



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 76 OF 2017

(Being an appeal arising from original conviction and sentence in Kitale Chief Magistrate's Court in Sexual Offence No. 122 of 2015 delivered on 6/10/2017 by Hon. M.I.G. Moranga Principal Magistrate)

R K KAPPELLANT

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) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that **on the diverse dates in the month of January 2015 in Trans Nzoia East District of the Trans Nzoia County intentionally caused his penis to penetrate the vagina of R M a child aged 10 years.**
2. He was 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 are that **on the diverse dates in the month of January 2015 in Trans Nzoia East District of the Trans Nzoia County intentionally touched the vagina of R M a child aged 10 years.**
3. The appellant was convicted and sentenced to life imprisonment hence this appeal.
4. Before looking at the grounds raised by the appellant in his appeal it shall be appropriate to summarise the proceedings as presented in the trial court.
5. **PW1 a minor and the complainant** stated that she was a class 4 pupil at [particulars withheld] primary school. That she knew the appellant whom she referred as "Kuka" and a watchman at their school. The appellant doubled up as her grandfather as well.
6. She testified that in January 2015 he called her at around 4.00 pm and defiled her in class 7 at their school. He threatened to kill her if she would tell anyone. She explained how the appellant defiled her and gave her Kshs 50. She said that they bought sweet with her friend from the said Kshs 50.
7. She further testified that the appellant again defiled her after 3 days. She however refused to take the Kshs 50 he gave her. The incident happened in class 7 again.
8. It was later that the teachers as well as her grandmother got to know the incident and she was taken to hospital.
9. **PW2 J N W** testified that in the month of May 2015 she was informed by the complainant's class teacher that the minor had been defiled. She checked on her genitals but found that her virginity was still intact. The child then told her what had happened. She took her to the hospital and the matter reported at Kipsaina police post and later Cherengany police station.
10. **PW3 Peter Njenga Kagumi** a police reservist arrested the appellant after receiving instructions from the Kipsaina police post. The appellant was arrested while at home.
11. **PW4 Sergeant George Odongo** from Kipsaina police post carried out the investigation after receiving complainants from some Human Rights person.
12. **PW5 Kirwa Labatt** the clinical officer from Kitale District hospital examined the complainant and produced the P3 form. He found that there were no physical injuries noted and the vagina walls was hyperemic as she had lost her virginity and it looked old.
13. **PW6 Abubakar Tengula Jango** from Kenya National Human Rights testified that he received a complaint from a group of people on

3/6/2015 concerning the incident. They said that the appellant a watchman at [particulars withheld] primary school had defiled young school children. He investigated the matter and referred it to the police.

14. When put on his defence the appellant gave unsworn evidence denying the charge. He said that the charges were framed up as he had not been paid his dues as he was sacked summarily. He was sacked on 4/6/2015.

Analysis and Determination

15. I have read the entire proceedings herein as well as the submissions by the appellant. The respondent however did not file the submissions as required.

16. There are 3 crucial ingredients expected to be proved before convicting in such offences, namely the age of the victim, the identity of the perpetrator and whether actual penetration occurred.

17. In regard to the age of the minor, the same was settled by the production of the birth certificate.

18. There is no doubt that the complainant according to the produced P3 form was defiled. She explained that she was defiled by the appellant in January twice. She said that the appellant lured her with KShs 50 and equally threatened to kill her if she tells anyone.

19. I have read the evidence of the minor and put together with those of other key witnesses, I find some disturbing issues which needs to be answered.

20. First of all, the incident happened at around 4.00 pm both in class 7. Although no specific date was mentioned it appears that the incident took place during week day and thus there were at least teachers and other pupils. Infact the minor spoke of her two friends M and T. She said in cross-examination that;

“ There were other children T, F and M.”

21. None of these children were called to testify. Least of all none of the teachers were even called to testify. It is inconceivable that at 4.00 pm it was only the complainant and the appellant who were left together at school.

22. Equally, the evidence by the minor appear contradicting and inconsistent. Although I appreciate that she was a minor, nonetheless there ought to be a flow of evidence. The incident took place in January and it was only late in May that the whole issue come into fore. What happened in between.

23. Her mother did not help things either. She said that:

“ That evening I decided to check her genital area. I saw like the child had engaged in some agony, a further look I saw her virginity was still intact.”

24. If this was in May and the incident occurred in January 3 times how come she was able to see the hymen yet she had been defiled. The court is laying special emphasis on this line of argument as being a woman she was in a better position to notice the hymen.

25. The witness from the Human Rights Officer did not help much. He simply received reports or rumours from many people whom he was unable to mention as his informers.

26. Without considering the other issues raised by the appellant, I find that the centrality of this case lied on the witnesses (Independent) who ought to have been called especially, the friends to the minor as well as the teachers. I do not think it was difficult for the teachers, least of all the school head teacher to ascertain that the minor was his student and that the appellant was the school watchman.

27. For the above reason I shall allow this appeal. The appellant is set free unless lawfully held.

Delivered, signed and dated at Kitale on 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.