



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 134 OF 2015

(Being an appeal arising from Iten Senior Resident Magistrate's Court in Criminal Case No. 68 of 2015 delivered by N.C. Adalo Resident Magistrate on 7/10/2015)

DENIS WEKESA BARASAAPPELLANT

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 offence were that **on the 15th day of January 2015 at around 7.00 am within Elgeyo Marakwet County, did intentionally and unlawfully commit an act which caused penetration with his genital organ namely penis into the genital organ namely vagina of JJK, a girl aged 12 years old in violation of the said act.**
2. The alternative count 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 was that **on the 15th day of January 2015 at at round 7.00 am within Elgeyo Marakwet County, did intentionally and unlawfully caused his penis to come into contact with a girl aged 12 years namely JJK.**
3. The appellant was convicted and sentenced to life imprisonment hence this appeal. Before looking at the same its appropriate to sumamrise the evidence as presented during trial. PW1 the complainant told the court that she was aged 12 years old and pupil at [Particulars Withheld] Academy. That on the material day at 6.00 am she was heading to school and met the appellant who was walking in the opposite direction. He changed course and followed him.
4. He then got hold of her and blocked her mouth so as to stop her from screaming. He proceeded to remove her clothes and defiled her. He thereafter left her and she went to school where she informed the teacher on duty a Mr Chepkisai who notified the school matron. The matron, one Betty examined the complainant and found that she had been defiled. She took her to Kapsowar hospital where she was treated and the P3 form filled.
5. Later the complainant went to identify the appellant at a parade conducted at Kapsowar police station.
6. **PW2 Betty JK** the school matron testified of how she examined PW1 and found blood in her private parts which had injuries. She was given sanitary parts to stop the bleeding. She was then taken to Kapsowar hospital. The following day she escorted PW1 to the police station for purposes of identification.
7. **PW3 C.I Henry Zuma** carried out the identification parade where PW1 managed to identify the appellant among 8 people. He did also produced the identification parade form.
8. **PW4 Dr Charles K. Cherop** from AIC Kapsowar Mission hospital examined the child on 15/1/2015 and filled the P3 form. He found active bleeding in the genitalia. The labia minora was lacerated and the hymen was torn and lacerated. He concluded that there was penetration. He produced the P3 form.
9. **PW5 P.C John Alubale** carried out the investigations and recorded statements from the witnesses and preferred charges against the appellant.
10. When put on his defence he gave unsworn evidence and stated that he had come that morning looking for potatoes to purchase. He reached a market called Chebulbai and decided to visit one farm. He met 3 people who greeted him and advised that he should follow them as they knew the potato vendor. They met many armed people on the way who spoke a dialect he did not understand. Suddenly one of them struck him on the head with a rungu. He was taken to the chief's office at Chebulbai and later to Kapsowar. He was treated at Chebiemit

hospital.

11. **DW2 Shadrack Wekesa Barasa Ibama** the father to the appellant testified that he had sent him that morning to buy potatoes at Chepsiro. He had given him kshs 1000/=. He said that he called him at 10.30 am that he had approached Chebulbai centre. He however did not call again till 4.00 pm when a policeman called him and told him that the appellant had been assaulted. On cross-examination he said that he did not know what happened between the time the appellant left home.

Analysis and Determination

12. I have perused the proceedings carefully as well as the submissions by both the appellant and the learned State counsel.

13. This court is satisfied that penetration was proved by the evidence of PW1, PW2 as well as the doctor who examined the complainant and filled the P3 form.

14. The examination infact was done while the injuries were still fresh.

15. As to the identity of the perpetrator, there was no sufficient evidence on why the crowd pounced on the appellant. He gave unsworn testimony, which in my view would have been appropriate to be tested through cross-examination. Be it as it may, it was his legal right to give unsworn evidence.

16. What is central however is whether the minor was able to identify the assailant. From the cross-examination she said that the appellant had a black trouser and a shirt which was black and had drawings. The minor went on to state that she had seen the appellant at Chebulbai centre. She further stated that the appellant had a cap.

17. On this issue of identification PW5 the Investigating officer stated that the complainant had reported that the assailant had a long sleeved shirt, red in colour and a black trouser and sandals brown in color. When he found him at the trading centre the appellant had black vest, black trouser and brown sandals.

18. What runs across their evidence is the black trouser worn by the appellant as well as brown sandals.

19. Most importantly, the identification parade is where the minor clearly picked the appellant. I have examined the identification parade form produced and in my view it was correctly done contrary to the appellant's submissions. The said parade was done the following day, and clearly the image was still clear in the mind of the complainant.

20. In the premises, and considering that the incident took place in bright daylight and that the minor having noticed the complainant while he walked past him and subsequently followed her, and the time he spent defiling her and further noting that the assailant did not cover his face or do anything to conceal his identity I am satisfied that it was the appellant who defiled the minor.

21. Clearly her evidence was clear and forthright and in line with the Proviso to Section 124 of the Evidence Act namely, that she was truthful in her testimony.

22. The question of the complainant age in my view was not clearly explained. It is not enough to wave a birth certificate especially in such serious offences. I notice for instance that the same was procured on 16/1/2015, a day after the offence. Although there is nothing wrong about it the charge sheet clearly states that the minor was 12 years old. Infact in her evidence she stated all along that she was 12 years old.

23. In my view had she been 11 years or thereabout there was nothing difficult for the minor who appeared to be truthful to have stated so.

24. In the premises I find that the proper age to be attributed to the complainant should be 12 years.

25. In view of the above finding I find that the sentence of life imprisonment imposed upon the appellant should be interfered with which I do by setting the same aside.

26. Under the Provisions of Section 8(3) of the Sexual Offences Act No. 3 of 2006, the proper sentence should be an imprisonment for a period of not less than 20 years.

27. The appeal is hereby dismissed. The appellant is hereby sentenced to 20 years imprisonment to be computed from 19/1/2016.

Orders accordingly.

Delivered, signed and dated at Eldoret on this 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.