



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 207 OF 2014

(Being an appeal arising from conviction and sentence in Kapsabet Principal Magistrate's court in criminal case NO. 3628 of 2013 delivered by G. Adhiambo Ag. Senior Resident Magistrate on 16/12/2014)

WMS.....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) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence was that **on the 28th day of December 2013 within Nandi County intentionally and unlawfully did cause his penis to penetrate the vagina of CN a girl aged 15 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 offence was that **on the 28th day of December 2013 within Nandi County intentionally and unlawfully did cause his penis to come into contact with the thighs of CN a girl aged 15 years.**
3. He was convicted and sentenced to 35 years imprisonment hence this appeal. He has raised three grounds of appeal namely that the sentence was excessive in the circumstances and that penetration was not proved beyond reasonable doubt and that the voire dire examination was not carried out.
4. The brief summary of the evidence was that PW1 the complainant a standard 5 pupil at [Particulars Withheld] primary school was heading home at around 7.00 pm on 28/12/2013. She met the appellant who was standing at a path near his house. He then held her and took her to his house which was 50 metres away. He forcefully defiled her. In the process the complainant's mother came and demanded that the door be opened. The appellant pushed the complainant inside the bed. Her mother however with the help of the torch saw the complainant's slippers on the floor and managed to remove the complainant. Later she was taken to Kapsabet District hospital for treatment. A p3 form was also filled after the matter was reported at Kapsabet police station.
5. **PW2 Hellen Tandoi** from Kapsabet police station gender office carried out the investigations after the matter was reported at the station. She also recorded statements from the witnesses and preferred charges against the appellant.
6. **PW3 Danson Gichangi** a clinical officer from Kapsabet District hospital filled in the p3 form as well as examined and treated the complainant. He said that the complainant told him that this was the 3rd time she was engaging herself in sexual intercourse. He found her hymen broken but not afresh wound. There was no signs of force having been used and no tenderness. There was pure whitish vaginal fluid which was normal. There was few spermatozoa.
7. He examined the appellant who according to him was a regular patient at HIV clinic. The recommendation was that he continuous carrying on with the HIV treatment.
8. **PW4 BA** the mother of the complainant testified that on that material day she came home from work at 7.30 pm and found the complainant missing and she was told that she had left at 4.00 pm.
9. One Kibet, her neighbour and Silas Mugambi traced the complainant at the home of the appellant. They went there and upon knocking the door the appellant refused to open but when they threatened to break the door he complied.
10. They found the complainant under the bed and her slippers on the ground. She raised alarm and neighbours came and threatened to beat the appellant. He was arrested and taken to Kapsabet police station. Later a P3 was issued and the child taken to Kapsabet District hospital.

11. When placed on his defence, the appellant gave his unsworn evidence denying the charge. He said that PW4 owed him Kshs 2000 which he had given her to procure release of her brother. when she demanded on 28/12/2014 she promised to give her that evening. She then went to his house and knocked the door and he went out while holding her phone which she had pledged as a security in lieu of the payment of Kshs 2000. Immediately she attacked him physically with other people and he raised alarm. Neighbours pleaded with them not to kill the appellant. He was taken to the police and placed in the cells. He was taken to the hospital and later charges preferred against him.

Analysis and Determination

12. I have carefully read the proceedings herein as well as the written submissions on record. The three ingredients now acceptable to prove the offence of defilement are the age of the victim, the identity of the perpetrator and whether indeed penetration occurred.

13. The immunization card produced shows that the complainant was born on 9/8/1998. It means that at the date of the offence she was 15 years old. This was not disputed.

14. As to the identity of the perpetrator, I find that the prosecution was able to establish this. The appellant was not a stranger to both the complainant and her mother (PW4). These were people living close by. The appellant was known as 'fundi' a name he did not dispute.

15. Moreover and more importantly, he did not deny that he was not in his house that night. Infact he admitted in his unsworn evidence that PW4 together with others went to his house and assaulted him.

16. PW1 on her part stated that he was found under the bed inside the appellant's house. In the premises I do not think there was any case of mistaken identity.

17. Was the complainant defiled? My simple answer is in the affirmative. The complainant clearly explained how she found herself in the appellant's house and how her mother busted on her. Although she alleged that she went there by force or coercion of the appellant, I do not think that was true. There was no suggestion on her part that she tried or attempted to resist or extricate herself from the appellant. Neither is there any evidence that the appellant used any force.

18. This however does not aid the appellant's appeal. Although the evidence by the clinical officer showed that the complainant had engaged herself in past sexual activity, this did not warrant the appellant to do so with her.

19. The more fundamental issue was the knowledge on the part of the appellant that he was HIV positive and as found out by the trial court, the intention was not only sexual satisfaction but to infect the complainant who was then a class 5 pupil. There was nothing to suggest even in his unsworn testimony that the appellant did not know that the complainant was not a primary school going child.

20. Consequently I do find that the evidence against the appellant was overwhelming. In his defence, he did not permit the state to cross-examine him neither did he call any witness including his neighbours to testify on his behalf and specifically that he was assaulted by PW4.

21. Having stated so the only ground of appeal which I find merits consideration is the period of sentence meted against the appellant. The 35 years period was excessive in the circumstances.

The proper section which he ought to have been charged is 8(1) and (3) and not (2) as the victim was above eleven years.

22. Consequently I shall dismiss the appeal and order that the sentence be reduced from 35 years to 20 years in line with Section 8(3) of the Sexual Offences Act. The 20 years period shall run from 30/12/2013 as I note that the appellant conducted trial while in custody.

Orders accordingly.

Judgment read, 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. Karanja for the Respondent

Appellant – Present

Court Assistant – Christine

Judgment read in open court.