



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 143 OF 2016

(Being An Appeal Arising From Conviction And Sentence In Kapsabet Principal Magistrate's Court Criminal Case No. 2323 Of 2014

WYCLIFE SAISIAPPELLANT

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) (3) of the Sexual offences Act No. 3 of 2006**. The particulars of the charge was that **on the 14th day of July 2014 at [particulars withheld]village, Ndurio location in Nandi County intentionally and unlawfully did caused his penis to penetrate the vagina of M.J. a child aged 12 years.**
2. He was equally charged with the alternative count of **committing an 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 2014 at [particulars withheld] village, Ndurio location in Nandi County intentionally and unlawfully touched the vagina of M.J. a child aged 12 years.**
3. The appellant was convicted and sentenced to 10 years imprisonment hence this appeal.
4. The summary of the proceedings at the trial court were that **PW1 the complainant** told the trial court that she was 12 years old having been born in the year 2002. That on 14/7/2014 she was sent by her mother to buy milk and on her way she met the appellant who told her to get into his house so that she could give her money for her mother.
5. While in his house he locked the same and forcefully defiled her. She went home thereafter but was afraid to tell her mother. She told her younger sister one WC who told her mother. Her mother then took her to Kobujoi Mission hospital and thereafter reported at Kobujoi police station. The complainant stated that she knew the appellant who used to stay at her grandmother's house.
6. **PW2 VC** told the court that on 16/7/2014 at around 11.00 am she was told by her young child concerning the incident. She checked the complainant's private parts and saw some puss. She took her to the hospital where she was examined. The matter was reported at Kobujoi police station where P3 form was issued and later filled. The appellant was arrested and taken to the police. She said that the appellant was a herder at a neighbour's home.
7. **PW3 SMS** the father to the complainant explained what he did immediately PW2 told him of the incident. He explained how he took the child to the hospital and reported the matter at the police station. He also identified the treatment documents as well as the P3 form.
8. **PW4 Naomi Lagat** a clinical officer from Kaptumo sub -district hospital examined the minor and found that her hymen was broken and not fresh and white discharge from the vagina. There was no evidence of venereal disease in respect to the appellant. He also produced the P3 form in respect to the appellant.
9. **PW5 P.C Moffat Liboywa** testified on behalf of one P.C Geoffrey Ayuku who was the investigating officer. He narrated how the report was made and the subsequent arrest and charging of the appellant. He also produced the certificate of birth.
10. When put on his defence the appellant gave unsworn testimony denying the charge. He narrated how he worked as a welder between 14/7/2014 upto 20/7/2014 when he was arrested. He said that when he went to Kobujoi police station he was not told of the charges he was to face but he was simply put in and later charged.

Analysis and Determination

11. The court has perused the proceedings herein as well as the submissions by the parties. What is evidently clear is that the age of the

complainant is not in dispute. The clinic card produced showed that she was born on 13/5/2002.

12. Secondly the issue of whether she was defiled was well captured by the trial court contrary to the appellants submissions. There was no evidence of penetration although the minor suggested so. The clinical officer however found that there was venereal disease and discharge and the hymen though broken was old looking.

13. What is baffling however is why the complainant had contracted STD allegedly from the appellant and yet the appellant did not have.

14. What about the evidence of identification? I think there was no suggestion that the minor could have been mistaken. The incident took place at 5.00 pm and the appellant was a person known to her. The idea of the appellant being a welder and not a herder was not tested by cross-examination of the appellant. Consequently I find that for all intent and purposes he was a herder well known to the complainant as well as the rest of the witnesses.

15. Having read the proceedings herein, this court is inclined to grant the benefit of doubt to the appellant for the simple reason that the evidence of the minor seemed not to have been well corroborated. In other words, while on the other hand she stated that there was penetration, the medical examination does not support the same. Secondly even if there was penetration, how come the appellant did not have any STD as per the medical examination. Is it possible that the complainant may have contracted it elsewhere?

16. Even if the appellant had and got healed, a span of 3 days or thereabout in my view was so close for the medics to have ascertained this.

17. Convicting him on the alternative charge of indecent act would be running contrary to the fact that the complainant had contracted a venereal disease.

18. In the premises I do find that considering the evidence at hand it was not sufficiently proved that the appellant defiled the minor or at least indecently assaulted her.

19. The appeal is allowed. The appellant 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:-

Mr. R. Karanja for the Respondent

Appellant – present

Court Assistant – Christine

Judgment read in open court.