



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.63 OF 2019

RMK.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. N. MAKAU (SRM) DATED 18TH SEPTEMBER 2019 IN CRIMINAL CASE NO.170 OF 2016 AT NAKURU)

JUDGEMENT.

- 1. The appellant was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006.** The particulars of the offence were that on the diverse dates between 1st July 2015 and 5th July 2015 in Njoro district within Nakuru county, unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of HN a child aged 8 years which caused penetration.
- 2. 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 charge were that on the diverse dates between 1st July 2015 and 5th July 2015 in Njoro district within Nakuru County, unlawfully and intentionally committed an indecent act to HN by touching her genital organ namely vagina with your genital organ namely penis.
3. The appellant after a full trial was convicted and sentenced to life imprisonment hence this appeal. Before looking at the merits or otherwise of the same it shall be reasonable in the circumstances to summarise the evidence as presented during trial.
- 4. PW1 PWK** the father to the complainant testified that he stays in Kiambu and the minor stays with her grandmother who is his mother at Njoro. He said that the appellant was his younger brother. On **6th July 2015** he received a report from his mother who told him about the incident. He could not come on the same day as it was late.
5. When he arrived the following day he found that the complainant had been taken to a children's home. He also found that the child of her sister had also been defiled by the appellant. He went to the police station where the P3 form and post rape form were issued to him. According to him the appellant had defiled the two minors.
6. When cross examined by the appellant he said that the appellant had been charged with another offence of defilement. He denied having disagreed with him over a family land.
- 7. PW2 JAPHETH CHELIMO** a clinical officer at Njoro sub county district hospital examined the complainant on **9th July 2015** three months after the incident. He found the injuries to be perforated hymen. He concluded that there was penetration. He produced the P3 form as well as post rape form on behalf of his workmate Nancy Njoroje.
8. When cross examined he said that the injuries were three months old and there were no lacerations on genitalia. He said that the injuries can as well be caused by other circumstances like vigorous exercises.
- 9. PW3** the complainant testified through an intermediary and in her sworn evidence testified that she was staying with her grandmother who is the mother to the appellant. That she was a class three pupil at Bearevue primary school. She testified that the appellant defiled her inside the house on her grandmother's sit. She went ahead to demonstrate how the appellant perform the said defilement.
10. She said that on the material day he removed her clothes and he also removed his trouser. On another occasion he had done so at a maize plantation. She did not tell anyone as he had promised to beat her if she did. She said that the father to one AN took her to the hospital.

11. On cross examination she said that her father was called K and she did not know where he stayed. The defilement took place during the day and was taken by her uncle W to the hospital.

12. **PW4 PC MAINA WANJOHI** the investigating officer in this case testified that pw1 came to the station on **9th July 2015** and reported the incident in the company of the complainant. She told her that the appellant had defiled her at the maize field as well as at her grandmother's house. She was then taken to the hospital. By then the appellant was in prison as he had been charged earlier having been arrested on **6th July 2015**.

13. He went on to state that the other case was his brother's daughter also known as AN. The complainant herein is the daughter to the appellant's sister. He also went to her grandmother's house but there was not much evidence he gathered. He had an age assessment conducted on the complainant which showed that she was 8 years old.

14. When the appellant was placed on his defence he called three witnesses. On his part he testified in his sworn testimony that he was simply framed up by his brother over the family land which he wanted to sale. The incident of the land made their father place a caution on the land. He also accused his brother of sending flying squad officers to arrest him over some vehicle theft.

15. He said that on the date he was alleged to have committed the offence he was in custody. When cross examined he said that the complainant in another case before court 8 was the daughter to his brother.

16. **DW2 JKN** is the father to the appellant and he said that the appellant have had issues with (I suppose) pw1 over the land who wanted to sale his land which forced him to place a caveat or caution. He said that AN was her granddaughter and she was his daughter's child. He said that the complainant was at home. He absolves the appellant herein for any offence as the issue was in respect to the land.

17. **DW3 JOHN NJOROGGE WAWERU** is a neighbour to the appellant. He testified that the appellant came to his house on **6th July 2015** and said that he had come from Nakuru. He had a quarrel with the wife of his brother concerning a wallet which he had left behind. He implored him to leave the issue which he obliged and left. He said that the whole issue was a family feud which led the appellant to be framed.

18. **DW4 AN** the mother to the appellant testified that she stays with her grandchildren who are named after her. She said that one mama Njoroge took the children to the police. She said that the complainant herein was her daughter's child and she was not aware that she had been defiled.

19. When cross examined she said that she usually sleeps with the children in the same room. She said that the children love the appellant although he did not have a house at home but he usually comes home. On that material day when he came home he found the children with the appellant at home.

