



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 32 OF 2018

(An Appeal arising from Conviction and Sentence in Kitale Chief Magistrate's Court in Sexual Offence

Case No. 153 of 2016 delivered by Hon. G.N. Sitati Resident Magistrate on 15/3/2018)

ALFRED PAPA JOSEPH.....APPELLANT

VERSES

REPUBLICRESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of **Defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence was that **on the 6th day of October 2016 at Kaisagat farm, within Trans Nzoia County, intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of V.C a child aged 11 years.**
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 are that **on the 6th day of October, 2016 at Kaisagat farm within Trans Nzoia County intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of V.C a child aged 11 years.**
3. The Appellant was convicted and sentence to 20 years imprisonment hence this appeal. The Appellant has generally attacked the entire evidence as presented by the prosecution arguing that the case was not proved beyond the shadow of doubt. The Respondent on its part has opposed the appeal and argued that there was watertight evidence against the Appellant and the appeal ought to be dismissed.
4. The summary of the matter is as follows. **The Complainant** stated that she was staying with her grandfather as well as the Appellant who was a herd's boy of her grandfather. She said that on the material day they were alone and he told her to go to the kitchen and light the fire. He then followed her and pushed her to the ground. He threatened to kill her if she told anyone that he had defiled her. The Complainant vividly told the court how the Appellant defiled her after removing her panty.
5. She said that one Kevin saw the incident and he told her grandfather. The Appellant was arrested after her grandfather told the police. She was also taken to the hospital where she was treated and age assessment undertaken.
6. **PW2 SKM** testified that the Complainant was his granddaughter and that on the material day he had left her at home as he went to court for a case. He had also left the Appellant who was his herds boy at home with the Complainant.
7. When he came back in the evening he was told by one Kevin of what had transpired. He told him that he had found the Complainant naked on the floor as well as the Appellant. He then informed a Kenya Police Reservist called John Nyakundi who apprehended the Appellant.
8. The Appellant was arrested and PW1 taken to the dispensary and later to the hospital. He said that PW1 equally told her in the evening of what had taken place.
9. **PW3 Pharice Silali**, from the Dental Unit Kitale Referral hospital examined the Complainant and found that she was around 11 years old. He produced the Dental Age Assessment report.
10. **PW4. Linus Ligare** also from Kitale County Referral hospital examined the minor and filled the P3 form which he also produced together with other treatment notes. He concluded that the hymen was torn and that penetration had occurred.

11. When placed on his defence the appellant gave unsworn evidence denying the charge. He said that he was 17 years old. He said that he had gone to the homestead to cut grass. He met PW2 and his wife but not the Complainant. He said that he stayed from 2/10/2016 to 5/10/2016 and was arrested on 6/10/2016 by one Kenya Police Reservist called Nyakundi who beat him up and accused him of the offence. He wanted him to confess to the offence. He was thereafter taken to the police station.

ANALYSIS AND DETERMINATION

12. The court has perused the proceedings herein as well as the written submissions by both the Appellant and the learned state counsel. The duty of this court is to re-evaluate the evidence afresh and come up with a fresh conclusion taking into consideration the fact that it did not have the benefit of seeing the witnesses' demeanour like the trial court.

13. The elements which need to be established in the offence at hand are now well known namely that the age of the victim must be proved as this will have great determination especially during sentencing. Secondly there must be established the question of penetration and the identity of the perpetrator too.

14. Taking into consideration the above facts, two issues were clearly proved by the production of documentary evidence. The first was the age of the minor which was proved to be 11 years as per the Dental Age Assessment report.

15. The P3 form produced as well as the accompanying treatment notes showed that there was penetration. Although according to PW4 there was no other injury there was nevertheless prove of penetration.

16. Was the Appellant the perpetrator? The only eye witness, KEVIN was not called. The Investigating Officer said that he could not trace him. PW2 stated that it was the said KEVIN who told him what had transpired. He said that that was the first thing that he told him even before he reached the house. Later the Complainant told him the same information.

17. Considering what the witnesses said, is it possible that they conspired to lie against the Appellant? Does the evidence of PW1 tally with what was discovered? Did she speak the truth? Can she benefit from the provisions of Section 124 of the Evidence Act?

18. I have carefully looked at the graphic details of how the complainant described how she was defiled. The Appellant was a person well known to her although he had stayed for about 4 days or thereabouts. They were alone. Immediately after the incident she was taken to the hospital and there is sufficient prove that she was defiled. There was no suggested evidence that there was any other male person who may have defiled her.

19. In the premises I find that though young she spoke the truth and I cannot find any other evidence to the contrary. Of course it would have been more appropriate to call Kevin as a witness but I do not think that the absence of his evidence diminished the prosecution evidence.

20. There was the argument by the Appellant that he was assaulted by the Kenya Police Reservist one Nyakundi but there was no proof of the same. There was no production on the part of the Appellant of any medical evidence.

21. He also mentioned in his defence that he was 17 years old but there is medical evidence on record, actually age assessment report which shows that he was above 18 years old.

22. Consequently I do not find any merit in the appeal. The incident took place during the day and the Complainant was well known to the Appellant. The medical records show that she was defiled. There was nothing to indicate that she cooked up the story. The appeal is hereby dismissed.

23. In computing the 20 years sentence the court noticed that the appellant was in custody all through the trial despite being granted bond. The period should thus run from 11th October, 2016 for avoidance of doubt.

24. Orders accordingly.

Dated, signed and delivered this 6th day of June 2019.

H. K .CHEMITEI

JUDGE

6/6/2019

In the presence of:-

Appellant – present

Mr. Omori for the Respondent

Court Assistant – Emily

Judgment read in oepn court.