



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 4 OF 2019

(Being an appeal from the Conviction and Sentence of Hon. P. K. Biwott in Criminal Case No.77 of 2018)

PATRICK WEKESA SIMIYU.....APPELLANT

VERSES

REPUBLICRESPONDENT

BETWEEN

REPUBLIC.....PROSECUTION

VERSES

PATRICK WEKESA SIMIYU.....ACCUSED

J U D G E M E N T

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1) and (2) of the Sexual Offences Act No. 3 of 2006**. Trans-Nzoia County **intentionally caused your penis to penetrate the anus of STS. a child aged 6 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 May, 2018 at [Particulars Withheld] village Sirende sub location within Trans-Nzoia County intentionally caused contact between your penis and the anus of STS a child aged 6 years.**
3. The Appellant was convicted and sentence to serve 30 years' imprisonment hence this appeal. In his grounds of appeal, the Appellant has argued generally that the case against him was not properly proved as it was full of contradictions and that there was no prove of penetration.
4. The parties were ordered to dispose this appeal by way of written submissions and the court has perused the same. Before looking at the merit or otherwise of this appeal it shall be appropriate at this juncture to summarise the evidence as presented during trial.
5. **PW1 LN** testified that she was the mother to the complainant who according to her was 4 years old. She said that on the material day they were coming from church together with another lady and one Isaac who was also a child. They met the Appellant who requested that he goes with the Complainant to his house.
6. She went on to state that after ½ an hour he came home crying and told her that the appellant had done *tabia mbaya* to him. He said that the appellant had removed his clothes and sodomised him and gave him guavas and told him not to tell anyone. She was advised to take him to the hospital and her mother in law made a report at the police station. At the police station she was given the p3 form which she had it filled at the hospital and returned to the police station. She also identified the age assessment report prepared on behalf of the complainant.
7. **PW2 STS** the Complainant testified in his unsworn evidence that they were returning a wheelbarrow with one Benja when they met PW1 on the way as well as the Appellant. The Appellant took him by hand and they went to his house where he removed his clothes and defiled him. He screamed but he closed his mouth using his hand. He thereafter released him and he went home but warned him not to tell anyone. He gave him a fruit which he threw away and he informed his mother what the Appellant had done.
8. **PW3 JOHN KOIMA** a clinical officer from Kitale County hospital produced the P3 form which he filled as he examined the Complainant. He said that earlier own he had been treated by Dr. Gekode. He found the anal area loose, eroded and fresh although there

were no spermatozoa.

9. PW4 P.C HENRY SHIKUKU from Maili Saba Patrol Base arrested the Appellant after the matter had been reported. He was arrested at his work place.

10. PW 5 P.C LINET OMWAMBA from Kitale Police station took over the matter from **P.C LOLARI** who recorded statements from the witnesses and had issued a P3 form to the Complainant. He later preferred charges against the appellant.

11. PW6 DR. RACHAEL MUIRA from Kitale County Referral hospital produced the dental age assessment report which she opined that the Complainant was aged about 6 years.

12. When placed on his defence the Appellant gave unsworn evidence denying the charge. He said that he did not know the complainant and that on the material day he was at home doing his farming work.

ANALYSIS AND DETERMINATION.

13. The court has perused the proceedings carefully and the submissions both by the Appellant and the learned state counsel. This being a first appeal the court is enjoined to analyse afresh the evidence on board with a caution that it did not have the opportunity to see the demeanour of the witnesses like the trial court. This was clearly explained in the case of **OKENO VS. REP. (1972) .32.**

14. The grounds for the offence of defilement are now clear namely that there must be prove of the age of the Complainant, the identity of the perpetrator and that there was penetration.

15. The facts and evidence at hand shows that the age of the Complainant though her mother said that he was 4 years old was proved to be 6 years as per the dental age assessment report. In my view this was conclusive.

16. As to the identity of the perpetrator, it is clear that the incident occurred during the day and the child as well as her mother met the appellant on the way. It was the evidence of the Complainant and his mother that they met the Appellant on the way after returning the wheelbarrow. There was no suggestion that the child went with anyone else apart from the appellant.

17. Was the complainant defiled? The answer following his evidence and that of the Clinical Officer is on the affirmative. The child came home crying after ½ an hour and informed her mother what he had undergone. Immediately her mother reported to the village elder and took him to the Police Station. The Clinical Officer testified that the anal area was tender and fresh when he checked. The medical summary produced showed that he had been sodomised.

18. There was therefore sufficient evidence that it was the Appellant who defiled the minor in his house as there was nothing to show that the minor sustained the injuries elsewhere. The defence by the appellant was of no probative value for the simple reason that he did not oust the prosecution line of evidence as it was mere denial of the offence. Secondly it was unsworn and offered no opportunity for cross examination.

19. The submission by the Appellant in my view is not of much value as the question of lack of examination of the complainants clothing does not aid the fact that he was defiled. The same applies to the submission that the police failed to visit the scene.

20. All in all, the case against the Appellant was proved beyond the shadow of doubt. There was no contradiction in respect to the evidence by the Respondent. The appeal is otherwise dismissed.

21. On the question of sentencing, it is true that the offence carries a maximum sentence of life and the Appellant was sentenced to 30 years' imprisonment. The court has considered this and although it is a discretion given to each trial court, the 30 years' period considering the mitigation by the Appellant and the general circumstances of this case this court shall slightly interfere with the period meted against the Appellant.

22. The 30-year period is hereby reduced to **18 years'** imprisonment from the date herein.

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 the Respondent

Appellant present

Court Assistant – Kirong

Judgement read in open court.