20. When cross examined she said that the appellant had disagreed with his brother but not her sister.

ANALYSIS AND DETERMINATION

21. The court ordered the matter to be heard by way of written submissions which the parties have complied. The court has perused the proceedings herein and the exhibits produced by the respondent.

22. The court without going into the other issues raised for the reasons that shall be stated herein is of the considered opinion that this matter should be retried. The court has arrived at the said decision based on the fact that from the record there are three AN. The first AN is DW 4 who is the grandmother to the complainant herein and another one who was a complainant in another case filed before court No.8 although the details were not produced.

23. The complainant herein seems according to pw1 to be his daughter while according to dw4 she was a daughter to her daughter who is a brother to the appellant. The other AN is a daughter to PW1 .

24. The evidence presented before the trial court suggests that the two minors sharing the same name were defiled by the appellant herein. The situations and evidence in respect to the relationships were not made very clear by the respondent.

25. PW1 for instance states that her mother called to inform him that the appellant had defiled his daughter who in this case was the complainant herein.

26. When cross examined he went on to state that;

“he had been charged with another case where he had defiled my daughter and i found he had already been arrested.”

27. PW3 the complainant testified that it was her uncle the appellant who had defiled her. She went on to state that;

“the father to AN took me to hospital and he knew what had happened to me and he was told and i don't know who told him”

28. This court supposes that it was pw1 who took her to the hospital. If this was the case, then pw1 was wrong in stating that the complainant was his daughter. In fact, the complainant went on to say in cross examination that

“...they do not all stay at home and my father is called K and i do not know where he lives.”

29. Does this presupposes that the complainant was the child to HN daughter.?

30. Pw4 in her evidence on this area of relationships stated that;

“...the other allegation was by AN daughter to brothers accused and present case AN is for the sister. The other child was 4 years old.”

31. PW4 in cross examination told the court that;

“I had brought the charge sheet in 2015 and it was not meant to accused and I had to alert the court and that is when the charge was read to accused in different file.”

32. Clearly there were two criminal charges facing the appellant. However, the evidence in my view was convoluted.

33. The position of relationships again cropped up during the defence hearing and the complainant’s grandfather told the court that;

“AN is my granddaughter and she is a daughter to my daughter. W is the father in the case before you. AN is currently at home. The one who is the complainant and when i left home she was at home “.

34. On cross examination he said ‘;

“AN for my daughter is older and for my son is younger HN.”

35. What runs across the evidence on record is that the two minors were of the same name, staying with their grandmother and were both allegedly defiled by the appellant. The appellant was their uncle whether in the African sense of relationship or as is understood in the western world. An uncle could mean being the sister or a brother to their mother or being a brother to their father. That dichotomy ought to have been made clearer.

36. What I find most significant is the medical reports which were produced especially the initial treatment note from Piave health centre (exhibit p3). The same indicates that the minor was escorted to the hospital by her auntie and the area chief on **9th July 2015**. It goes on to state that the aunty learned from the child’s teacher about the defilement.

37. In the instant case there was no such mention by any of the witnesses. Pw1 for instance learned of the incident from his mother dw4. The complainant on the other hand did not know who told pw1 about the incident. Dw4, her grandmother only got to know when the girls were taken away by mama Njoroge and Nyambura a police officer.

38. So who was treated at Piave hospital and escorted by the area chief and the minor’s aunt? Could it be the other HN and not the complainant herein? Is it possible that there was a mixture of treatment documents.

39. The charges facing the appellant are grave. The punishment is life imprisonment which he is already serving. At the same time among the two minors whom did the appellant defile especially in regard to this case? If there was another defilement case in court No 8 could it be possible that there was a mixture of evidence to the extent that what was presented here were those of the other matter if indeed there was one.?

40. These are weighty issues which go into the root of the matter. This court is of the considered opinion that since there was no clarity of the complainants, it would be unfair and unjust to convict the appellant without these clarifications. The court declines to allow the appeal as prayed by the appellant for the reason that the offence is serious and if true then commensurate punishment ought to be meted. At the same time justice for the minor must be seen to be done without compromising the due process of law. Both sides must be given their day in court.

41. In the premises, this court shall not delve into the other grounds and submissions raised by both parties for now. The appellant shall have his day in court as well as the complainant herein. It is expected that procuring the witnesses who apparently all are known to each other shall not be onerous. In any case it is less than two years since this matter was concluded which in the circumstances is not very long.

CONCLUSION

42. The appeal is allowed only to the extent that the matter be retried before another court other than Hon. N. Makau. In the meantime, the appellant is hereby granted a bond of Kshs. 200,000 with surety of similar amount. This matter be mentioned before the deputy registrar of this court for further directions.

Dated signed and delivered via video call at Nakuru this 11th day of March 2021.

H K CHEMITEI

JUDGE