



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO.76 OF 2018

(Being an appeal from the decision of Hon. G. Sitati (SRM) in Criminal Case No. 109 of 2017)

MOSES WANJALA WAFULA.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

BETWEEN

REPUBLIC.....PROSECUTOR

VERSES

MOSES WANJALA.....ACCUSED

JUDGEMENT

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on the 8th day of September, 2017 within Trans-Nzoia County intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of MC child aged 16 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 8th day of September 2017 within Trans-Nzoia County intentionally caused the contact between his genital organ namely penis and genital organ namely vagina of MC a child aged 16 years**.
3. The Appellant was convicted and sentence to serve 15 years' imprisonment hence this appeal. Before looking at the merits or otherwise of this appeal it is necessary to summarise the evidence as presented during trial.
4. **PW1 MB** testified that on 7/9/2017 he attended a burial vigil which went on till 3.00 am. He left the children there including the Complainant who later came and reported that she had been defiled while on her way by the Appellant. He then reported the matter at the police station, Kapkoi, who later had the Appellant arrested. He also took the complainant to the hospital where he was treated and the P3 form filled. He also marked for identification the child health card which indicated that she was born on 12/11/2001.
5. **PW2 the Complainant** stated that on the material night they travelled back at around 3.00 am from a funeral vigil with his siblings. On the way they were attacked by some 4 people who included the appellant. She was able to identify three and not the 4th person.
6. The Appellant then took her to the maize field where he proceeded to defile her. She got to see him with the help of the light from the moon as well as when he was called by one Gitau and the Appellant answered that it was him Mandela.
7. After the ordeal the Appellant who was armed and had threatened to harm her left and she went home. She informed PW1 the following day who organised for her to be taken to the hospital as well as have the matter reported at the police station.
8. **PW3 CK** corroborated what the Complainant stated that they were coming from the funeral vigil when they were attacked by 4 people who included the Appellant. The others were Mark and Ngetich. He however did not see the Appellant defile the Complainant.
9. **PW 4 RAPHAEL KIPLIMO** a clinical officer from Kapkoi Health Centre examined the Complainant and concluded that there was a tear on the labia minora and slight bleeding noted and the hymen was freshly torn. He found that penetration had occurred.

10. **PW 5 PC SAMUEL MUKOLWE** from Kapkoi Police station carried out the investigation and preferred charges against the Appellant. He denied that the Appellant had been arrested as a result of another offence.

11. When placed on his defence, the Appellant stated that he had been arrested on account of a motorbike incident between him and PW1 who had given him Kshs. 19,000.

ANALYSIS AND DETERMINATION.

12. The court has perused the proceedings carefully and the submissions by the parties. The three ingredients of the offence of defilement are generally known, namely, the age of the victim, the identity of the perpetrator and penetration.

13. In regard to this matter and specifically the age of the Complainant it is noted that the only document which was marked for identification is a child health card. The same was not produced as an exhibit although marked. This court has been unable to trace the same in the court file.

14. The court notes that the Complainant stated that she was 17 years which in the opinion of this court is what is called a borderline age. There is need to get the proper age as in the absence of the birth certificate or dental age assessment one cannot be allowed to estimate. It would have been different had the clinic card been produced.

15. The court in the absence of any prove of age would be in a guessing spree yet the charges facing the Appellant are grave.

16. In the circumstances, it would have been easier to allow the appeal on that ground alone. However, the other evidence rendered by the Respondent in the opinion of the court merits consideration too. The proper recourse is to order a retrial. It is noted that the incident took place not long ago and there is every chance that the witnesses are still available.

17. It is also necessary to retry this matter so as to allow the Complainant as well as the Appellant get justice from the mercy seat.

18. In the premises, this matter is hereby referred to the lower court for retrial before another Judicial Officer other than Hon. G SITATI.

19. In the meantime, the matter be mentioned before the Chief Magistrate Court Kitale for appropriate directions.

20. Orders accordingly.

Dated, signed and delivered in open court at Kitale this 4th day of March 2020.

H.K. CHEMITEI

JUDGE

4/3/2020

In the presence of:-

Ms Kagali for the Respondent

Appellant – present

Court Assistant – Kirong

Judgement read in open court.