



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 62 OF 2017

(Being an Appeal arising from conviction and sentence in Kitale Chief Magistrate's court Sexual offence No. 17 of 2015 delivered on 4/8/2017 by M.I. Moranga Principal Magistrate)

CALEB KHAMALA OKOLE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **defilement of a child 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 were that **on the 20th day of January 2015 at Section 19 within Trans-Nzoia County intentionally caused his penis to penetrate into the vagina of S I a child aged 9 years.**
2. 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 offence were that **on the 20th day of January 2015 at Section 19 within Trans-Nzoia County intentionally caused contact between his genital organ (penis) and genital organ (vagina of S I a child aged 9 years.**
3. The appellant was convicted and sentenced to life imprisonment hence this appeal. Before looking at the grounds as set out in the appeal it shall be appropriate to summarise the evidence as presented during trial.
4. **PW1, the complainant** testified that she was 10 years old and a class 4 pupil at [particulars withheld] primary school. That on 20/1/2015 at around 4.00 pm, by then at [particulars withheld] Academy she was heading home as she did not go for games on that particular day as she was going for Madrassa. She was with one S W who was her classmate. As they walked home she met the appellant who told them to go to class. Her friend took off. The appellant held her hand and took her to her class and locked from inside. Apparently, there were no students in the class. The appellant demanded that she undress which she did remaining only with a T-shirt. He then ordered her to lie on the floor and he proceeded to defile her. He warned her not to shout or he would beat her. He covered her mouth with hyjab. A bell rang and he ordered her to go out after wearing her clothes.
5. She left for home where she immediately told her mother what had transpired. She came back with her to the school and pointed out the appellant to her mother who started shouting attracting the attention of the rest of the teachers. The appellant took off.
6. The complainant was taken to Cherengany hospital where she spent the night there. Later they reported to the police station where a P3 form was issued and filled at Kitale District hospital. She said that her underpant had watery substance and was soiled but did not take it to the police.
7. **PW2 Kirwa Labatt** produced the P3 form which concluded that the labia folds were hyperemic i.e painful and swollen and that the hymen was slightly torn. There was no vaginal discharge.
8. **PW3 A A** the mother to the complainant testified that she was at home at around 5.00 pm when the complainant came from school and was crying. She told her that she had been injured by a teacher whom she mentioned his name but PW3 did not know him. She examined her private parts and saw that she was injured. She saw some blood and discharge. She immediately went back to school with her and when the child pointed out the appellant he took off. They then took the child to Cherengany nursing home where she spent the night. Later the matter was reported to Kitale Police Station who issued a P3 form. She further stated that when she examined the child's clothing she saw sperms.
9. **PW4 I M** the father to the complainant testified too that he was called by PW3 and informed of the incident. They went to the school together with his wife and his brother but the appellant had run away. They took the child to Cherengany Nursing home and the following day to Kitale District Hospital where the P3 form was filled.

10. **PW5 P.C. Michael Muchir** carried out the investigation, recorded statements and preferred charges against the appellant. He also visited the child at Cherengany Nursing home as well as the school and specifically class 4X.

11. When put on his defence **the appellant** gave sworn evidence denying the charge. He said that he was in school that particular day till 3.20 pm when he went with one Samuel Onkoba to withdraw some money belonging to victory Pentecostal Church Kibomet from Family Bank . He came back to school at 4.15 Pm and arrived at 4.30 PM. He passed class 4X and he saw 4 pupils kneeling down who included the complainant. At class 4X there was on going debate which is usually the case on Tuesdays between 4.00 – 5.00 pm. The appellant produced both the time table as well as banking slips and statements as evidence.

12. He further stated that it was teacher M W N who punished the pupils. He said that class 4X . 4Y and 5X hold debates between 4.00 pm – 5.00 pm.

13. He said that the complainant's mother came shouting and hit him on the face and attracted a lot of attention. To avoid embarrassment he decided to take off. He said that the school was both day school as well as boarding. He generally denied committing the offence. He said that infact the following day he decided to go to Kitale police station to report the assault and the abuse meted by PW2 on him.

14. **DW2 M N N** testified that she was a teacher at [particulars withheld] Academy during the time of the incident. She was in charge of debate for class 4X. She gave them a heading to debate and she went to class 4Y to ask them to stop making noise. The appellant was not present. She further said that she went back to class 4X and found 3 pupils who were making noise and who included PW1. She saw the appellant and one Mr Wanjala passing by and teacher Wangila punished the pupils by canning their feet and allowed them to go back to class. She later released them to go home including PW1 who was a day scholar.

