



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 39 OF 2018

(Being an Appeal from the Judgement of Hon. Sitati SRM dated 10th May, 2018 in Criminal case No. 155 of 2016)

ELKANA NDIEMA CHEROBEN.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with two counts of the offence of **Defilement contrary to Section 8(1) as read with section 8(2) of the Sexual Offences Act**. The first count was that on the diverse dates between **1st September 2016 and 22nd of September, 2016 at [particulars withheld] within Trans Nzoia county intentionally caused his penis to penetrate into the vagina of GW a child aged 10 years.**

2. The alternative count to this 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 are that **on diverse dates between 1st September, 2016 at [particulars withheld] within Trans Nzoia County intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of GW a child aged 10 years.**

3. The second count was **Defilement of a child contrary to Section 8(1) as read with section 8(4) of the Sexual Offences Act no 3 of 2006**. The particulars of the charge was that **on the diverse dates between 1st September, 2016 and 22nd September, 2016 at [particulars withheld] within Trans Nzoia County intentionally caused his penis to penetrate the vagina of GD , a child aged 16 years .**

4. The alternative count was **committing an indecent act with a child contrary to Section 11 (1) of the Sexual offences Act**. The particulars was that **on diverse dates between 1st of September, 2016 and 22nd of September, 2016 at [particulars withheld] within Trans Nzoia County intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of GD a child aged 16 years .**

5. The Appellant was convicted on both counts and sentence to life imprisonment hence this appeal. The memorandum of appeal on record raises several grounds which can be summarised, thus: there was insufficient evidence to convict the Appellant; the evidence raised was contradictory in nature; the Appellant's defence was not taken into consideration and thus this appeal ought to be allowed.

6. The parties filed their written submissions which the court has perused extensively. However before looking at the same and the attendant analysis it shall be appropriate at this juncture to summarise the evidence as presented during trial.

PROSECUTION'S CASE

7. **PW 1 LINUS LIGARE** the clinical officer from Kitale district hospital examined the complainants and produced the p3 forms. In regard to the first complainant he found the hymen to be old looking and torn with slight vaginal discharge. As regards the second complainant he found the hymen torn and old looking but he ruled out defilement but nonetheless concluded that there was sexual assault.

8. **PW2 PHARICE SILALI** also from Kitale district hospital produced the dental age assessment report on behalf of Dr. Oyieke who found that the two minors were estimated to be 10 and 16 years respectively.

9. **PW 3, GW** the 1st Complainant testified that she was previously at **[particulars withheld]** after leaving her parents. She said that on a date she cannot recall around lunch hour she was called by the Appellant who was then in his office. She said that she was washing utensils with her friends. In his office the Appellant went ahead and defiled her while she was standing and after undressing her. She said that she felt pain and bled. She left and went to tell madam what had happened.

10. She was then taken to the hospital and later to the police station. When cross examined she admitted that one Peter had previously defiled her as well as her father while he was drunk.

11. **PW4, CD** also gave sworn evidence like PW3 above. She said that she was taken at the Rescue Centre after coming from Lodwar and getting lost. She said that on the 21st September, 2016 at around lunch hour she was playing with the other children when the appellant called him in his office. While in the said office he proceeded to undress and defiled her. She felt pain and thereafter left to play with the other children.

12. In the evening she met him behind the toilet but she threatened to report him. She told madam Chebet, Brenda and Sarah about it. She was also taken to the hospital. On cross examination she said that one teacher Bushuru was also in the school. She also said that the appellant tore her skirt in the process and that she was defiled while standing and facing the wall.

13. **PW5 JANET CHEPTOO KETER** testified that she worked at the [particulars withheld] with the Appellant and that she knew both complainants. She said that she was at work on the 23rd September, 2016 when one Esther Chebet also a teacher told her of what the complainants had told her. She met the girls and they repeated to her what they had gone through in the hands of the Appellant recently. They decided to take them to the hospital.

14. When cross examined she said that she had been told by the said Chebet that what the children were sharing was very sensitive. She said that she was aware that PW3 had been defiled before.

15. **PW 6 P C. MARY UMASI** from the Gender and Child Protection Unit at Kitale police station carried out the investigation and preferred charges against the Appellant. She said that when the matter was reported at the station she issued them with a P3 forms which were duly filled and returned and the same formed the basis of charging the appellant as well as the evidence from the witness statements which they recorded.

16. She said on cross examination that she visited the scene and she did not see the need of involving the management in the investigation except PW5.

DEFENCE CASE

17. When placed on his defence the appellant gave sworn evidence and called several witnesses. He admitted that he was an employee of the children rescue centre since the year 2013. He went ahead to describe the number of the employees of the centre and its management and the number of the children who were there that time and that they were 38 in all. He extensively described in details the location of the buildings and structures including the offices, the dining place as well as the clinic and the toilets.

