



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 93 OF 2013

(Being an Appeal arising from conviction and sentence in Kitale Chief Magistrate's Court criminal case No. 2670 of 2012 delivered on 14/9/17 by Hon. J.A. Owiti Ag Principal Magistrate)

PATRICK WAMARA MUNYANA.....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 charge were that **on the 23rd day of October 2012, in Trans-Nzoia County, intentionally caused his penis to penetrate the vagina of E N L, a child aged 10 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 charge were that **on the 23rd day of October 2012, in Trans-Nzoia County, intentionally touched the vagina of E N L a child aged 10 years with his penis.**

3. The appellant was convicted and sentenced to life imprisonment hence this appeal. The brief facts or summary of the evidence as presented during trial were as hereunder.

PW1 J N the mother to the complainant stated that she was told by her co-wife one S concerning the defilement of the minor by the appellant. She then took her for treatment after examining and finding that indeed she had injuries in her vagina. She took her to Kitale District Hospital where she was issued with a Post rape form as well as a P3 form.

4. **PW2 the complainant** testified that she was 10 years old and a class IV pupil at [Particulars Withheld]. She said that her step mother sent her to purchase vegetables from the appellant house on 23/10/2017 at 4.20 pm.

5. She went and found the appellant in the house who upon entering his house held her hand and pulled her inside. He then removed his shorts and laid the minor on the floor and laid on her and defiled her. She thereafter gave her the vegetables and the complainant went home but was in great pain. She kept on sitting on the road.

6. At home however she feared telling her step mother but at school she told one N who informed Madam L and C. They took action and the appellant was arrested.

7. **PW3 Solomon Mengich** a retired police officer rescued the appellant who was being assaulted by a mob and took him to Kapcherop police station.

8. **PW4 P.C. Charles Were** from Cherengany police station carried out the investigation after the matter was reported at the said station. He issued the minor with the P3 form and referred the appellant for treatment. He recorded statements from the witnesses and preferred charges against the appellant.

9. **PW5 Linus Ligare** the clinical officer from Kitale District hospital examined the minor and filled the P3 form. He found that the hymen was torn and was recent. He concluded that he had been defiled.

10. When put on his defence the appellant gave sworn evidence denying the charge. He said that he was working at the farm on 23/10/2012 and was simply arrested.

Analysis and Determination

11. I have carefully read the proceedings herein and examined the exhibits produced. I have equally read the lengthy submissions of both the learned State counsel and the appellant.

12. What is abundantly clear is that the age of the minor which is a key ingredient of this offence was proved by the production of the clinic card or immunization card. Her mother corroborated her evidence.

13. Secondly I find that the identity of the perpetrator clearly established. Both the complainant as well as the appellant were people known to each other. They were I presume neighbours that is why the complainant was able to go and purchase vegetables from his house.

14. As to whether she was defiled, I have read her evidence and that of the Clinical officer and perused the medical documents produced and I have no doubt that she was defiled. Although she reported about 3 days later, the findings by Linus Ligare was corroborating what the minor stated.

15. The big question however is whether it was the appellant who defiled the minor. Section 124 of the Evidence Act provides that in such circumstances where there is no other witness except the complainant, her evidence ought to be taken into consideration if the court believes that she spoke the truth.

16. Looking at her age and the line of her evidence including her candid explanation of the steps the appellant took to defile her, I am left with no doubt in my mind save to conclude that the minor spoke the truth. Moreover I do not see any malice on the part of the minor or her family members.

17. In my view the action took place at around 4.00 pm and clearly there would not be a case of mistaken identity. I think the whole incident was premeditated. The defence by the appellant was simply dismissive. Infact the grounds raised in his appeal were too general in nature.

18. This appeal must fail. The same is dismissed.

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.