



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 19 OF 2018

(Being an appeal arising from Kitale Chief Magistrate's Court Criminal Case No. 3470 of 2010 delivered on 19/2/2013 by J.M. Nang'ea Senior Principal Magistrate)

JOHN LOKIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with multiple charge of **defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the 20th day of December 2010 at [particulars withheld] within Trans-Nzoia County, intentionally caused his penis to penetrate the anus of K.L. a child aged 14 years.**
2. He was charged with the alternative charge of **Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on the 20th day of December 2010 at [particulars withheld] within Trans Nzoia County, intentionally caused contact with the anus of K.L a child aged 14 years with his penis.**
3. The appellant was also charged with the second count of **defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on the 20th day of December 2010 at [particulars withheld] within Trans Nzoia County, intentionally caused his penis to penetrate the anus of E.E. a child aged 17 years.**
4. The alternative 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 were that **on the 20th day of December 2010 at [particulars withheld] within Trans Nzoia County, intentionally caused contact with the anus of E.E. a child aged 17 years with his penis.**
5. The appellant was also charged with the third count of **defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on the 20th day of December 2010 at [particulars withheld] within Trans Nzoia County, intentionally caused his penis to penetrate the anus of A. L. a child aged 12 years.**
6. He was charged with the alternative charge of **committing an indecent at with a child contrary to section 11(1) of the Sexual offences Act No. 3 of 2006**. The particulars were that **on the 20th day of December 2010 at [particulars withheld] within Trans Nzoia County, intentionally caused contact with the anus of A.L. a child aged 12 years with his penis.**
7. He was convicted and sentenced to 20 years imprisonment and the same were ordered to run concurrently. He has appealed citing several grounds.
8. The evidence as presented in summary were that **PW1, Peter Ebei Ekale** a herder testified that he and his colleagues had been circumcised on 1/12/2010 and the appellant had been tasked with the duty of looking after them in an enclosed area. That on 20/12/2010 at around 7.00 pm the appellant came from a drinking spree and after smoking bhang, he began physically beating each one of them. He then had him lie on his stomach and began penetrating him. He did the same to his fellow initiates. Thereafter he defeacated and told them to eat his faeces which he did. He then left.
9. The following morning one Stella brought them food and they informed her who in turn informed their parents. The appellant disappeared.
10. The complainant with his colleagues were brought to Kachibora hospital where they were treated and later to Kitale District hospital and P3 form was filled and age assessment undertaken.
11. **PW2 also a minor** gave the same evidence as PW1 in similar version.

12. **PW3 J L** the parent to the complainants testified that he knew the appellant and had given him the responsibility of looking after their sons after they had been circumcised. They received a report in the morning that they had been assaulted by the appellant. They saw the injuries and decided to take them to Kachibora hospital and later Kitale District hospital.

13. **PW4 J E** a parent to the complainant gave same testimony as PW3. He said that he had known the appellant for over 10 years.

14. **PW5 Dr Ken Ndege** a dentist produced dental report for all the complainants which he found them to be 19 years (P E) 12 years and 13 years respectively.

15. **PW6 Kima Labol** clinical officer examined the complainants and found that E E had a bruise and there was no bruise on the oral ring and had no discharge.

Davon Lotokoi 12 years old had tenderness on both ankle joints and had normal oral cavity.

Kevin Lotete 14 years had tenderness on the back and ankle joints and the anus was normal.

16. He concluded that they had tenderness on various parts of the body and had been assaulted.

17. **PW7 Christine Looyia Loseni** testified that on 21/12/2010 it was her turn to cook. The appellant would ordinarily come to take food to the boys. That morning he did not come to take the porridge. She then sent one Stella whom she later came to explained to her what the complainants had told her. Immediately arrangements were made to them to be taken to the hospital. The appellant had disappeared.

18. **PW8 K L** also the complainant gave the same version of evidence just like his co-complainants.

19. **PW9 PC D A** carried out the investigation and recorded statement from the witnesses. He issued them with P3 forms which were filled at Kitale District hospital. He also went to Moiben police station where the appellant had been held after being arrested.

20. When put on his defence the appellant gave unsworn evidence denying the charge. He explained how he was arrested in Moiben as he carried out some harvesting in a farm on 20/12/2010. He said that the complainant's father had land dispute with him. He was arrested and later transferred to Kachibora police station and brought to court with charges which he said were strange.

Analysis and Determination

21. The court has perused the proceeding herein as well as the submissions by the applicant. There were no submission though filed by the state.

22. The appellant has raised general issues in his grounds of appeal which has generally centered on the fact that the prosecution failed to prove its case beyond reasonable doubt.

23. The ingredients of defilement are now well settled, namely, the age of the victim, the identity of the perpetrator and whether penetration occurred.

24. I have no doubt that the age of the complainant were established through the dental age assessment undertaken and produced in court.

25. Secondly, the relationship between the appellant and the complainants in my view was clearly established.

26. I do not find the evidence of the young boys dissuaded during cross-examination. The appellant was clearly entrusted with the boys during their healing and seclusion period. They all gave consistent evidence of how the appellant after coming back while drunk, smoked bhang and decided to physically assault the boys. They also claimed that the appellant sodomised each one of them and ordered that they eat his faeces. In terms of recognition therefore I do not find any reason to doubt that the complainants did not know their assailant.

27. The next issue is whether they were actually sodomised or defiled. All the three of them gave the same version of events. The medical report produced, in this case, the P3 form filled on 28/12/2010 does not support their contention. All that the same shows are general injuries sustained on other parts of the body.

28. The same states on Section C (3) that

“Normal external anus, no bruises or anal ring.

No discharge around the anus and external area.”

29. The same were filled on 28/12/2010 about 7 days after the incident. There was no production of other treatment notes especially from Kachibora hospital which was the initial port of call. These would have in my view buttress any evidence of defilement.

30. In light of this, and contrary to the finding of the trial court, it becomes very difficult to conclude that they were indeed defiled. It cannot be, I opine, that all the findings concerning the anal region would be without any visible injuries or at least a samplance of it. Although the boys have cogent evidence, I find that in the absence of any iota of defilement as can be deduced from the P3 form, it becomes tricky and

risky to rely on their collective evidence alone.

31. However on the question of other multiple injuries, I do find that their testimonies is backed by the findings on the P3 forms.

32. In the premises I did that the charge in respect to defilement was not conclusive to warrant the appellant to have been convicted and sentenced accordingly.

33. Having found that he assaulted the three boys, the proper charge which I shall proceed to hold against the appellant is Assault contrary to Section 251 of the Penal Code.

34. In light of the above findings I shall allow this appeal only to the extent that the charge of defilement was not established and substitute it with the charge of Assault contrary to Section 251 of the Penal Code.

35. This obviously shall affect the sentencing of 20 years meted against the appellant.

36. In light of the above new charge, I order that the appellant shall serve the maximum period of 5 years for each of the counts. The sentence would run concurrently.

37. I notice that the appellant was convicted on 19/2/2013 meaning essentially that he would have served his 5 years period.

38. Equally its clear that the appellant has been in custody from 27/12/2010 despite being granted bond. The period he has served in custody in my view is sufficient to have taught him a lesson. In the premises I shall set him free 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.