18. He said that on the 19th September, 2016 he was not on duty as per the duty roster which he produced. On the 21st September, 2016 he was on duty but not in the compound but in the field delivering uniforms and he produced evidence to that effect. The Appellant went ahead to produce receipts to indicate that on the material period he went home and he even purchased some iron sheets.

19. He said that they had a staff meeting on the 23rd September, 2016 when Juliet left the meeting and took the children to the hospital. He said that they did not understand by that time what was taking place. He said that she did not bother taking the children to the nurse who was at the Centres' clinic that time but instead went to the District hospital.

20. He vehemently denied that he was involved in the offence and that it was very unusual for the children to simply go and play even after undergoing the ordeal.

21. **DW 2 JOSAPHINE SAKWA**, the centre manager testified on behalf of the Appellant. He narrated how the centre operates and that the Appellant was an employee of the institution and the Complainants were at the centre that time after being rescued. According to her were any incident to occur, the same would have been noticed as the alleged locus in quo is so obvious as there is no lockable door and the same is made of plywood and sharing windows among other common features.

22. She said later after doing their investigation internally the children confessed that they had lied. The Investigating Officer did not visit the institution as she would have at least signed the visitor's book. She said that the two minors had undergone serious stress including sexual abuse by their relatives and even on the streets.

23. **DW3 TERESA HASMANE** the chairlady of the board of trustees testified on behalf of the Appellant. She said that she doesn't stay at the centre but she heard of the defilement incident. They initiated their internal investigations and found a lot of contradictions in the evidence given by the minors. She said that the staff did not notice anything that changed in the children after the alleged incident. That the local nurse at the institution was bypassed and she was not involved. According to her, given the nature of the physical facilities and how they were designed there was no possibility of the incident occurring without anybody noticing it.

24. **DW4 SAMUEL LOBOLIA TAMAN** an employee of the centre testified concerning the happenings of 21st September, 2016 when he assigned the Appellant the duty of delivering the uniforms to some 2 families at Kipsongo and Bidii areas. He also testified of the meeting that took place on the 23rd September, which involved all the staff and that they were all shocked to learn of the incidences. He denied that such incident could take place at the centre without anybody noticing.

ANALYSIS AND DETERMINATION

25. The duty of this court is to analyse the evidence afresh and come up with independent decision with a rider that it did not have the benefit which the trial court had of seeing the parties and their witnesses. **See OKENO VS. REP (1972) EA 32.**

26. As stated above, I have perused the rival written submissions by counsels on record and to save on judicial time and space I do not intend to reproduce the same save to state that each is pulling to its own favourable direction which is obviously expected.

27. It must be noted that the charge that faced the Appellant was so grave that it earned him a life imprisonment and thus every scrutiny ought to be undertaken so as to ensure justice for both the Appellant and the Complainants.

28. The ingredients of the offence of defilement are now clear namely, it must be established the age of the Complainant, that there was penetration and that the accused person caused that said penetration.

29. Having stated so, the age of both Complainants' as per the dental report was found to be 10 and 16 years respectively. The same did not form part of this appeal as there was no contention. It is also noted that the two minors were children in need of care pursuant to their backgrounds and from the reports presented in court they had undergone abuse by their relatives and perhaps other people.

30. Were they defiled? The star witness in this matter was their teacher or guardian PW5 whom the children reported the incident and she immediately took action by taking them to the hospital.

31. The two incidences seemed to have taken place in short intervals according to the evidence of the minors. None of them was able to pinpoint a specific date but it would seem that the 2nd Complainant zeroed in on the 21st September, 2016. There was no eye witness to the incident. In the absence of an eye witness, this court must interrogate the veracity of the minor's evidence to ensure that they fall within the ambit of the proviso to Section 124 of the Evidence Act namely that they spoke the truth or that their evidence was believable.

32. Did the first incident really occur? The Complainants no doubt knew the Appellant who was their teacher so to speak and there can therefore be no incident of mistaken identity. Pw3 stated that she was called by the Appellant while she washed utensils after lunch with her friends. She went to the office and that is when he defiled her. She went on to state that :

“He inserted his penis into my vagina. I felt pain and I bled thereafter. He opened the door and told me to get out. I had put on my dress and he remained in his office. I went and told madam about it. She was a teacher at Birunda. ...”

33. On cross examination, she said that she told madam the same day and she was taken to the hospital. She concluded that, ***“I bled and my panty was stained”***.

34. This line of evidence was not consistent with that of pw1 the clinical officer who said that ;

“Relied on history and physical findings made an impression of sexual assault, ruled out defilement.”

35. If indeed the said complainant had been defiled and bled as she said, then there was nothing difficult for the madam to have taken her to the hospital that day and preserve the exhibits especially the panty which was not produced.

36. It would even appear that no teacher was told about the incident that day. The only time PW5 got the information seemed to have been on the 23rd when she took them to the hospital. She on her part did not say whether she saw any blood stained panty.

