



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT KITALE

CRIMINAL APPEAL NO. 49 OF 2015

(Being an appeal arising from the judgment of Kitale Principal Magistrate J.A. Owiti delivered on 17/4/2015 in Criminal Case NO. 493 of 2014)

ALEX KIBET NDIEMAAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant was charged with the offence of **Defilement of a Child 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 the **23rd day of December 2013 at Kitalale area within Trans Nzoia county intentionally caused his penis to penetrate to the vagina of L C a child aged 16 years.**

The alternative court was committing an **Indecent Act with a Child Contrary to Section 11(1) of the Sexual Offence Act No 3 of 2006.**

The particulars of the offence are that on the **23rd day of December 2013 at Kitalale area within Trans Nzoia County intentionally caused the contact between your genital namely penis and the genital organ namely vagina of L C a child aged 16 years.**

The appellant was convicted and sentence and hence this appeal. Before looking at the grounds as set out in the appellant appeal it shall be worthwhile to summarise the evidence as presented during trial.

PW1 the complainant a standard Vi pupil at [particulars withheld] primary school told the court that on the material day at around 1 pm she went to draw water at the home of one D C when the appellant who is employed as a herdsman in that homestead forcefully defiled the complainant inside the house of his employer. Afterwards the appellant warned the complainant not to tell anyone.

The complainant testified that when her grandmother arrived she told her of the ordeal and she took her to Rongai hospital where she was treated. She was later referred to Kitale District Hospital. The matter was reported at Kitale police station and statements recorded.

PW2 Chistina Joseph Chemrot Kibet is a village elder at Tiogon village. He testified that on 2/1/14 he was at the assistant chief place when the complainant and her grandmother reported the incident at the said chief's place. He escorted them to Kitale District hospital. He also confirmed that he had known the

appellant for a period of 6 months. He also witnessed the arrest of the appellant at Nambaramach market.

PW3 Faris Bilali a community oral officer produced the dental assessment report on behalf of Dr Kiprof who opined that the complainant was aged 16 years.

PW4 John Koima a clinical officer produced a P3 form of the complainant which showed that the hymen was torn and there was whitish vaginal discharged from the vagina. He also produced the treatment notes on behalf of Dr Gekoda.

PW5 H C is the complainants grandmother . She was not present at the scene as she had travelled to Kamukuywa in Bungoma for 3 days and when she came back she was told by the complainant that she had difficulty in walking and she told her what the appellant had done to her. She escorted her to Bondeni Health Centre where she was treated and referred to Kitale District hospital.

PW6 PC Rose Sabuli testified on behalf of PC Vitalis Wanyama who carried out the investigations and who recorded witness statements and preferred charges against the appellant.

When put on his defence the appellant gave sworn evidence. He said the lady who is his neighbour called Judith requested him to lend some money which he did. He gave her Ksh 2000 which she promised to refund but she did not. On 12/1/14 he went to ask for the money but she never paid back instead on 18/1/14 he was arrested by police officers in the company of PW2 and when he inquired why they refused to explain and was told he would learn later. He was placed in the cells and later charged . The lady whom he had given his money was the complainant's mother.

During cross-examination by the prosecutor he said that he had lend her money on 3 occasions. Kshs 10,000, Kshs 5,000 and Kshs 7,000 respectively. He said that his salary was Kssh 3000 per month.

Analysis and Determination

The appellant as well as the learned state counsel argued this appeal by way of written submissions. This being an appeal, this court ought to reevaluate afresh the proceedings and arrive at a fresh and independent findings.

The sum total of the grounds raised by the appellant in his appeal are that there were contradictory evidence by the witnesses, the medical evidence produced was insufficient and that there were key witnesses who were not called.

For the offence of this nature to be proved three essential ingredients are necessary to wit the age of the victim has to be proved, penetration ought to be established and the identity of the perpetrator must be proved.

In this case the complainant testified that she was a standard 6 pupil and she was not sure of her age. Her grandmother did not help things either. The dental assessment report by Dr Kipriop stated that she was 16 years. I find this credible despite the absence of any other documentary evidence. In any event the complainant fell within the category of a child as envisaged under Section 2 of the children's Act.

Was the perpetrator identified? I think so. The fact that the incident allegedly occurred at around 1 pm clearly denotes that there was no case of mistaken identity.

There was no strong defence to challenge the assertion that the appellant knew the complainant. He even stated that he had lend money to the complainant's mother one Judith and it was as a result of this that he was accused of defiling the minor.

As to whether the appellant defiled the complainant, there was no eye witness. It was his word against hers. The incident occurred at 1 pm at the home of one D C the appellant's employer. The complainant stated that they drew water from the said home. That was not controverted by the appellant. The report

was made to PW5 on 10/1/14 after coming back.

What is evident in the prosecution case is the material contradictions of dates. In her initial evidence in chief the complainant states that she was at home on 13/12/13 when she went to fetch water and this was when she was defiled. At the same time during cross-examination she stated that she was defiled on 28/12/13. PW2 states that the complainant grandmother (PW5) reported the incident on 21/1/14 at 2.30 pm to the assistant chief and again this is the time he escorted her to the hospital.

PW5 stated that she went back home on 10/1/14 when she was informed about the incident by PW1.

The treatment chart exhibit 6, P3 form, states that she was treated on 15/1/2014 and the p3 form filled on 16/1/14. Despite the above contradiction on dates especially by PW5 who stated that due to her adverse age she could not recall the dates well and it would be safe to go by the documented dates as in my view they are more reliable.

Nonetheless in my finding I do not think that the said contradictions defeats the fact that the complaint was not defiled. I find her evidence more believable than the appellants defence. In his defence the appellant shift blames on the complainant's mother whom she had owed him some money. However on cross-examination he admitted earning Kshs 3000/- and one wonders where he got all the money to lend the complainant's mother.

The complainant graphically described what occurred on that day and the finding of the clinical officer in my view corroborates her testimony.

This is a classic case where Section 124 of the Evidence At Cap 80 laws of Kenya clearly applies. The same states as follows;

“Notwithstanding the provisions of Section 19 of the oaths and statutory Declaration Act, where the evidence of alleged victim admitted in accordance within that section on behalf of the prosecution in prosecuting against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceeding, the court is satisfied that the alleged victim is telling the truth.”

In my view I do not find any reason why the minor could simply implicate the appellant. There was no grudge against her and the issue of her mother owing the appellant money did not feature anywhere including cross-examining PW5.

In the premises I do not find this appeal meritorious and the same is disallowed.

Delivered this 25th day of January 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for state

Appellant – present

Kirong – Court Assistant