15. She further testified that after 20 minutes PW2 together with the complainant came shouting and asking who had canned her daughter. She was speaking in Kiswahili and Somali language. She called someone and suddenly the father to the child came and demanded to know who had raped her daughter.

16. **PW3 J W** was a teacher at [particulars withheld] primary school. He said that on that material day he was a teacher on duty. He said that there is usually a debate between 4.00 pm- 5.00 pm involving classes 4 to 8. He said that he found some pupils in class 4 kneeling on the ground and he punished them and ordered that they go back to class. He said that DW2 was in class 4X that day. He said that PW1 was in class 4X. That whenever there are debates teachers would go round helping the pupils and DW2 was involved that day. He further said that at 5.15 -5.20 pm he heard screams from a lady upstairs and some men came to the school demanding to see the teacher who had defiled their daughter. He did not understand but later he recorded statement with the police.

Analysis and Determination

17. The court has read the entire proceedings together with the written submissions by the appellant's counsel. Apparently the court did not have the advantage of any submissions by the respondents.

18. The appellant jointly and severally in his submissions has incorporated the entire grounds as raised in the petition of appeal.

19. Fundamentally, the three issues which ought to be proved in this kind of offence are the age of the victim, the identity of the perpetrator and whether indeed there was defilement.

20. Going through the proceedings I do not think that there was may doubt that at the time of the incident the complainant was aged 9 years old. The birth certificate produced summarised this.

21. The next issue is whether she was defiled. The P3 form produced by PW2 shows that when she was examined, it was found that her labia folds were hyperemic, that is painful and swollen and the hymen was slightly torn. Apparently the treatment documents done initially at Cherengany nursing home were not produced. However from the evidence of PW3 it appears that she was bleeding.

22. PW3 corroborated this by what she saw when she examined the child at home. Her soiled underpant which had some blood stains strangely was not produced.

23. The big question however is whether the appellant was the perpetrator . There is no doubt that the incident allegedly took place at around 4.00 pm and thus the case of mistaken identity did not arise.

24. The complainant said that she was heading home with one S W who was her classmate. On the way just after the classroom she met the appellant who told them to go back to class. Her friend took off and the appellant then held her hand and took her to the class where he proceeded to defile her.

25. There was no eye witness to the incident. It is therefore her word against the appellant. I appreciate the recording by the trial magistrate as it captured the witness demeanor throughout the proceedings.

26. There are however hard questions which one is left to ponder even as the whole episode unfolded. First of all, it is appreciated that it was a Tuesday and during those hours the timetable which was produced as defence exhibit showed that there was debating for class 4-8. This was not disputed by the complainant. She however stated that she did not go to debate that day as she usually goes to Madrassa at that time.

27. I find this line of argument not very convincing as from the timetable produced, it appears that save for class 1-3 the rest of the students usually have debates or Mjadala on Tuesdays. How then did she decide to go for Madrassa as advised by her mother. On the same note I do

not find any evidence from such neighbour where she attends Madrassa on that particular Tuesdays.

28. More importantly, it admitted that the complainant was among the pupils punished for making noise that day. She conceded that teacher Wangila canned them and ordered that they go to class.

29. If there was debate as one can see from the school timetable and that the same was done in class 4X which was the complainant's class, and more so between 4.00 – 5.00 pm, how was it possible that the appellant defiled the minor at that particular time and in that particular class?

30. Equally, this was a school of about 500 students, both borders and dayscholars, as well as teachers and other support staff, how could the appellant at that hour when the entire school was still active proceeded to undress the complainant make her to lie down and proceed to unzip and defile her? Surely, I think taking the circumstances obtaining at that time, a reasonable man could not do this and even if one was to do so then at least one of the 500 people within the compound should be able to notice .

31. I find that although the complainant emotionally testified , the surrounding circumstances militated against her evidence. As a matter of fact and which I find strange is her admission that;

“ I cannot tell if he lay or knelt ----- I do not know if he held my private parts with his hands or not but I can distinguish if it was a hand or not. I did not see him put his “thing” into “mine” the one he urinates with “ ----- I did not feel pain when he put his thing.”

32. What was more distressing in my view is the absence of medical documents from Cherengany Nursing home. This was the first port of call by the complainant with her parents. It would have been worthwhile to produce the same. Otherwise, the P3 form came later and infact PW2 was not even the one who examined the complainant.

33. The upshot of the above is that the appellant should have been given benefit of doubt. His defence and that of his fellow teachers in my view seemed more credible and convincing. It is not enough to find that the complainant spoke the truth. Infact had S W been called to testify she would have shed light on whether indeed they met the appellant on their way out and whether she had also decided to boycott debate.

34. In the premises I shall allow the appeal and order the appellant to be released unless lawfully held.

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

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.