



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 5 OF 2018

(BEING AN APPEAL FROM THE DECISION OF HON. MORANGA (SPM) IN CRIMINAL CASE NO.2976 OF 2013)

JAPAN KILAHAMUDAVI.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **defilement contrary to Section 8(1) and 8(3) of the Sexual Offences Act No 3 of 2006**. The particulars of the offence were that **on the diverse dates between 1st of November 2013 and 13th day of November 2013 at [Particulars Withheld] village within Transzoia County intentionally caused his penis to penetrate into the vagina of T. K. M. a child aged 12 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 diverse dates between 1st November 2013 and 13th day of November, 2013 at [Particulars Withheld] village within Transzoia County intentionally caused the conduct between your genital organ namely penis and the genital organ namely vagina of T. K. M. a child aged 12 years.**
3. The 2nd count was equally **defilement of a child contrary to Section 8(1) and 8(3) of the Sexual Offences Act no 3 of 2006**. The particulars of the charge were that **on the 14th day of November, 2013 at [Particulars Withheld] village within Transzoia County intentionally caused his penis to penetrate the vagina of T. K. M. a child aged 12 years.**
4. The alternative count 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 14th day of November, 2013 at [Particulars Withheld] village within Transzoia County intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of T. K. M. a child aged 12 years.**
5. The Appellant was convicted and sentence to 20 years' imprisonment on the second charge and was acquitted of the 1st charge. He was dissatisfied and has filed this appeal raising several grounds. Before looking at the merits or otherwise of the same it shall be appropriate to summarise the proceedings at the lower court.
6. **PW 1 the complainant** testified that she was about 13 years old and a class 5 pupil at [Particulars Withheld] primary school. She said that on the 1st day of November 2013 at around 8.00 am she was send by her eldest sister MW to go and get the water well key from the Appellant who stayed at an adjacent plot from them.
7. She testified that she went and found the Appellant in his house. He gave her the key but then pulled her inside an inner bedroom where he proceeded to defile her. After he was through he gave her Kshs10 and warned her not to tell anyone or he will kill and put her inside the well.
8. Again in the same month and about 4 days later she went to collect the wells key from the Appellant who again proceeded to defile her inside his house and warned her not to tell anyone. He gave her Kshs.10 and advised her to buy anything she wanted.
9. The following Sunday at around 9.00 am she went to fetch water again and decided to pick the key from the Appellant. Again he took her to her bedroom and proceeded to defile her. As he was finishing the complainant's sister arrived and found him tying his belt. The Complainant in the process of putting on her underpants.
10. She then explained to her sister what had transpired in earlier occasions. The Appellant became adamant and refused to cooperate and the chiefs' office was notified. The appelland was arrested by the village elder and his vigilantes and taken to the police station.

