



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 10 OF 2018

(Being an appeal from the decision of Hon. V.WANDERA in Criminal Case No. 87 OF 2016)

DAVID KINGORI NDUMIA.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

DAVID KINGORI NDUMIA.....ACCUSED

J U D G E M E N T

1. The accused was charged with the offence of **Defilement contrary to Section 8(1) and (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 27th day of June, 2016 at [Particulars Withheld]village within Trans-Nzoia county intentionally caused your penis to penetrate into the vagina of MN a child aged 3 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 charge were that on the 27th day of June 2016 at [Particulars Withheld] village within Trans-Nzoia County intentionally caused conduct between your organ namely penis and the genital organ namely vagina of MN a girl aged 3 years.**
3. The Appellant was after full trial convicted and sentence to life imprisonment hence this appeal. Before looking at the grounds raised in the same it shall be necessary to summarise the evidence as presented during trial.
4. **PW1 BAO** testified that she was the mother to the complainant who was aged 3 years old. She said that she left home for her shamba on 27/6/2016 and left the child with her husband who operated a hotel. The Complainant was not at the house when she came back and her husband told her that she was at the neighbour's house.
5. After a while the Complainant came with one Speedo and it was raining. She noticed that she was not walking well and upon inquiring she did not tell her what had transpired but Speedo told her what had taken place at the home of the complainant.
6. She then examined the complainant and found that her vagina was reddish or inflamed and there was blood on the trouser she was wearing. She went ahead to produce the trouser which she had apparently kept in her custody. The lady she was with went and called their neighbours. Sammy who was with the Complainant came and told them that the Appellant had done *tabia mbaya* (bad manners) to the Complainant in his house where they had as well been served with tea and ugali by the Appellant.
7. The Appellant was then arrested by the Complainant's father and other members of the public and escorted to Matisi Police station. She was advised to take the child to Kitale District hospital where she was examined and treated.
8. She said that she had known the Appellant for the last two years as a neighbour. She was issued with a P3 form at Matisi police station which was filled at the hospital and returned. She also identified the dental age assessment report of the minor as she did not have a birth certificate.

9. On cross examination by the Appellant and later by his Lawyer when she was recalled she said that the distance between her house and the appellant was about 200 metres and that she had no disagreement with him at all.

10. **PW2 SO** who was aged 10 years old in his unsworn evidence stated that she was playing with the Complainant at her parent's place. The appellant then gave them ugali and tea and did *tabia mbaya* to the Complainant. The Complainant cried when he was defiled by the Appellant. He also identified the trouser which was being worn by the Complainant on the material day. When crossed examined by the defence counsel he said that they were inside the Appellant's house with another child called Speedo.

11. **PW3 PHARIS SILALI** from the Dental Department Kitale County Referral hospital carried out the Dental Age assessment upon the minor and found that she was 3 years old.

12. **PW4 KIRWA LABATT** from Kitale County Referral hospital examined the Complainant and found her genitalia had partial torn hymen and mild bruises on the labia. There was no vaginal discharge. He filled the P3 form which he went ahead and produced.

13. **PW5 JOHN KOIMA** from Kitale County Referral hospital examined and treated the complainant. He produced the treatment notes and in his prognosis he found the hymen partially torn and mild bruises on the labia. He concluded that there was attempted sexual assault.

14. **PW6 PC MBARAK MWASHAMBI** from Matisi Police station was assigned the file after the matter was reported by PW1. He recorded statements from the said PW1 and PW2 as well as other witnesses. He also said that they visited the scene and had the Appellant arrested.

15. When placed on his defence the appellant gave unsworn evidence denying the charge and did not call any witness. He said that he was home on 29/6/2016 taking supper with his family when two young men and woman came and they opened the door for them. They then began assaulting him and it attracted his neighbours who wanted to know what was taking place. They were then told to take him to the police station which they did and was detained at Matisi Police station for three days. He was later escorted to Kitale Police station and subsequently taken to court and charges preferred.

ANALYSIS AND DETERMINATION

16. The parties have file written submissions as ordered by the court and I have carefully perused the same together with the proceedings at the trial court and the exhibits produced.

