



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 97 OF 2016

(An appeal from original conviction and sentence in Sexual Offences Case No. 11 of 2015. Kitale delivered by C.C. Kipkorir – Resident Magistrate on 13/10/2016.)

HENRY SEVERIN.....APPELLANT

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(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on diverse dates between 29th December 2014 and 6th January 2015 at [particulars withheld] within Trans Nzoia County, intentionally and unlawfully caused his penis to penetrate the vagina of V.C.B. a child aged 8 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 diverse dated between 29th December 2014 and 6th January 2015 at [particulars withheld] within Trans Nzoia County, intentionally touched the vagina of V.C.B. a child aged 8 years.**
3. He was convicted and sentenced to life imprisonment hence this appeal. In his grounds of appeal, he has argued that the trial court did not consider his defence; no crucial witnesses were called and that the case was not proved beyond reasonable doubt.
4. Before considering the same it suffice at this moment to summarise the proceedings as presented during trial. The appellant was a herdsman of the complainant's (PW1) parents. **PW1** testified that she was 8 years old and a class 4 pupil at **[particulars withheld]** primary school. On 29/12/2014 the appellant told her to go to his house. She obliged and while there he told her to remove her underwear while the appellant removed his trouser. They were on the bed and the appellant proceeded to defile her. This occurred on several other days. She was afraid to tell her mother. She however told one D who informed the complainant's mother. Action was taken and the appellant arrested and the complainant taken to Kitale District hospital where she was treated.
5. **PW2 D E** aged 14 years and a class 8 pupil at **[particulars withheld]** primary school testified that on 29/12/2014 at 4 pm while heading to S's house she met the complainant crying. She told her that the appellant had raped her. She however forgot about it but on 6/1/2015 she saw the appellant and she recalled the incident. She informed one Mama C who went and informed the complainant's mother.
6. **PW3 P C** testified that on 6/1/2015 she was told by Linah Cheruto that the complainant had been defiled. Linah was a "Nyumba Kumi" chairlady. She inquired from the complainant and she confirmed she also checked her private parts and it was true. She was then taken to the hospital where she was treated and P3 form filled. She also reported the matter to the police. She also produced the clinic card which showed the child was born on 24/5/2006.
7. **PW4 Linah Cheruto Busienei**, a health worker and Nyumba Kumi chairman testified that on 6/1/2015 PW2 came and told her that the appellant had defiled the complainant. She said that she told her that the incident had occurred on 29/12/2014 when she found her crying on the road. She went to Patricia's house and told her and left for work. Patricia called her at 11 am informing her to join her at the hospital.
8. **PW5 John Koima** the clinical officer from Kitale District hospital examined the minor and filled the P3 form which showed that the hymen was broken and there were bruises on the labia. He concluded that she had been defiled.
9. **PW6 P.C. Monica Sisa** from Cherengany police station carried out the investigations when the matter was reported by complainant's mother. She gave them the P3 form which was filled at Kitale District hospital which concluded that she had been defiled. She rearrested the appellant who had been arrested by members of the public.

10. When put on his defence the appellant gave sworn evidence denying the charge. He stated that he was a Tanzanian from Bukoba and had been brought as a herder in the year 2014. He was paid Kshs 2,500/= per month. He said however that he had not been paid his salary and he got annoyed and took a TV and woofer from his employer. As he left with them the wife to his employer called the neighbours and was arrested. Efforts to explain the issue of his salary were fruitless. He was taken to the police and later charges of defilement preferred against him.

Analysis and Determination

11. The court has carefully perused the entire proceedings herein together with the submissions of both the appellant and the respondent. This being a first appeal, this court is enjoined to re-evaluate the evidence afresh and come up with a new finding altogether.

12. There is no doubt that the complainant as well as the appellant knew each other very well. The appellant was employed by the complainant's parents as a herdsman. This is confirmed by the appellant's own admission that he was not paid his salary for the period he worked.

13. Secondly, the incident took place during daytime. The first incident took place at around 4.00 pm as confirmed by PW2. The question of identification was not in doubt.

14. The evidence by the minor was well corroborated by that of the medical officer who found that the hymen was torn and bruises on the labia. PW2 equally attest to the same as she saw the injury on the child's private parts.

15. Did the appellant defile the minor? Its the evidence of the minor against his. Section 124 of the Evidence Act provides that the court shall convict if it is satisfied that the victim spoke the truth. Running across the minor's evidence and especially on cross-examination, I did not find her evidence shaken at all. Though she may not recall the number of times defiled by the appellant, the incident of 29/12/2015 appears very clear. PW2 whom she met, a child also had forgotten all about it till she saw the appellant later. She then went ahead to inform PW3 the chairlady "Nyumba Kumi" who took action by reporting to the complainant's mother.

16. The chain of events from the time PW2 reported all the way to the hospital and the filling of P3 form was not broken. I have perused the treatment notes dated 6/1/2015 and from the history given it appears that she was defiled that morning.

17. I did not find any reason why the child would lie. This is a person whom she had been in conduct with for the last 9 months or so. Moreover, PW2 found her crying and she informed her of her ordeal. She said that she feared telling her mother.

18. The appellant defence did not in my view elicit much. On cross-examination he was not able to tell how much his employer owed him.

19. Finally on the question of age, I think the clinic card produced was not challenged and it gave the correct age of the minor.

20. I thus do not find this appeal unmeritorious. The same is 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.