



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 27 OF 2016

(An appeal from original conviction and sentence

in criminal case No. 1257 of 2014 delivered

by P.W. Wasike Resident Magistrate

on 30/6/2015)

AMOS KIRISWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the 30th day of March 2014 at [particulars withheld] within Trans Nzoia County, intentionally attempted to cause his penis to penetrate the vagina of M.N. a child aged 3 years.**
2. The appellant was convicted and sentenced to 20 years imprisonment hence this appeal. Before analysing the same suffice to summarise the evidence as presented during trial.
3. **PW1 the complainant and a minor** testified with the aid of the Children's Officer. She said that the appellant whom she pointed in court in her unsworn evidence, put his penis into her vaginal area. She called the same bad manners. It appears from the proceedings that she was too scared to testify.
4. **PW2 E M**, the father to the complainant stated that the complainant was her first born and that on that day (30/3/2014) he took the complainant to the house where he made tea for her and left for his business. His wife had left for church.
5. After about 5 minutes he came back but did not get her. He searched for her everywhere including the bathroom where he found the appellant holding the child on his knees - squatting. He let the child go and when he observed, she had semen on her behind and her trouser was pulled to her knees.
6. He locked the appellant in the house and called his mother. Members of the public came and helped in arresting the appellant. He was taken to Kipsaina police station and the child taken to Kitale District Hospital.
7. **PW3 L N**, the mother to PW2 and grandmother to PW1 was called while herding her cows. She rushed and found the appellant locked in the bathroom. She checked the child and found some mucus like substance on her thighs. People came and beat the appellant. She sent someone to call the child's mother.
8. **PW4 V W**, the mother to the complainant was called while she was in church and found PW3 on the way to Kitale with the child. She took the child to Kitale District Hospital.
9. **PW5 J W W** testified that on the said date at around 10.30 am he heard screams emanating from his neighbour. He rushed there and found the appellant already apprehended. He checked the child's private parts and saw some dirt/semen.

10. **PW6 Jacob Cherotich**, rearrested the appellant after he was brought to Cherengani police station by APC Kiano. He also issued P3 form to the complainant and recorded statements from the witnesses and preferred charges against the appellant.

11. **PW7 Linus Ligare** produced the P3 form which showed from the history as seen by Dr Kegode that the complainant was in pain and tenderness at her private parts.

12. When put on his defence the appellant gave unsworn evidence. He said that on the material day he had gone to demand his money from one of his customers. He went to PW2's home where upon knocking the door, a male answered and upon opening it and when he demanded to be paid Kshs 1600/= he was locked inside. Shortly thereafter a crowd came and assaulted him and was only saved by AP officers who short in the air to scare the crowd. He was later charged with the offence which he continued to Deny.

Analysis and Determination

13. The court has perused the lengthy submissions both by the appellant and the respondent. This being a first appeal the court is enjoined to re-evaluate the evidence afresh with a rider that it did not have the opportunity of seeing the witness and their demeanor.

(See Okeno Vs Republic (1973) E.A. 32.

14. The appellant's grounds of appeal as contained in his petition filed on 30/3/2016 are that the case was not proved beyond reasonable doubt; the exhibits were not produced; the Complainant was not cross-examined and that the court did not take into consideration his grudge with the complainant's mother.

15. The critical issues to be determined is whether there was clear prove of identity of the perpetrator. There is no doubt that the event took place at 10.30 am and thus there cannot be a case of mistaken identity. The appellant does not dispute this fact of time.

16. It is evidently that the minor was too scared to testify despite the presence of the Children's Officer. Going by her evidence and that of her father I find the two are in agreement. It appears that PW2 did not go for long after leaving the complainant taking tea. He found the appellant in the act. His trouser zip opened and his manhood erected.

17. All the prosecution witnesses PW1, PW2 and Pw3 saw the semen on the complainant's thighs. Although there was no confirmation on the medical document produced that semen was still evident, I do not see how the three adults would fail to recognise.

18. Although the actual age of the child was not proved by any medical evidence for instance age assessment report or birth certificate or such other documentary evidence I find that the complainant was a "child of tender" years within the meaning of Section 2 of the Children's Act Cap 141 laws of Kenya.

19. There was therefore sufficient evidence as explained by the witnesses that the appellant did attempt to defile the complainant. It was only the reappearing of PW2 that saved the day. More importantly, its clear that the appellant lured the child to the bathroom far from where her father had left her taking tea.

20. The appellant has complained that he was not granted the chance to cross-examine the complainant. Whereas this was true, the child as it can be deduced from the court records was too scared to testify. In any case, I do not see any prejudice suffered by the appellant since the child's evidence was unsworn and more significantly needed corroboration. The corroboration by the other witnesses clearly placed the complainant at the scene.

21. The issue of a grudge between the appellant and the complainant's mother did not come out clearly during trial. If the complainant's mother owed him Kshs 1600/=, the same was not clearly argued. At any rate by giving unsworn testimony the appellant denied the prosecution the opportunity to cross-examine him.

22. account the period spent by the appellant in custody while undertaking trial I am inclined to order that the sentence is hereby reduced to 10 years imprisonment from the date of the lower court's judgment.

23. Save for the above interference with the sentence, the appeal is otherwise dismissed.

Delivered, signed and dated at Kitale this 10th day of May 2018.

H.K. CHEMITEI

JUDGE

10/5/18

In the presence of:

M/S Kakoi for the Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.