



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 35 OF 2019

ANTHONY KIPROP.....APPELLANT

VERSES

REPUBLIC..... RESPONDENT

(Being an appeal from the Judgement of C.M. Kesse (SRM) in Criminal Case No. 139 of 2016)

JUDGEMENT

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1), (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that on the 22nd day of September, 2016 at [particulars withheld] village, Michai location within Trans Nzoia County intentionally and unlawfully caused his penis to penetrate the vagina of AM a child aged 12 years old.

2. The alternative charge was **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 22nd day of September, 2016 at [particulars withheld] village, Michai location within Trans-Nzoia County intentionally and unlawfully caused your penis to touch/penetrate the genital organs vagina of AM a child aged 12 years.

3. The Appellant was convicted and sentence to serve 15 years' imprisonment hence this appeal. The court ordered that this matter be disposed by way of written submissions which it has perused together with the entire proceedings. It shall be necessary to summarise the evidence as presented during trial.

4. **PW1** the Complainant testified that she was 12 years old and a pupil at BS Academy. She said that on the material day they were being taken home vide the school van driven by the Appellant. On the way the appellant made her alight shortly before reaching her usual stage. He told her to wait as he dropped the other children.

5. The Appellant then came back and parked the school van in a hidden location and he met the Complainant who had begun walking away. He then pulled her to some maize farm and defiled her forcefully. The Complainant could not scream as the Appellant held her mouth and laid on her on the ground. After defiling her, he left and she followed soon thereafter. She said that she found one mama E on the way and she told her what had transpired. The crowd came and arrested the Appellant. She was then taken to the hospital by her father who was called and the matter was reported at the Police station where she was issued with a P3 Form.

6. **PW2 LM** a minor also said that he was in the same school with the complainant and that on the material day they were going home aboard the school van together with her and other children. She said that the Complainant alighted before reaching her usual stage and he did not get to know the reason. He was later told by one Mama Robert that PW1 had been slapped.

7. **PW3 PK** is the father to the Complainant. He identified her birth notification as well as the clinic card. He said that he was telephoned by his brother concerning the incident. He went and found PW1 at *namba nane* stage and he took her to Kipsaina Health Centre where she was treated. He also reported the matter at Kapsara Patrol Base where a P3 Form was issued and he had it filled. He recorded the statements and went to the scene.

8. **PW4 CNW** testified that she was a cook at SW Academy where the Complainant was a student. On the material day at around 5.00 pm she was heading to her construction site when she saw the school van parked on the side of the road and she met the Complainant who told her that she was from buying mandazi. She said that she had been given money by the driver after defiling her. She then showed her the scene of the incident.

9. She then called the minors uncle and began interrogating her and she learned that the mandazi was an exchange for defiling her.

10. **PW5 DENNIS MUTEMBA** a doctor at Kitale County Referral hospital examined the Complainant two hours after the incident and

produced the results which indicated that the hymen was missing and that there was nothing peculiar on her private parts. He concluded that he had engaged herself in sexual activity.

11. **PW6 MWK** the head teacher at BS academy testified that they interrogated PW1 after 3 days and she told them what had transpired in the whole episode. Upon cross examination she said that the Complainant admitted that she had another boyfriend.

12. **PW 7 SGT. STEVE WERU** from Cherangany Police station carried out the investigations, and recorded statements from the witnesses. He said that the Appellant was rescued from the members of the public who were baying to lynch him. He further testified that he visited the scene and saw the shoe marks worn by the Appellant.

13. When placed on his defence the Appellant gave unsworn evidence and stated that he was a school driver and he knew PW1. He said that after dropping the children on the material day he went back to school and saw some Motor bike riders coming after him. They assaulted him for an offence he did not know. He was taken to Kapsara Police Station and later charged. He generally denied the offence.

ANALYSIS AND DETERMINATION

14. The court has perused the proceedings as stated earlier as well as the parties' submissions. The issues essentially raised by the Appellant in his grounds of appeal has to do with the credibility of the witnesses as well as that of the Complainant. Basically he submitted that her evidence was not believable.

15. The duty of the court was spelled out in the case of **OKENO V. REPUBLIC 1972 EA. 32**. This court must evaluate the evidence as presented and come up with a fresh finding noting that it did not have the chance of seeing the witnesses and their demeanour.

16. The ingredients for the offence of defilement are now clear, namely, the age of the victim, penetration and the identity of the perpetrator.

