



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 97 OF 2011

(Being an appeal from conviction and sentence in Principal Magistrate's Court at Kapsabet In criminal case No. 278 of 2010 delivered by G. Mutiso – Resident Magistrate on 6/6/2011)

ELIUD KIPCHIRCHIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Defilement in Violation of Section 8(1) as read with Section 8(1) (2) of the sexual offences Act** . The particulars of the charge were that **on the 21st day of January 2010 at [particulars withheld] village in Nandi Central district of the Rift Valley province committed an act which caused penetration of his penis into the vagina of D.J. a child aged 2 ½ 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 21st day of January 2010 at [particulars withheld] village in Nandi Central district of the Rift Valley province, intentionally and unlawfully did cause his penis to come into contact with the vagina of D.J. a child aged 2 ½ years in violation of Section 11(1) of the Sexual Offences Act No. 3 of 2006.**
3. The appellant was convicted and sentenced to life imprisonment hence this appeal. The appellant has raised several issues in his grounds of appeal to with the unconstitutional way in which the trial was conducted, the defective charge sheet and that the matter was not proved beyond reasonable doubt.
4. Before looking at the same its worthwhile to summarise the proceedings at the trial court.
5. **PW1 Misoi Isaack** the clinical officer from Kapsabet District hospital examined the minor and filled the P3 form which he produced. His findings were that the hymen was broken, the vaginal walls were reddened and had whitish vaginal discharge. There was semen on her underpants.
6. **PW2 Consolata Chepngetich Rotich** the mother to the complainant testified that she had left the complainant with her brother B C and had gone to the river. When she came back she found B who was 4 years old looking at the appellant house. She went there and found the appellant on top of the child. Both were naked. She said that the appellant had inserted his penis inside the minors vagina. When the witness screamed the appellant put on his trouser and took off. Her neighbour one Margaret Bett came and when they examined the child's vagina they saw blood and sperms. She took her to Kapsabet District hospital where she was treated.
7. **PW3 Gradrus Keino** the assistant chief Kibigewt sub location was called by one Kiaras Kogo who informed him of the incident. He went to PW1 's house and found the appellant having been arrested. He took him to Kapsabet police station.
8. **PW4 CPL Catherine Kitiabi** took over the investigations from Corporal Eston Kwepanda and she preferred charges against the appellant.
9. when put on his defence the appellant gave unsworn evidence denying the charge. He said that he sells charcoal and on 21/1/2010 he found PW2 cows in their shamba. He then quarreled him and went ahead to burn the charcoal. At 10.00 am he met PW2 as he went to the shamba. PW2 beat up her children for going to the shamba. Shortly thereafter the assistant chief came and arrested the appellant whom according to him thought that it was to do with his alcartation with PW2.

Analysis and Determination

10. I have carefully read the proceedings together with the written submissions by the parties. There is no doubt that PW2 as well as the appellant are people known to each other. Consequently the mistaken identity issue does not arise herein.

11. Secondly, from the evidence of the clinical officer there was defilement of the minor, the complainant PW2 corroborated this.

12. The only big question which baffled me is where and why did the minor not called to testify? I say so because from the proceedings, I have not seen anywhere where it was recorded that the minor was present in court. Even if she was to be declared vulnerable witness under the provisions of Section 31 of the Sexual Offences Act, at least she should have been presented to the trial court.

13. How would the court know that PW2 was speaking the truth? She was not infact called as an intermediary. She testified as a witness.

“intermediary” under Section 3 of the Sexual Offences Act has been defiled as a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, councillor, guardian, children's officer or Social worker,”

14. In this case, sadly, the prosecution nor the court did not inquire about the whereabouts of the minor. How would one know, perhaps the unsworn defence by the appellant was plausible.

15. I find that at least the child should have been introduced to the court and recorded in the proceedings and thereafter it would be the mother PW2 should have been called to testify as probably a witness as well as an intermediary.

16. Without delving into the other rounds raised by the appellant. Which in my view were periphery in nature and did not go into the evidence adduced, I find that on the above ground alone, this appeal ought to succeed. The nature of the sentence, namely, the appellant spending all his years in jail was so serious that no room ought to have been left for any doubt.

17. The proper course is to order a retrial. However this was a 2010 matter (8 years have lapsed) I shall allow the appeal grant the appellant the benefit of doubt and set him free. I suppose that the 8 years he has spent in custody must have taught him a longlife lesson.

18. The appellant be set free unless lawfully held.

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

H.K. CHEMITEI

JUDGE

In the presence of:

Mr. R. Karanja for the Respondent

Appellant – present

Court Assistant – Christine

Judgment read in open court.