



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 89 OF 2016

(Being an appeal arising from Conviction and Sentence in Kitale Chief Magistrate's Court in Criminal case No. 1131 of 2014 delivered by P. W. Wasike Resident Magistrate on 17/6/2015)

DAVID SIMIYU WANYAMA ALIAS KELVIN...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(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that **on diverse dates between 16th and 24th February 2014** [Particulars Withheld] **village within Trans Nzoia County, intentionally caused his penis to penetrate into the vagina of WNW a child aged 16 years.**
 2. He was equally charged with the alternative charge 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 diverse dates between 16th and 24th February 2014 at** [Particulars Withheld] **village within Trans Nzoia County, intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of WNW a child aged 16 years.**
 3. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal.
 4. The substance of the grounds raised in his amended grounds of appeal are that the entire evidence as presented by the prosecution were full of inconsistencies doubts and discrepancies.
 5. The brief summary of the proceedings at the trial court was that **PW1 the complainant** was a form 2 student at [Particulars Withheld] High School. She visited the appellant on 22/2/2014. She spent 2 days there when on 24th her mother traced and found her in the appellant's house. They were arrested. The appellant disappeared. The complainant was taken to Kitale District hospital where she was examined and P3 form filled.
 6. **PW2 Moses Wanyonyi Wafula** a Community policing member arrested the appellant on 21/3/2014 as he boarded a vehicle and handed him over to the police.
 7. **PW3 EM** the mother to the complainant testified that she had gone for a meeting on 22/2/2014 leaving behind the complainant who was her 2nd born child. When she came back on 23rd she was told that the complainant was not at home. She was suspicious concerning the appellant whom she had relationship with the complainant.
 8. She went to the appellant's house between 10.00 and 11.00 pm. Upon knocking the door the appellant opened as he tried to button his trouser. The complainant was sleeping on the bed. She called Mukasa, the village elder. They arrested the appellant and handed him over to the police. The appellant later took off and the complainant was taken to the hospital.
- The witness identified the complainant's birth certificate.
9. **PW4 Michael Michir** from Kitale children protection Unit carried out the investigations after the appellant had been brought by vigilants. He recorded evidence from the witnesses and preferred charges against the appellant. He also produced the certificate of birth indicating that the complainant was born on 28/4/1997.
 10. **PW5 Kirwa Labat** a clinical officer from Kitale District hospital produced the P3 form on behalf of Stephen Wanga Chepkosi who had since retired. The report concluded that the hymen was broken and was old looking. He concluded that there was penetration.

11. When put on his defence, the appellant gave sworn evidence denying the charge. He said that he went working at her aunts place on 21/3/2014. As he went home riding a bicycle he hit a motorcycle that was parked. The rider of the motorcycle demanded Kshs 5000/= which he did not have. He was threatened with unspecified consequences. He was later arrested by PW2 and handed over to the police. He was later charged in court with the offence of defilement and not destruction of a motorcycle.

Analysis and Determination

12. The duty of this court is to reevaluate the evidence afresh and come up with an independent finding noting that it did not have the chance of seeing the witnesses during trial. (*Ekeno Vs Republic (1972) E.A. 32.*)

13. The court has carefully perused the proceedings as well as the attached exhibits as well as the parties written submissions. The 3 ingredients of defilement are now obvious, namely, the age of the complainant, the identity of the perpetrator and the element of penetration must be proved.

14. Looking at the matter at hand it is clear that the age of the complainant was not in dispute. She was aged 16 years as per the certificate of birth produced.

15. The question of defilement was corroborated by the production of the P3 form and the evidence of the minor. She clearly explained the number of days spent at the appellant's house.

16. Was the appellant the perpetrator? In my view yes. The appellant was well known to the minor despite his defence to the contrary. More importantly the complainant was found in the house of the appellant by PW3 naked and lying on bed. The appellant can easily be said that he was half dressed.

17. Rummaging through the proceedings as well as entire spectra of evidence I do not find any reason to doubt the complainant. I do not see why she should target the appellant unfairly. Essentially they were boyfriend/girlfriend relationship. The ground that the trial court did not conduct voire dire examination is not true as it is clear that the same was done based on the proceedings on record.

18. The upshot of this is that this appeal is disallowed. Save that the appeal is dismissed, I have equally noted that the complainant acquired and indeed spent three days outside her home with full knowledge that her mother PW3 had left her to take care of her young siblings. In my view this was a truant teenager. Obviously she is legally protected.

19. However considering the above circumstances I find that the 4 year or thereabouts the appellant has spent in jail are sufficient to have taught him a lesson. Let him be released unless lawfully held.

He shall however be under probation for the next 2 years under the relevant probation office.

Delivered, signed and dated at Kitale this 9th day of November, 2018.

H.K. CHEMITEI

JUDGE

9/11/18

In the presence of:

Mr Kakoi for the Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court.