



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 75 OF 2017

(Being an appeal from the decision of Hon. V. Wandera (CM) dated 22/9/2017 in Criminal Case No. 163 of 2016)

PETER NYONGESA WASWA.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006**. The **particulars of the charge were that on the diverse dates between July and October, 2016 in [particulars withheld] village within Elgeyo Marakwet count intentionally caused your penis to penetrate the vagina of WCJ a child aged 11 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 were that on the diverse dates between July and October, 2016 at unknown time at [particulars withheld] village within Elgeyo Marakwet County intentionally touched the vagina of WCJ a child aged 11 years with his penis.**
3. The appellant after full trial was convicted and sentence to 20 years imprisonment hence this appeal. Before looking at the merits or otherwise, the summary of the evidence as presented during trial is worth considering.
4. **PW1** the Complainant testified that she was aged 12 years old and a class 5 pupil at [particulars withheld] primary school. She testified that she knew the Appellant whom she met on her way to school when they had a graduation. The Appellant gave her kshs. 20 to take it to her grandmother but she did not give it to her and the following day it got lost while in school.
5. The Appellant gave her the money the following day but in the process she defiled her in his house. She said that the Appellant had promised to give her and her friend maize to eat. While at the Appellant's house the Appellant then took her, placed her on his bed and defiled her and warned her not to tell anyone.
6. One Mama Sharon saw her getting out of the Appellant's house and she informed the Complainant's father who took her to Kapcherop hospital.
7. The Complainant also said that the Appellant defiled her the second time when they had a graduation in their school. She said that she gave her kshs.50 to take it to her grandmother and that it was during this second time that she informed them of what she had gone through.
8. **PW2 PCC** the father to the Complainant stated that he was called by his younger brother E who told him that he had some information and they should meet at their mother's house the following day. They met together with one JJ who had told the witness mother of an incident in which she had seen the Complainant come out of the Appellant's house and that she had found her with kshs 50 which she claimed that she had been given by the Appellant.
9. The witnesses asked her mother to inquire from pw1 who confirmed the defilement incident. He took her to Kapcherop health centre where it was found that she had been defiled. He also reported the matter at Kapcherop police station where he was given a P3 form. He also produced the child clinic card which showed that she was aged 12 years old.
10. On cross examination he denied that he was arrested because he was a Luhya and the rest were Kalenjin's and that he did not have any grudge with him.
11. **PW3 ROBERT KIPKOECH KIPROP** a Clinical Officer from Kapcherop Health centre examined the Complainant on the 26/10 /2016 and found that there was" **a whitish discharge from the vaginal orifice and the vagina wall hyperaemic(reddened) and tender on palpation**". He concluded that there was penetration.

12. **Pw4 CORP. LILIAN OCHIENG** carried out the investigations and preferred charges against the Appellant. She recorded witnesses' statements and issued the P3 form which was filled and returned. She was satisfied that the Complainants had been defiled.

13. **PW5 JJR** testified that on 26th October, 2016 during a graduation of Nursery pupils at [particulars withheld] primary school she met some women including one Mama L who said that they had seen PW1 come out of the Appellant's house. She followed the Complainant whom she met her at [particulars withheld] Trading Centre where she was holding firewood as well as kshs. 50. She told her that the kshs.50 was for her grandmother who had sold eggs to the Appellant.

14. She went on the following day to inquire from the Complainant's grandmother who denied that she had sold eggs to the Appellant. He stopped the Complainant's father who wanted to beat her. She interrogated her and she told her of what had transpired between her and the appellant. Together with the Complainant and her father they went to Kapcherop health centre as well as Kapcherop police station. She said that she knew the appellant who was a casual labourer at [particulars withheld].

15. She said that when she met her at the trading centre she was walking with her legs apart and that she had defiled her in July as well. She denied on cross examination that the Appellant had reported her to the chief for brewing busaa.