11. She was thereafter taken to the hospital where she was treated and discharged. A P3 form issued at the police station was equally filled. She said that it was normal to always get the key for the well from the Appellant who was a caretaker at the plot.
12. **PW2 MNM** is the Complainant's elder sister. She said that on the 14th day of November, 2013 at around 9.00 am the Complainant wanted to bath and she sent her to *guka* (grandfather), the Appellant to get water. She stayed for about 30 minutes yet she expected her to take about 5 minutes. She decided to go and check and she found the Appellant's door open. She found the Complainant alighting from the bed and the Appellant pretending to close the window. As she alighted she was in the process of wearing her underpants.
13. She went home with her and she explained to her what had happened and that it was not the first time the Appellant had defiled her. She examined her and she saw sperms in her vagina. She then reported the matter to the vigilante group who came with one Rono and arrested the Appellant and took him to the police station.
14. She took the Complainant as well to the police station where a P3 form was issued and the same was filled at the hospital. She went on to state that she had known the Appellant who stayed alone and has no wife or children. She said that they pay him Kshs. 40 per month for the water.
15. On cross examination she said that the Complainant did not scream neither did she say that she screamed. She said that she did not know of the other incidences except the one she witnessed.
16. **PW3 DAVID KIZITO OGORI** testified that he was a businessman and was a village elder at Kisumu Ndogo village. He said that he was called by one Meshack Kiarie on the 17th day of November, 2013 and informed that there was a defilement case and the perpetrator was being attacked. They rushed to the scene and found the Appellant holding a jembe as the crowd bade for his blood.
17. They took him using a motorbike to the Chief's Office and subsequently to Kitale police station. He said that he has never had any difference with the Appellant.
18. **PW 5 LINUS LIGARE** a Clinical Officer from Kitale District hospital examined the Complainant and filled the P3 form. He said upon examination he found the hymen was torn and old looking and there were epithelial cells in the urine. He concluded that there was prove of penetration. He produced the P3 form as well as the other treatment documents.
19. **PW 5 DAVID RONO** a village elder at Kitale East village testified of how they arrested the Appellant who had been accused of defilement. He said that he knew him before the arrest physically though he did not know his name. He also took the Complainant to Kitale Recovery Centre.
20. **PW 6 CORPORAL FELICITY RONO** from Kitale police station Gender Unit testified on behalf of the Investigating Officer who had since been transferred. He also produced the minor's immunisation card which showed that she was born on 10th December, 2020.
21. When placed on his defence the Appellant gave sworn testimony denying the charges. She said that the minor was her neighbour and she denied that she ever visited him on all the days she alleged. He went on to state that the keys to the well are normally collected at 6am daily and hanged at the gate till the last person closes and returns the key.
22. He said that the minor came on the 14th November, 2013 to claim dues for some groundnuts he had bought from her father. One mama Ann went to the Complainant's sister to Complain why she allowed the Complainant to go to people's houses early in the morning. The child according to him left in less than 10 minutes.
23. He went on to state that he left to town with one WALTER OMBIJI to buy some pipes and gum and when she came back at 2.00 pm PW2 and others began pelting her with stones. There was a crowd that gathered and the village elder RONALD KIZITO came and he was handcuffed. He was roughed up and eventually taken to the police station.
24. He generally denied that he defiled the minor since as in other days he had gone to church. When cross examined he admitted that he was the custodian of the keys to the well and neighbours usually fetched water there including the minor's family.
- ANALYSIS AND DETERMINATION.**
25. The court gave directions that the appeal be disposed by way of written submissions which the parties have complied. The court has perused the same and does not intend to reproduce them here save to state that the Appellant's submission has essentially attacked what he has called his constitutional right to call defence witnesses. He alleged that the trial court failed to permit him to call them.
26. He further submitted that there were serious contradictions in the evidence as presented during trial and the court did not take this into consideration.
27. The first charge against the Appellant was disallowed by the trial court and therefore what convicted the Appellant was the 2nd count. Both of course still referred to the same Complainant.
28. The duty of this court was well spelt out in the case of **OKENO. VERSES. REPUBLIC 1973. E.A** at page 32 which stated that;

“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.

29. The ingredients for the offence of defilement are now clear, namely the age of the Complainant, the identity of the perpetrator and whether penetration occurred.

30. In the instant case there was not much dispute in regard to the Complainant's age. The immunisation card showed that she was close to 13 years old as at the time of the offence.

31. The next question is whether it was the appellant who defiled the minor. The evidence of the minor as well as her sister PW2 is critical. The incident occurred at around 9.00 am and it cannot be argued that there was mistaken identity.

32. It was not in dispute that the Appellant was a stranger within the vicinity. As per PW2 they lived about 25 meters apart and they fetched water from the same source. The Appellant admitted that he held the keys that covered the water well.

33. It was the minors case that this was not the first time the Appellant was defiling her. The evidence of PW2 corroborated that of the minor in my view. Her sister had sent her and found her inside the appellant's house attempting to wear her underpants. The Appellant was as well in the bedroom attempting to close the window.

34. Was their evidence challenged in any way by the Appellant during cross examination? I do not think so. It was after this that PW2 decided to seek assistance from the village elder and the vigilantes. Why would she trigger such action if at all there was no crime committed?

35. There was no evidence of bad blood between the Appellant and the Complainant as well as her family. The issue of paying for the groundnuts by the Appellant was not raised during hearing in chief.

36. In the premises, I find that the trials court finding on this was factual. The Appellant was literally found in the act save that he had completed the action. There was nothing in my view to suggest that the minor was untruthful in her evidence. Perhaps she did not report the other two incidences because of the threats by the Appellant.

37. The medical examination found that the Complainant had been defiled. The hymen was torn and old looking which corroborates the allegation that there was a previous defilement.

38. The defence by the appellant did not raise much in terms of ousting the state's case. In the absence of any witness called by him especially one Walter Ombijo whom they went to town together on that particular day, the alibi he attempts to create cannot be sustained. Contrary to his submissions there is no evidence that the trial court denied him the chance to call his witnesses.

39. Consequently, this court finds that the three ingredients of the offence were proved by the Respondent. It was the Appellant who defiled the minor and that he was found in the act. The Complainants evidence and that of her sister PW2 corroborated each other. The incident occurred in the morning and inside the Appellant's house.

40. The appeal is otherwise dismissed.

Dated, signed and delivered zoom on this 4th day of June, 2020.

H. K. CHEMITEI

JUDGE.

4/6/2020