37. PW 1 on his part stated that the alleged defilement may have taken place more than a year ago but above 10 days and that is why he said that the same was torn and old looking. In my considered view therefore, this conclusion by the clinical officer tallies well with the assertion and admission by the minor that she had been sexually abused by her father while drunk and a boy whom she called P.

38. PW3 on her part claimed that she was playing outside that day, 21st September, 2016 when the Appellant called her into his office. The time was equally around lunch hour. He defiled her and told her to leave and not tell anyone. She went and showered and again in the evening the Appellant defiled her behind the toilet. She said that she told Brenda, Sarah and madam Chebet.

39. The three were not called to testify and no reason was given for this. I find that contrary to the allegation that there were no other teachers or guardians or workers in the centre, they were actually present including teacher Bushuru as clearly admitted by PW4 during cross examination.

40. The Complainant's skirt which was torn by the Appellant was not produced. She also alleged that during the second time the Appellant was armed with a knife.

41. I have anxiously perused the entire proceedings and in my view I did not find the evidence against the Appellant tying up. In as much as the complainants gave sworn evidence, the evidence as offered by the Appellant and his witnesses was in my respectful view credible.

42. This for example is portrayed by the exhibits **D4 (a, b, c)**. These are the **“Beneficiary support receiving forms”** showing that on the 21st September, the Appellant delivered three sets of uniforms to some families. His witnesses have confirmed this. Contrary to pw4s evidence, there was a high probability that he was not at the institution on that particular day.

43. The same goes to the production of the receipts in which he purchased iron sheets and took them to his place at Cherangany on the same

day.

44. What is puzzling this court is the lack of explanation by the Investigating Officer and by extension PW5 why she decided to bypass the local dispensary within the compound and take the minors to the district hospital. If this is the facility that treated this rescued children in the normal course of events, why did she decided to bypass it. There was no demonstration that the officer manning the said clinic was absent or was going to be biased against the Appellant.

45. More importantly, the institution management was by- passed by PW5 for the reasons best known to her. One may be forgiven to conclude that she was settling some scores with the Appellant or the institution.

46. The history of the minors cannot be ignored. The evidence produced by the defence showed that they had suffered sexual assault differently and that they indeed needed care and attention. That fact was buttressed by the findings of the Clinical Officer.

47. The set of photographs produced by the defence which shows the institution cannot be wished away. The scene in my opinion is so small and obvious that one can dare carry out defilement of children over lunch time without being seen. Even if the Appellant was alone I doubt whether none of the 38 children milling around would not have seen him. At any rate the incidences except the one that allegedly took place behind the toilet in the evening, all took place around lunch time.

48. One witness who in my view was key and was left behind was one teacher Chebet whom the children confided to. PW5 also talked about her but she was not called to testify. The court would take it that her evidence would have been adverse against the Respondent.

49. I find that if the defilement was fresh as the witnesses seemed to suggest then the period that it was alleged to have occurred was so close that the Clinical Officer would not have concluded that the hymen was torn and old looking. Exhibit P 5 for example indicates some notes taken on 5th August, 2016 concerning G W which sowed the **“fresh wounds and tears in and around vaginal area part. The child was defiled by a person known to her.”**

50. I therefore agree with the Appellant’s submission that this case was not sufficiently established but in my view poorly investigated. I do not for example see any reason for PW5 to have spirited the minors from the centre and rushed them to the district hospital without first taking them to the local dispensary where evidence would have been preserved.

51. Equally, it has not been established by any other independent witnesses that the appellant was or was not at the compound that day. PW4 mentioned some other minors and a teacher who was there that day whom they ought to have been called to counteract what the appellant said. In the absences of such evidence, the court ought to have agreed with the appellants alibi that although he was on duty on the 21st September, 2016, he was not at the centre.

52. The court has also looked at the centres’ duty roster and it appears that on the days that are mentioned the Appellant was away.

53. On the question of the contradictory evidence the court in **TWEHANGANE ALFRED VS. UGANDA, CRIM APP. NO. 139 OF 2001, (2003) UGCA, 6**, stated that:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

54. As pointed out above, I did not find the Complainants truthful. There were obvious caps in the evidence and the witnesses called did not help much. The investigation was poor to say the least. There was no effort at least independent to place the Appellant at the scene. The sexual assault unfortunately suffered by the minors, were done elsewhere according to their own confession.

55. It becomes very difficult for the minors especially PW3 to play with the others after being defiled and bled and simply run to where the others are as if nothing had happened.

56. For the foregoing reasons, this appeal succeeds. The Appellant is hereby set free unless lawfully held. Orders accordingly.

Dated, signed and delivered at Kitale this 16th day of October, 2019.

H. K. CHEMITEI

JUDGE

16/10/19

In the presence of:-

Mr. Omoria for Respondent

Vigundo holding brief for Karani for Appellant

Appellant – present

Court Assistant – Kirong

Judgment read in open court.