17. The ingredients of defilement are generally three namely, the age of the victim, the identity of the perpetrator and penetration.

18. In the instant case the age of the minor was stated by her mother PW1 as 3 years and although she did not produce any documentation in support the same was buttressed by the production and the evidence of the dental age assessment report. In any event there was nothing to suggest that she was not of such tender years.

19. As to whether the complainant was defiled, the evidence of PW2 although he was also a minor corroborated that of pw1 and the medical officers who examined the minor. He said that they were together with the Complainant at the home of the Appellant where they were given tea and ugali and the appellant did *tabia mbaya* to the Complainant. As clearly understood by the trial court and this court takes judicial notice of the same, the Kiswahili word *tabia mbaya* has always been associated with a soft way of discussing sexual acts, whether lawful or not. The same is usually and invariably used when the subject of sex is raised where minors are involved in most cases.

20. The evidence by PW2 is thus consistent with that and clearly despite PW5 conclusion that there was partial penetration, the whole evidence pointed to the fact that the minor was defiled. There was the production of the trouser allegedly worn by the minor during the incident and which contained some blood stains. The injuries sustained in her private parts by the minor attest to this.

21. This court further on the issue of the trouser alluded to above does not find the same weighty for the twin reasons that there was no scientific evidence that what the witness called bloodstains was indeed blood and it belonged to the complainant. There was no report from the government chemist for verification as is normally the case. Secondly, the same had been in the custody of pw1 instead of the investigating officer or at least the hands of the police. It could therefore be tampered with.

22. Nonetheless this court is satisfied that the appellant was defiled and there was penetration whether partial or otherwise contrary to the Appellant's submission.

23. Was the Appellant the perpetrator? The only eye witness is PW2 who said in his evidence in chief that;

“I know Kingori (he points at the accused at the dock). Kingori did bad manners to Margaret inside his house. Speedo, Margaret and I were in Kingoris house when he gave us ugali and tea. It was during the day. Kingori threw M on the bed and did bad manners to M. Kingori used his “m**” (penis) to do bad manners to MM cried when Kingori did bad manners to her”***

24. When cross examined by the appellant he said that he was outside with Speedo when the appellant did bad manners to the Complainant although he saw it with Speedo. When he was recalled for cross examination by the defence counsel, he still maintained his stand that he saw the Appellant did bad manners to the complainant.

25. The sum total in my view is that the Complainant was with the Appellant on that particular day and time. The evidence showed that the Complainant was in the house of the Appellant on that particular day. The incident occurred during the day and I find it difficult to belief that

PW2 did not witness the incident. There was no suggestion on the part of the appellant that PW2 was not known to him.

26. Contrary to the general grounds raised by the Appellant in his appeal as well as in his submission there was sufficient evidence that the case was proved beyond any shadow of doubt as found by the trial court. The evidence by PW2 though unsworn was corroborated by the medical officers who examined the minor and their reports are on record.

27. His unsworn defence was of not much probative value as he did not afford the chance for cross examination. The same is thus persuasive and at any rate he failed to explain his whereabouts on the material day.

28. This appeal is dismissed.

29. However, on the issue of sentencing and pursuant to the Supreme Court's of Kenya decision in **FRANCIS KARIOKO MURUATETU & ANOTHER VS. REP.NO 15 OF 2018**, this court shall interfere with the life sentence which was lawfully meted against the Appellant.

30. This position is buttressed by the Court of Appeal decision in **JARED KOITA INJIRI V. REP. KISUMU CRI. APPEAL. NO 93 OF 2014, (2019) eKLR** where the learned Justices pursuant to the afore cited Supreme Court decision tampered with the sentence of life imprisonment.

31. In the premises, and considering the evidence on record and the general circumstances of this case the injuries as explained by the medical reports and the witnesses, this court sets aside the sentence of life imprisonment and replaces it with a custodial sentence of **17 years** from the date of this judgment.

32. Orders accordingly.

Dated, signed and delivered in open court at Kitale this 17th day of February, 2020.

H. K. CHEMITEI

JUDGE

17/02/2020

In the presence of:-

Mr. Omooria for Respondent

Appellant – present

Court Assistant – kirong

Judgement read in open court.