16. When placed on his defence the appellant gave unsworn evidence denying the charge and he did not call any witness. He said that he resides at [particulars withheld] where there are many people from the Kalenjin community and that he was a Luhya. He said that the latter were jealous of his progress as he had bought land from that area. He went on to explain how he was arrested by some men and taken to the trading centre and assaulted. He was later bundled onto a motorbike and taken to Kapcherop police station and later charged.

17. He said that he had a grudge with PW2 whom they used to make bricks together after he took kshs. 5000 from the person he had given the job. He further accused him of not permitting him to harvest his maize after he had leased land from him.

ANALYSIS AND DETERMINATION

18. The duties of the court at this juncture was spelled out on the case of **OKENO VS. REP 1972 E.A 32**. Thus;

“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.

19. Having stated so the Appellant as well as the Respondent have filed written submissions which the court has perused and it does not intend to reproduce them here. The Appellant in particular has argued that there was a lot of discrepancy in the evidence by the prosecution witnesses and that there was no prove of penetration.

20. The ingredients of the offence of defilement are now well settled, namely, the age of the Complainant must be proved, the penetration itself must be established and the identity of the perpetrator ought to be proved.

21. On the question of the age the Respondent did produce the child's clinic card which showed that she was born on 2/3/2005. She was therefore at the time of the incident aged about 12 years a factor well considered by the trial court.

22. The next issue was whether she had been defiled. It is clear that there was no eye witness to the incident. Save for the suspicion by PW5, there was no other person who saw the incident.

23. The prosecution did not call or record statements from the Complainant's school friends who had seen her enter the Appellant's house together. At some point she said that they went fetching vegetables together with other children.

24. Despite the lack of an eye witness, the medical evidence clearly indicated that there was sexual activity and thus the conclusion of penetration. This court does not hesitate to conclude that there was sufficient prove of penetration both from the Complainant's evidence and the Clinical Officer.

25. Was the Appellant the perpetrator? In the absence of an eye witness this court shall rely on the evidence of the complainant as well as the provisions of section 124 of the Evidence Act Cap 80 laws of Kenya, especially the proviso thereof. The same states;

1. “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.”

26 . In a nutshell the victim must be truthful and the court must find her so. Looking at the evidence of the minor, the same no doubt does not look consistent and clear on many fronts. This include the fact that she was not clear on how the first incident occurred but what comes out clearly is the second incident when they had graduation day in their school. This was the time when she was seen by the two ladies including Mama L.

27. Nonetheless, despite lack of clarity she was clear when she was testified how she had been defiled by the Appellant. She graphically described how the incident occurred in his house when she gave her kshs. 20 and 50 respectively. There was no apparent reason why he gave him the cash. It appears that the money was meant to buy her loyalty and trust but not to pay her grandmother for the eggs.

28. After the report was made, she was taken to the hospital and the medical evidence produced clearly found that she had been defiled. PW 5 when crossed examined by the appelland said that she felt bad as a mother when she heard the information from the other ladies.

29. Was he fixed by pw2 and PW5? The answer is on the negative for the simple reason that he did not cross examined him on the issue of the bricks and maize which he had raised in his unsworn defence. It would have been appropriate just the way he raised the issue of the illegal brew with PW5.

30. The same was an afterthought taking into consideration that his defence was of not much probative value as it did not afford cross examination to be undertaken.

31. It is evident that the prosecution left behind other key witnesses including one Chebaya who was with the Appellant as well as the lady called Mama L and by extension the Complainant's grandmother. Leaving them did not diminish the fact that the other witnesses did not establish the case against the Appellant. He was well known to the Complainant a fact which he has not denied.

32. Equally having read the entire proceedings, this court does not find any reason why the Complainant should lie to the court or for that matter fix the Appellant. I do not find any basis that she was coached at all. The minor knew the Appellant very well. Both incidences occurred during the day and there could not be a case of mistaken identity.

33. The court in the premises does not find any merit in this appeal and the same is hereby dismissed.

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

H. K. CHEMITEI

JUDGE

2/4/2020