



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 119 OF 2011

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's court in Criminal case No. 2194 of 2010 delivered by T.A. Odera Senior Resident Magistrate on 19/8/2011.)

ROBERT WANJALA WAFULAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the 14th August 2010 at [particulars withheld] Farm in Kwanza District within the Rift Valley Province, intentionally caused his penis to penetrate the vagina of HM a child aged 15 years.**
2. He was equally charged with the alternative count of **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 offence were that **on the 14th August 2010 at [particulars withheld] Farm in Kwanza District within the Rift Valley Province, intentionally caused his penis to come into contact with the vagina of HM a child aged 15 years.**
3. The appellant was convicted and sentenced to 20 years imprisonment hence this appeal.
4. The summary of the evidence as presented during trial was that **PW1 the complainant** was aged 15 years old and a class 7 pupil at [particulars withheld] primary school. That on the material day she had gone to fetch water from the river with her sister DA. On her way back, she was confronted by the appellant whom she did not know at that time. He took her to the maize farm where she proceeded to defile her. She went home and reported the matter to her sister and they began looking for the assailant whom they found in a drinking den. She identified him via his clothes. He was arrested and taken to the police station. She was referred to Kitale District hospital where a P3 form was equally filled.
5. **PW2 KO** is the brother in law to the complainant. He testified that when he came home from the shamba, the complainant came home with water in the bucket and crying. She told them that she had been defiled by a stranger who was wearing a blue jacket with red stripes and white and black shoes. He took the child to Twiga Ap Camp where she was interrogated. Later at home she heard some noise and realized that the suspect had been arrested. They were then taken to Endebess police station. He took the child to the hospital where she was treated.
6. **PW3 Linus Ligare** the clinical officer from Kitale District hospital produced the P3 form which he filled while examining the child. He found that the hymen was torn. This examination took place on 16/8/2010 two days after the incident.
7. **PW4 Corporal Jerida Mutimba** from Endebess police station carried out investigation and preferred charges against the appellant. She also produced the birth certificate and the age assessment report.
8. When placed on his defence the appellant gave sworn evidence denying the charges. He said that he buy and sells firewood and on a date he cannot recall he arrived at a centre called Kimesi where an armed crowd confronted him and he was accused of an offence he did not know. He was taken to Endebess police station and charged 4 days later.

Analysis and Determination.

9. The court has carefully read the proceedings herein at the lower court as well as the submissions by the appellant. The three ingredients of defilement are now clear, namely, the age of the complainant must be determined, the identity of the perpetrator and that penetration indeed occurred.

10. In this regard, I find that the age of the complainant was not in dispute as evidenced by the production of the birth certificate. There was equally an age assessment which was undertaken.

11. As to whether there was defilement, I find that the same was proved by the evidence of the clinical officer.

12. The great reservation I have however is on whether it was the appellant who defiled the minor. I state so because the only eye witness is the minor. The other eye witness the sister was not called to testify. Infact none of the persons who arrested the appellant testified. Could there have been a case of mistaken identity?

13. The complainant stated that;

“ I identified him as he was wearing trouser suit blazer, jacket (minor was red and white) old black shoes.”

14. PW2 on this question of identification stated that;

“ ----- she told me she was defiled by a stranger man who was wearing a blue jacket with red strips and white and black shoes.”

15. Nothing was explained by the minor concerning any physical or facial appearances. Anybody can wear the clothes mentioned by the minor. It is not lost also that at such a time of such heinous incident, there is every possibility of the child being shaken and panicking and as a result unable to clearly identify a stranger. Moreover, it would have been proper to have those who participated in the arrest of the appellant testify.

16. It would have been in my opinion more appropriate for the police to have conducted an identification parade. This would have eliminated any doubt. To simply rely on the evidence of the minor on identification was too risky in the circumstances.

17. Furthermore other key witnesses as rightly submitted by the appellant ought to have been called especially the sister to the complainant and all those who assisted in arresting the appellant.

18. I think I have stated much to show that this appeal ought to succeed. The appellant is hereby set free unless lawfully held.

Delivered, signed and dated at Kitale this 11th day of February 2019.

H.K. CHEMITEI

JUDGE

11/2/19

In the presence of:-

Mr Omoria for the Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.