



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 95 OF 2013

(Being an appeal arising from the Judgment of Kitale Ag Principal Magistrate J.A. Owiti delivered on 16/ 8/ 2013 in Criminal Case No. 990/2012)

ANTONY ONYANGO GEORGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of **Defilement of a Child Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offence Act No. 3 of 2006.**

The particulars of the offence were that on the **10th day of April 2012 at [particulars withheld] "A" Farm within Trans Nzoia County intentionally caused his penis to penetrate the vagina of S N S a child aged 13 years.**

In the second count he was charged with the **Defilement of a Child Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offence Act No 3 of 2006.**

The same is similar to Count 1 save for the date of 14th April 2012.

The alternative count is **Indecent Act Contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006.**

The particulars of the charge are that on the **10th day of April 2012 at [particulars withheld] "A" farm within Trans Nzoia County, intentionally caused the contact between your genital organ namely penis and genital organ namely vagina of S N S a child aged 13 years.**

The appellant was convicted and sentenced to 20 years imprisonment hence this appeal.

FACTS

The complainant who was a standard 7 pupil at [particulars withheld] testified that on 10/4/2012 while on her way to school at

6 am he was requested by the appellant to accompany him to his home which she did. The appellant then proceeded to defile her on the said date at the home of N the appellant's sister in law. On 11/4/2012 the appellant took her to her sister's home where he again proceeded to defile her.

On 12/4/2012 he defiled her again but on 13/4/2012 early in the morning the complainant's brother one G and police officers rescued her. They were taken to Endebess police station and the complainant taken to Kitale district hospital for treatment and examination.

PW2 S N W is the complainant's mother. She testified that the complainant left for school on 10/4/2012 with the other children. However she did not come back for lunch and neither did she turn up the following day. She then went to school and was told that she did not report. She was given a letter by the school head as well as the village elder and the area chief. On 14/4/2012 she got information that she had been traced at a place called Kimondo. She informed the Administration Police officers where they raided the appellant's home and the minor arrested together with the appellant.

PW3 Linus Ligare a clinical officer examined the complainant and concluded that the hymen was torn and was fresh looking. He also later examined the appellant. He did produce the relevant P3 forms which he had filled.

PW4 C M a pupil at [particulars withheld] primary school is aged 14 years and accompanied the police on 14/4/2012 to the home of the appellant. The Administration police knocked the door but the appellant refused to open till his father called him when he opened. They found the complainant on the appellant's bed and they arrested them.

PW5 D M testified that he was told by the complainant's mother about her disappearance. He said that on 13/4/2012 at around 1pm he saw the complainant coming out of the appellant's house and he informed the complainant's mother. On 14/4/2012 at around 5 am he went with the Administration Police officers to the appellant's house where they found both the appellant and the complainant and they arrested them. He said that the complainant was sitting on the appellant's bed.

PW8 PC Richard Kimuli was the investigation officer. He testified that he rearrested the appellant after being brought by the AP officers from Salama AP Camp. He recorded the statements and preferred charges against the appellant.

PW9 APC Nanganyi Jacob after receiving report from Pw2 concerning the disappearance of the minor from the complainant's mother booked it in the occurrence book. On 15/4/2012 at 5 am and after receiving reports of the complainant's whereabouts proceeded and arrested the appellant and booked him at Endebess police station.

PW7 Dr Ken Ndege produced the age assessment report on behalf of Dr Kiprop. When put on his defence the appellant said that the complainant went to their home on 10/4/2014 after being beaten by her mother. She then decided to remain in his home till the time he was arrested.

Analysis and Determination

This being a first appeal the court is enjoined to re-evaluate the evidence afresh and arrive at independent findings. The appellant has written extensive submissions which I have perused. He has raised several grounds of appeal and more fundamentally that the age of the complainant was not conclusive and that the medical report was insufficient.

For the offence of defilement to be determined it is imperative that the age of the complainant be determined, that the penetration did occur and that her perpetrator was clearly identified.

The age of the complainant contrary to what the appellant stated was clearly established to be 15 years as per the dental age assessment report on record. Section 2 of the Children Act Chapter 141 of the Laws of Kenya defines a child to be ***“any human being under the age of eighteen years;”***

This ground therefore is clearly misplaced.

As to whether the complainant was defiled, the P3 form clearly demonstrated that there was sexual

intercourse undertaken by the complainant. The evidence of PW1 was clear and in my view corroborated by other witnesses. The medical examination was done less than 12 hours after the arrest of the complainant and the appellant.

In any case the appellant did not explain why he did not send the complainant whom he clearly knew to be a student back to her parents. Why for instance did he remain with her for 3 days before being apprehended? The above observation clearly answer the question of identity. There is no doubt that he was clearly arrested with the complainant.

The sum total of my findings is that the case was clearly established beyond any shadow of doubt. The appeal is dismissed.

Delivered this 25th day of January 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for state

Appellant – present

Kirong – Court Assistant