



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 36 OF 2017

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court in Criminal case No. 2374 of 2013 delivered by G.N. Sitati Resident Magistrate on 6/04/2017)

KENNEDY MUHEMBERI.....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(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the 16th day of September 2013 within Trans Nzoia County intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of HW a girl aged 10 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**. The particulars of the charge were that **on the 16th day of September 2013 within Trans Nzoia County unlawfully and intentionally by use of his genital organ namely penis caused a contact with the genital organ namely vagina of HW a girl aged 10 years.**
3. He was convicted and sentenced to 10 years imprisonment hence this appeal.
4. The summary of the evidence as presented during trial was that the complainant PW1 who was an 11 years old and a class 5 pupil at [Particulars withheld] primary school was sent by her mother to the appellant house to get an axe. While there, the appellant forcefully removed her clothes and defiled her.
5. Her parents became suspicious as the child delayed in coming home. They sent one David who went and picked her from the appellant's house. She came crying. She told her mother what had transpired. Her parents that night went to the village elder. The appellant was arrested the following day. She was taken to Kitale District Hospital and treated.
6. **PW2 BNW** the mother to the complainant testified that the complainant was 12 years old. That evening she sent her to the appellant's house to get an axe. The child delayed and it prompted her to tell her husband to go and get her. One David instead went to check on her. She came crying and upon inquiry she told her what the appellant had done. He checked her trouser and found that it contained sperms. She told her husband who then went to the village elder (one Daniel) to report the same. The following day together with the village elder they reported to Sibanga police station and the child was taken to Kitale police station.
7. **PW3 AW** is the father to the complainant. He narrated the incident of the axe which the child had gone to get from the neighbour. He said that it was David who went to get the child from the appellant. She came crying but she refused to tell him what had happened. He reported the matter to the village elder whom together the following day they reported the matter to the police station. He took the child to Kitale District Hospital where the child was examined and the P3 form filled.
8. When put on his defence the appellant gave sworn evidence denying the charge. He said that he had a grudge with the complainant's father whom he did not feel good when the child was sent to his house. He however admitted that he saw the child with David and had an axe.

Analysis and Determination

9. The court has perused the proceedings herein carefully. The duty of this court is to reevaluate the matter afresh and come up with an independent finding. **See Okeno Vs Republic (1972) E.A. 32.**

10. There are 3 grounds which must be proved for this offence to be established namely;

- a) the age of the complainant
- b) The identity of the perpetrator
- c) penetration

11. In this case, it appears that the 2nd ground was clearly proved. The same is buttressed by the appellant's own evidence who admitted seeing the complainant that day with one David.

12. The 1st and the 3rd grounds need serious interrogation. From the record and as correctly found by the trial court the age of the complainant was not proved by the production of any documentary evidence. This should not be a bother nonetheless as the evidence on record showed that the child was about 10 years old. Her mother stated that she was 11 years old. In view of this the child felt under what is described as a "child" by the Children's Act Section 2 thereof. She was a child for all intend and purposes. There are myriad of authorities to support this line of argument.

13. On the issue of penetration, save for the evidence of the complainant, there was no supporting medical evidence. The child explained how the appellant defiled her. Ordinarily the same must be corroborated and in the absence of such corroboration the proviso to Section 124 of the Evidence Act kicks in. The same provides that the court must believe that the child is speaking the truth.

14. Having perused the evidence on record, I find the evidence of the child was truthful. That position was held so in *Chila vs Republic (1967) E.A. 722, 723*. In this case however there was no medical evidence produced. Other than the assertion by PW2 that there was sperms on the child's trouser, (the same was not produced,) there was no P3 form or any treatment documents produced.

15. The absence of the same put the trial court in a dilemma and forced it to invoke Section 179 of the Criminal Procedure Code and thus changed the charge to Sexual assault contrary to Section 5(1) of the Act.

16. The said Section 5 narrates the offence of Sexual assault and it appears that the prerequisite is penetration. In the case at hand, there was no prove of penetration as stated earlier. What then was the essence of the trial court terming the same Sexual assault?

17. In the cases of *Martin Nyongesa Vs Republic Criminal App No. 661/2010 Eldoret*, there was at least medical evidence produced. The offence there was rape. The same obtained in *Kassim Ali vs Rep Criminal App. No. 84/2005*. The offence was rape.

18. The case at hand was defilement. In my view in the absence of any medical report showing that there was penetration, the court should have resorted to the alternative count. The said count covers in my view such situation where it becomes difficult to proof penetration which was a key ingredient of the main count.

19. In the premises I shall set aside the finding of the trial court namely convicting the appellant of the Sexual Assault and find that he was guilty of the alternative count of committing indecent act to the complainant.

20. This does not give him any freedom as the punishment pursuant is still 10 years imprisonment.

21. For the foregoing reasons, the appeal is dismissed.

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.