child aged 15 years.**

The alternative charge was **Committing Indecent Act to a child Contrary to Section (11) (1) of the Sexual Offences Act No 3 of 2006.**

The particulars were that **on the 2nd day of July 2014 at [Particulars Withheld] area with Trans Nzoia County intentionally caused contact between your genital organ namely penis and the genital organ namely anus of J A M. a child aged 15 years.**

The appellant was convicted and sentenced to 20 years imprisonment hence this appeal. Its worthy to summarise the evidence as presented by the parties.

PW1, a minor aged 15 years who is equally a special student at a local Primary school testified that he was heading to school that morning when he was accosted by the appellant and who proceeded to sodomise him. He said that the appellant threatened to beat him if he screamed. He raped him at a maize farm and left him. He went to school but because of great pain he informed his teacher Mr Ongaya who called the complainant's mother. The complainant was taken to hospital and the matter reported to the police.

PW2 Charles Ongaya is the complainant's teacher. He said that on the material day he saw the complainant who appeared sad and weak. He interviewed him and he told him of what the appellant had done to him that day. He then called his mother who came and took him to hospital.

PW3 P M is the complainant's mother who testified that the complainant had some mental disability. He

went to school that morning but was called around 9 am and told to report to the complainant's school as there was some emergency. She rushed to school and upon being informed of the incident he took the child to Kitale District Hospital where he was treated and P3 form filled.

He confirmed that he knew the appellant herein who was his neighbour.

PW4 Francis Barchebo produced the p3 form on behalf of the complainant which showed that he had been defiled.

PW5 Michael Michir received information at the Gender and Children Desk Kitale Police Station and carried out the investigation. He gave the complainant the P3 form which was filled. He also had the appellant arrested and charged.

When put on his defence the appellant denied the charge. He said that on the material day 2/7/2014 he was receiving milk from his suppliers for purposes of selling. He said that he never left home till 8.30 am that day.

DW2 Sammy Kirui Cheptoo and **DW3 Sammy Bartenge** testified on behalf of the appellant confirming that they saw the appellant that morning carrying on with his business of buying milk from his customers who included the said witnesses.

The state supported the conviction and sentence stating that the age of the minor was fully proved as well as penetration which are essential ingredients of such offences.

Analysis And Determination

Having read the submissions by the appellant as well as the oral submissions by the learned state counsel I find that there is no doubt based on the evidence especially the medical documents produced that the complainant was defiled. Neither is it disputed that the minor is mentally challenged a fact confirmed by the trial court and the witnesses including the mother, the teacher and the clinical officer.

The issue to determine in light of the above observation is whether or not its the appellant who defiled the complainant. The appellant in his defence attempted to show that he was in his place of work that morning. His witnesses did confirm the same. If so, who defiled the minor?

During cross-examination it was apparent that whatever area the complainant passed on his way to school was used by other pedestrians. There is therefore no eye witnesses to the incident. Yet at the same time there is strong evidence by the appellant that he was in his business throughout that morning.

Can it be concluded that the complainant despite his tender age and mental capacity would be in a better position to recognise the assailant? This is a classic case where Section 124 of the Evidence Act would apply which states in part that;

“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 if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

It is in my view not possible to determine the veracity of the complainant's evidence taking into consideration his mental status. The alibi defence raised by the appellant in my view is strong and weighty. There is no reason to doubt that at such early morning its common knowledge that milk vendors do carry out their business. PW3 the complainant's mother did confirm that indeed the appellant was a milk vendor.

How then was he carrying a crate of bread using a bicycle at the same time as alleged by the complainant?

I think I have stated as much to show that it would be unsafe to sustain the conviction. Its unfortunate that the person who defiled the minor who essentially is in need of care was not able to be apprehended. At the same time based on the facts and gaps alluded above it would be unfair to sustain the conviction against the appellant based on the scanty evidence.

The appellant is therefore set free unless lawfully held.

Delivered this 31st day of October, 2016.

H.K. CHEMITEI

JUDGE

In eh presence of;

Kakoi for state

Onono holding brief for Anano for Accused

Appellant - present

Kirong – Court Assistant