



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 133 OF 2011

(Being an appeal arising from conviction and sentence in Eldoret Chief Magistrate's Court criminal case No. 3980 of 2010 delivered by G. M'masi Senior Resident Magistrate on 12/7/2011)

ANTHONY LIHAVIAPPELLANT

VERSUS

REPUBLICRESPONDENT

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 14th day of July 2010 in Lugari district within Western Province, unlawfully and intentionally caused penetration of the genital organ (penis) into the genital organ (vagina) of DD, a girl aged 6 years.**
2. The alternative charge was **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 14th day of July 2010 in Lugari district within Western Province, unlawfully committed indecent act by touching the private part namely (vagina) of DD, a child aged 6 years.**
3. The appellant was convicted and sentenced to life imprisonment hence this appeal.
4. The evidence as was presented during trial was that PW1 the complainant testified that she was 6 years old and a class 1 pupil at [Particulars Withheld] primary school. She stated that the appellant defiled her at a maize plantation not far from their home and promised to give her Kshs 10. In the process he was busted by Cosmas and Geoffrey who arrested him while he attempted to run away.
5. **PW2 Geoffrey Masheti** testified that at around 7.30 pm while coming home from Makutano centre with Cosmas they found the appellant with the complainant. They saw him with the assistance of light from the torch. They arrested him and took him to the AP Post at Makutano.
6. **PW3 EI** the mother to the complainant testified that she was with her child on 14/7/2010 when she left the house. She was preparing food. While inside the house she heard some screams and when she went out she found the appellant having been apprehended by Cosmas and Geoffrey. He was being accused of defiling the minor.
7. **PW4 Philip Koro** from Mautuma Sub-district hospital examined the complainant and filled the P3 form. He found that the labia and minora were inflamed with tears. He concluded that the child had been defiled.
8. **PW5 Leah Keino** from Milimani Patrol base under Turbo police station carried out the investigations and preferred charges against the appellant.
9. When put on his defence the appellant gave unsworn evidence denying the charge. He stated that he was arrested for selling changaa on behalf of her mother and that the 3 persons who arrested him were the PW1's father's brother who had grudge with him. He said that the witnesses came from one family only and they had some disagreement and that the whole issue was a set up.

Analysis and Determination

10. The court has carefully gone through the evidence on record and more particularly the evidence of the minor. The court has equally appreciated the submissions made by both the appellant and the State counsel.
11. What is admitted without much doubt is the fact that the minor was aged 6 years old. Secondly, there was medical evidence in support of the defilement.

12. There are 2 crucial issues which I find germane in this appeal. The first one is how the evidence of the minor was conducted by the trial court. I find that contrary to all rules of evidence and specifically how the minor's evidence are taken the trial court proceeded without conducting the voire dire examination.

13. The child's testimony in the ordinary sense must and always must be tested through voire dire examination by the trial court.

14. Looking at what she stated, one can't conclude whether she was sworn or not. Even if she was sworn did she understand what transpired and more particularly speaking the truth?

15. Even more damning is the fact that the appellant was not given a chance to cross-examine her. For whatever reasons, the appellant ought to have been given the opportunity to cross-examine the child.

16. For this crucial omission by the trial court, this appeal ought to have succeeded and perhaps order a retrial. Nonetheless the evidence of PW2 and PW3 does not corroborate that of the complainant especially whether they found the appellant in the act. Infact the intensity of the light from the torch was not fully questioned.

17. PW1 suggest that by the time PW2 and his friend arrived, she was wearing her pant. Whereas PW1 states that they found him in that act. They are two different pieces of evidence.

18. PW3 states that the child had gone for a call of nature in the toilet within a maize plantation, whereas the child stated that the appellant took her from home to the maize plantation.

19. The nature of the charge facing the appellant was very serious as it confined him to prison for the rest of his life. There should not have been any gap more particularly by the trial court during the proceedings. Infact its very difficult to know whether the minor spoke the truth as per the provisions of Section 124 of the Evidence Act Cap 80 Laws of Kenya.

20. For the above reasons this appeal succeeds. I would have ordered a retrial but considering the fact that it was not possible even to procure the attendance of the witnesses when they were to be recalled, and coupled with the time span taken by this matter, I shall let the matter rest there.

21. The appellant is set free unless lawfully held.

Delivered, signed and dated at Eldoret this 12th day of October, 2018.

H.K. CHEMITEI

JUDGE

12/10/18

In the presence of:

R. Karanja for the Respondent

Appellant – present

Court Assistant – Christine

Judgment read in open court.