17. In the matter at hand, the age of pw1 is not in dispute as was proved by the evidence of her father as well as the production of the clinic documents.

18. . As regards the identity of the perpetrator, the incident occurred during the day and therefore, there was sufficient light for identification.

19. Was there penetration? The minor testified of what transpired on the material day and time. According to her the incident took a shorter time and it occurred in a maize field. The medical evidence produced corroborates the same. There is however nothing to indicate that it may have occurred on that particular time as there were no injuries and the missing hymen was not fresh or old looking.

20. That brings in the question of consistency by the Complainant and her witnesses. The court has critically looked at the thread of evidence as presented during trial and there are issues and pieces of evidence which does not add up. The above conclusion is clearly captured by the provisions of Section 124 of the Evidence Act which demands that in sexual offences where there are no other eye witnesses like in this case, the evidence of the Complainant ought to be believable.

21. The first issue which I find not clear and doubtful is the question of her clothing's. She told the trial court that she still had her clothes when the Appellant laid on top of her while she was on the ground. That was also corroborated by PW4 who found that her uniform was still clean.

22. How could this be yet according to her there was some struggle. Was the maize field devoid of any soil or grass or anything that would protect her clothes from getting soiled? How was that possible yet the other witnesses including the Investigating Officer found the place disturbed?

23. Ordinarily one should have found some dirt at least on her cloths especially soil or dust or any such evidence. One would even expect her hair to have been disturbed or generally her physical appearance not well groomed or in short unkempt.

24. The other issue is why she decided to alight before reaching her normal stage. She said that the appellant made her to alight for no apparent reason. Later he came back and forcefully took her to the maize field. PW2 said that she alighted and waited for her and that where she alighted was not a bushy area but near a shop. PW4 said that she told her that she was from buying mandazi.

25. Pw4 on cross examination said that:

“Soni came from the canteen, the canteen was 40m from where the vehicle was parked. Soni was dressed in school uniform. She was walking normally. She had two mandazi and the school bag”

26. Had she been defiled would she have been walking normally? One would need more evidence to buttress this. The scene of the incident according to PW4 was about 10metres from the scene. The school van was parked and she saw two children inside. Is it possible that the Appellant would defile the minor at that hour, in broad daylight just 10 metres from the shops beside a feeder road and leaving two children in the van?

27. Most importantly, the doctor testified on cross examination that:

“there was the absence of the hymen, it could not identify whether it was fresh or not.....the person who first examined the

minor indicated that the clothing was not soiled. There were no bruises. Whitish discharge may be caused by candidiasis on could be normal due to the fluid found in the vagina...I concluded that there were no bruises visible

28. Earlier there was evidence in chief by the Doctor that there were no spermatozoa. How could forceful defilement take place and in less than two hours the medics are unable to find any prove of injuries to a 12 years old girl?

29. As much as there may have been conclusion of sexual activity, in my view, this may have taken place elsewhere but not on the same day. The above conclusion is buttressed by the evidence of PW6 whom the minor told her during interrogation that he had another boyfriend.

30. There was evidence by the Investigation Officer that he visited the scene and found the shoe marks of *safari* boots allegedly worn by the Appellant. That they also found that shoe marks of the Complainant. It is clear that the scene had been visited by other persons beside the Appellant and the Complainant. In fact, PW3 stated that:

“we found grass, it seems that is where they laid. He was in Sahara and at the scene. I saw the prints many people have sahara. I never took saw Sony footprint”

31. It seems that the Appellant wore *Sahara* shoes and not *Safari* boots. Be it as it may it would have been incumbent upon the respondent to produce the shoes in court whether Sahara or safari boots.

32. In light of the above findings, I find that the conviction of the Appellant was shaky. The evidence by the Complainant was not consistent. It could be well have been suspected that the Appellant may have had an affair with the minor but the evidence is not adding up. She was not forthright to say the least. The medical evidence was not conclusive that she had been defiled on that particular time. In as much as there was no sperm noticed, there should ordinarily have been injuries as she said that she felt pain during the defilement. She was found to be normal and as PW4 said had she not been suspected of where she got the money to buy mandazi, she would not have disclosed.

33. For the above reasons, the Appellant is granted the benefit of doubt. The appeal is allowed and is hereby set free unless lawfully held.

Dated signed and delivered in open court at Kitale this 2nd day of April, 2020.

H. K. CHEMITEI

JUDGE

2/4/2020