



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO 98 OF 2018

VINCENT KIPNGENO CHEPKWONY.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT.

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. R. YATOR AT MOLO

IN CRIMINAL CASE NO.1584 OF 2015 DATED 12TH NOVEMBER 2018)

JUDGEMENT

- 1. The appellant was charged with the offence of Defilement contrary to Section 8(1) and (2) of the Sexual Offences Act no 2006 Laws of Kenya. The particulars of the charge were that on the 11th day of June 2015 at [Particulars withheld] area in Kuresoi South Sub County within Nakuru County intentionally caused his penis to penetrate the vagina of CC a child aged 7 years.**
- 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 offence were that on the 11th day of June 2015 at [Particulars withheld] area in Kuresoi Sub County within Nakuru County intentionally touched the vagina of CC with his penis.**
- 3. The appellant after a full trial was convicted and sentenced to life imprisonment hence this appeal. The appellant's amended grounds of appeal are that the respondent's case was full of contradictions; that there existed a grudge between the appellant and pw1; that the medical evidence did not corroborate the charge and that the court failed to consider the minimum sentence.**
- 4. Before looking at the merits or otherwise of this appeal it shall be necessary to summarise the evidence as presented during trial.**
- 5. PW1 AC testified that she was an aunt to the complainant as well as her guardian. She said that she was born on 7th August 2008 and the appellant was her brother in law. They all stayed in the same homestead.**
- 6. She testified that on 11th June 2015 her husband gave the complainant kshs.200 to take it to the appellant. She said that she called the child thrice and there was no answer. She later came and told her to take a shower and when she came back at around 6pm she saw that she was walking with a lot of difficulty. She inquired from her what was wrong as she was restless. She told her what the appellant had done.**
- 7. She checked her private parts and she saw some bloodstains. She took her the following day to Olenguruone hospital for treatment. She also got a p3 form from the police at Keringet station. The appellant was arrested at home on Monday.**
- 8. When cross examined she said that it was her husband who had given the money to the child. She went on to state that people came when they heard her scream after seeing the child's private parts. She denied that they had sold his cow nor cultivated his land.**
- 9. PW2 the complainant in her unsworn evidence testified that she was aged 9 years old and in class 5 at [Particulars withheld] primary school and pw1 was her aunt. She said that she knew the appellant as they stayed at the same homestead.**
- 10. She said that on the material day she was given kshs.200 by pw1 to take to the appellant who was in his house. As she gave him the money in his one roomed house he got hold of her hand and removed her clothes including her panty, held her mouth and placed her on the bed. He then proceeded to defile her and she could not scream as her mouth was closed.**
- 11. While at it she heard her aunt calling her but she could not respond. She then released her and went to shower and thereafter went to the**

shopping centre to buy unga. She told pw1 later in the evening what had happened between her and the appellant and she was taken to the hospital the following day. She said that she had not heard any differences between pw1 and the appellant.

12. When cross examined she said that she found the appellant inside the house and that she did not report the incident to her immediately but later in the evening. She denied that she had slept with another boy. She denied having heard of any issues of cows and land between him and her parents.

13. **PW3 ECM** the head teacher at [Particulars withheld] primary school testified that she knew pw2 who was a class 5 pupil at her school. She said that she learned of the incident from a teacher called PK on 14th June 2015. She telephoned pw1 who told her about the incident. On 15th June 2015 she allowed some teachers to go and see the victim and after about 30 minutes they told her that they had arrested the appellant. He was brought to the school and locked in the staffroom. She then called police officers who came and took him away.

14. When cross examined she said that she did not see him commit the offence but was told by PW2.

15. **PW4 JULIUS KIPNGENO KOECH** a clinical officer from Olenguruone sub county hospital examined the complainant and filled the p3 form. He found her infected with STD and her private parts had bruises and her vulva swollen. There was discharge from her vagina which had bloodstains.

16. He also examined the appellant and found that there was no injury in his private parts. There were pus cells in his blood samples and urine which made him conclude that he had some STD infection.

17. When cross examined he said that the incident took place on 11th May 2015 and the examination done on 12th May 2015. He said that the white discharge was the result of an infection. The urine samples he said were tested at Keringet health centre.

18. **PW5 PC MERCY KANGOGO** from Keringet police station carried out the investigations after the matter was reported on 12th June 2015 by PW1. She commenced the investigations and had the appellant rearrested. She recorded witness statements and she produced the minors certificate of birth.

19. When cross examined she said that the appellant was first arrested by the teachers and later police rearrested him.

20. When placed on his defence the appellant gave sworn evidence denying the charges and explained what he did on 11th June 2015 all the way till 15th June 2015. As he walked in the shamba on 15th June 2015 teachers from [Particulars withheld] school came and told him that there was some work in school. He accompanied them but he was arrested and the police were called who came and took him away.

