



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL No. 40 OF 2015

(Being an appeal arising from conviction and sentence in Eldoret Chief Magistrate's Court criminal case No. 1483 of 2012 delivered by S. Mokua Senior Principal Magistrate on 13/3/2015)

CHARLES AMBUTSI NGOSENYI.....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 25th day of March in Eldoret East District within Rift Valley province, intentionally and unlawfully caused his genital organ (penis) to penetrate into the Genital organ (vagina) of BAA a child aged 10 years old.**
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 offence were that **on the 25th day of March 2012 in Eldoret East District within Rift Valley province, intentionally and unlawfully allowed his genital organ (penis) to come into contact with genital organ (vagina) of BAA, a child aged 10 years old.**
3. The appellant was convicted and sentenced to life imprisonment hence this appeal. The evidence as presented during trial is worth considering and summarising before delving into the merits and or demerits of this appeal.
4. **PW1 the complainant** told the court that she was 11 years old though at the time of the incident she was 10 years. She said that she was at their home on the material day and the appellant was a casual labourer at a site near their home. On that day their mother who used to make food for the casual labourers left her at home with her brother BJ.
5. As they played and watched the T.V., the appellant came severally asking for drinking water. He came 4 times. He then came and grabbed her and defiled her in their house. He threatened to kill her if she tells anyone. When her mother came she confided to her. Her mother in turn told her father and she was then taken to Moi Teaching and Referral Hospital for treatment. The appellant was arrested the following day. The matter was equally reported to the police.
6. **PW2 MMA** the complainant's mother stated that she was a class 6 pupil at [Particulars Withheld] primary school. She said that the appellant was a person known to her as he was a casual labourer on a nearby site where she used to sell food to them. She said that the appellant told her that he had enjoyed playing with her son B that day. When she went home she found the complainant crying and she told her what the appellant had done. She took her to Moi Teaching and Referral Hospital. The appellant was arrested the following day from the site after attempting to run away. She also identified the P3 form issued to the complainant.
7. **PW3 Boniface Omondi** was a neighbour to PW1 and PW2 and the appellant was a casual labourer at his site. He was present when the appellant was arrested and almost lynched by the public. He was handed over to the chief.
8. **PW4 Dr. Joseph Imbenzi** from Moi Teaching and Referral Hospital produced the P3 form on behalf of Dr. Kibet who had examined the complainant. The doctor found that there was hymenal tears and injury to labia minora and there was vaginal discharge. There was also spermatozoa.
9. **PW5 P.C. Ndiema** from Kapsoya police station carried out the investigations after the appellant was taken to the station by members of the public. He preferred charges against the appellant after recording the statements of the witnesses. He did also produce the certificate of birth of the complainant.
10. When put on his defence the appellant gave sworn testimony denying the charge. He said that while he worked that morning a lady

came from behind and shouted that he was a thief. He was beaten by the members of public and taken to the police station and charged in court the following day.

Analysis and Determination

11. The court has carefully read the proceedings herein as well as the submissions by the appellant and the learned State counsel.
12. The three critical ingredients of the offence of defilement are the age of the complainant, whether penetration occurred and the identity of the perpetrator.
13. In this case the age of the victim is not in doubt. The certificate of birth showed that she was born on 13/10/2003. she was therefore below 11 years old.
14. As to whether she was defiled, I find her evidence strong and unchallenged. She forthrightly described how she was defiled and the medical evidence produced attested to this.
15. The evidence so far points to the fact that the appellant was the perpetrator. This is clearly so as the incident occurred during day time and there was no suggestion by the complainant that the perpetrator tried to conceal himself. She explained how the appellant came to their place at least 4 times asking for water to drink. She had been seeing him all through working at the construction site.
16. The appellant did not deny that he worked at a nearby construction site and PW2 used to prepare food for them (casual labourers).
17. Under the Proviso to Section 124 of the Evidence Act Cap 80 Laws of Kenya, I do find that the complainant though young was truthful. There was nothing in her evidence that was malicious at all. In any event there were other workers around on the site and no reason was suggested even by the appellant during cross-examination or in his sworn defence to suggest that the child was malicious.
18. For the above reason I do not find the appeal herein meritorious and the same is hereby dismissed.

Judgment read, delivered, signed and dated at Eldoret on 12th day of October, 2018.

H.K. CHEMITEI

JUDGE

12/10/18

In the presence of:

Mr R. Karanja for the Respondent

Appellant – present

Court Assistant – Christine

Judgment read in open court.