21. After about half an hour at the police station PW1 and 2 arrived and he admitted to the police that he knew them. He however denied that he had defiled her. He said that the issue between him and PW1 was a family land feud and that he had even reported the matter with the police who came to the scene and found that it was true. He said that PW1 sold his cows and harvested his maize.

22. He further denied that he was suffering from any venereal disease as he was not given any medicine after he was discovered to be suffering from STD.

23. When cross examined he said that he had not called any of his neighbours as witnesses. He said that the minor knew him well and she could not confuse him with anyone else.

24. When the matter came up for hearing the court directed the parties to file written submissions which the parties have complied. The court has perused the same and does not intend to reproduce them here save to state that they each gravitate towards their strong positions.

ANALYSIS AND DETERMINATION

25. Having gone through the entire proceedings and evidence the duty of the court was well articulated in the case of **OKENO V. REP (1972) E. A. 32** where the court stated that;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”

26. The grounds laid by the appellant are as earlier own stated above. In the same vein the appellant hinge his submissions on the said grounds. He said that there were inconsistencies on the evidence as presented during the evidence by the witness for example PW2 said that the Kshs, 200 was given to her by her aunty while at the same time she said that it was her husband who gave the child the money.

27. He further submitted that there was a grudge between him and the complainant’s parents over the land and that was the issue that caused the fabrication of the case. He said that pw2 confirmed that they were cultivating the appellants land.

28. He submitted that the medical evidence was not conclusive as he was never treated of any STD.
29. The learned state counsel on the other hand supported the findings of the trial court and submitted that all the ingredients of the offence were met. That what the appellant did was beastly and well calculated to harm the complainant which is exemplified by the fact that he infected her with a venereal disease.
30. She went on to state that the life imprisonment meted against him was commensurate to the offence as he did not show or exhibit any remorse.
31. Having stated so the three now common and acceptable ingredients of the offence which ought to be proved are the age of the victim, penetration and the identity of the perpetrator.
32. The age of the minor was clearly proved by the production of the certificate of birth which was not disputed at all. As at the time of testifying she was about 9 years old.
33. In this case the evidence of the minor, her mother and the clinical officer leaves no doubt that she was defiled. The p3 form produced was in sync with the oral evidence tendered.
34. The identity of the perpetrator in my view was not very difficult to establish. The incident from the time the child was sent to give the appellant the Kshs.200 and the discovery by pw1 that she was not walking well took less than 4 hours at most. This prompted her to check her private parts which she discovered had injuries. When she was taken to the hospital the following day the conclusion was that she had been defiled.
35. The appellant did not deny that the child did not know him. Neither did he deny the existence of the kshs.200 debt. He did not call any witness to rebut the allegations that he was in the house that afternoon as claimed by the minor.
36. The issue of a grudge between the appellant and pw1 may be true but there was no nexus proved between that fact and the offence. Even if pw1 and her family wanted to score a point against the appellant there was no strong rebuttal for instance that there were other body's or parties who had attempted to adjudicate over the same. Even at the level of cross examining pw1 the same did not come out. The minor obviously could not answer much on this. It is not therefore difficult to conclude that the issue of the land and the cows was a diversionary issue by the appellant.
37. This court does not find any reason to doubt the minor's evidence. She was candid in her evidence and whether the money was given by pw1 or her husband does not make it a major contradiction as the appellant is stating in his submissions. That minor difference does not oust out the fact that the child went to his house that afternoon where she was defiled by the appellant.
38. The minor being a single witness in my view was truthful and clearly benefits from the provisions of **Section 124 of the Evidence Act** especially the proviso thereof. The same states as follows;

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act , where the evidence of the alleged victim is 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 in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

39. Neither do I find any contradiction in the medical evidence presented. The fact that it was discovered that there was STD in the urine samples of pw2 as well as the appellants lends credence to the conclusion by the clinical officer that it was the appellant who infected the minor. In fact, he was clear that it was not visible for such a minor to be found with that kind of STD.
40. In a nutshell, this court does not find any reason to fault the findings by the trial court. The matter was well proved beyond any shadow of doubt and the appeal is unmeritorious and it is hereby dismissed.
41. On the issue of sentencing this court guided by the decision of the Supreme Court in **FRANCIS MURUATETU AND ANOTHER VS. REP.2017 eKLR** and other myriad of cases flowing therefrom is of the considered opinion that the life sentence meted against the appellant though lawful was excessive in the circumstances.
42. The sentence of life imprisonment is hereby set aside and is substituted with a custodial sentence of **25 years** from the date of this judgement.

Dated signed and delivered electronically at Nakuru this 4TH day of March 2021.

H.K. CHEMITEI

JUDGE.