



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 125 OF 2015

(Being an appeal for the judgment of Kitale Resident Magistrate C.C. Kipkorir

delivered on 11th December 2015 in Criminal case No 4737 of 2014)

MATHEW WAFULA WANYONYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of **Defilement of a Child contrary to Section 8(1) as ready with Section 8(3) of the Sexual Offences Act No 3 of 2006**. The particulars of the offence were that on the **28th day of November 20014** at [particulars withheld] village **Kitale within Trans Nzoia County, intentionally and unlawfully caused your penis to penetrate into the vagina of SNW a child aged 15 years.**

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

The particulars were that on the **28th day of November 2014** at [particulars withheld] village **Kitale within Trans Nzoia County intentionally caused the contact between your genital organ namely penis and the genital organ vagina of SNW a child aged 15 years.**

The appellant was convicted and sentenced to 20 years imprisonment hence this appeal. The appellants learned counsel Mr Ngeiywa raised several grounds of appeal, notably that the entire evidence by the prosecution was inconsistent and that voire dire evidence was not undertaken and that the essential key witnesses were not called by the prosecution. The learned state counsel Mr Kakoi opposed the appeal arguing that the prosecution did establish the three ingredients of defilement to wit, penetration, age of the victim and identity of the perpetrator.

It is worthwhile at this juncture to summarise the evidence as presented by the prosecution.

The complainant PW1, told the court that she was a standard 7 primary school pupil at Misano primary school. She testified that on the material date at around 10 am she was outside their house when she was called by the appellant who was their neighbour and sent her to buy bananas and doughnuts. He gave her Ksh 50 . After buying the same the appellant who was sitted outside his house told her to eat one but

she refused. The appellant then forcefully held her and proceeded to defile her. So as to conceal any noise he increased the volume of his radio. By that time the door was locked.

PW2 the complainant's mother by that time arrived and started looking for the complainant but in vain. The appellant door was locked and suddenly it was opened and the complainant left the house. She then went to Maili Saba where her grand parents were as she was afraid of being beaten by her mother E N PW2.

Meanwhile PW2 screamed but nobody came. She testified that the appellant removed a panga and threatened to cut her. She went to pick the complainant the following day and took her to Kitale District hospital as well as to the police station where she was issued with a P3 form.

PW3 John Koima examined the complainant on 1/12/2014 and concluded that she had been defiled and had injuries on her knees. He found that her hymen was broken and there was whitish discharge.

PW4 Sergeant Catherine Muthige carried out the investigations after receiving the information on 29/11/14. She recorded statements and preferred charges against the appellant .

When put on his defence the appellant gave unsworn evidence and said that the whole incident was fabricated by the complainant mother whom to he had given his jiko and when the same was damaged she was annoyed. Later after 9 days on a Friday morning he was arrested. He had earlier own informed the village elder (Mkasa) concerning the incident.

DW2 Saul Nyongesa Nyukuri the "Mkasa" confirmed that indeed the appellant had informed him on 28/11/14 at about 4 pm about the dispute between the complainant's mother PW2 and the appellant. He did not however deal with it as another issue arose which he had to attend. He said that later he heard about the incident.

Analysis and Determination

Both parties herein filed strong and arguable submissions in support and in opposition of the appeal. This court is enjoined to arrive at an independent finding after reviewing the evidence with full caution that it did not have the benefit of seeing the witnesses.

The substantive ground raised by the appellant is that the complainant being a minor gave evidence without undergoing voire dire examination. The purpose of voire dire examination is to confirm whether or not a minor appreciate the purpose of an oath and whether he/she appreciates telling the truth.

In *Julius Kirunga Mrithia Vs Republic (2011) eKLR* the court held that;

“ Under Section 19 of the oaths and statutory Declaration Act (Cap 15 Laws of Kenya), where a child of tender years is called as a witness in a proceeding there are two things the trial court must be severally satisfied about;

1) Whether the child understands the nature of an oath or

2) if the child in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth”

In this case the age of the child was estimated through dental age assessment to be about 15 years. The evidence on record does not indicate whether the court took the said complainant through a voire dire examination. Infact the only semblance of voire dire examination visible in the proceedings is where the child state that ***“ I know why I am in court”***.

The same is clearly seen at the judgment of the trial court where the court states that

“She is 15 years old and in my opinion understands the known meaning of word rape , being she did not consent to”

Again that as correctly submitted by the appellant ought to have come out through voire dire examination.

My above finding is premised on the evidence as presented by the appellant and his witness the village elder (Mkasa). It appears that there was a dispute over the appellants Jiko borrowed and damaged by PW2, the complainant's mother. The evidence of DW2 corroborated what the appellant stated. If this was true then one can easily suspect that there was bad blood between the appellant and PW2 and that the complainant was used as a “tool” of revenge.

Fundamentally though its the absence of the complainant's grandfather and the aunty who it is alleged the complainant went to their place. Because of the alleged bad blood between the appellant and PW2 hold that it would have been imperative to have either of the two testify.

Further the events surrounding the alleged defilement do not add up. If indeed the complainant was forcefully defiled by the appellant and she succeeded in escaping as she said why would she run away from PW2?

Wouldn't it have been logical to remain behind and even aid her mother who was being threatened by the appellant who by then was holding apanga. More importantly why would he disappear for about 2 days?

In the evidence of the clinical officer he alleged that apart from the hymen being torn there was bruises to her leg/ The complainant did not raise this in her evidence and I find it a little bit disturbing since if the same were occasioned by the appellant there was nothing difficult to tell the court.

All in all, I do not find the prosecution evidence watertight. It is not always necessary that because a victim has a broken hymen that she must have been sexually abused by the perpetrator.

And move importantly no other eye witness were called, not even the immediate neighbour.

Both PW1 and PW2 stated that there were no neighbours as it was a Sunday and that most of the neighbours had gone to church.

A closer view of the said date clearly indicate that it was a Friday and not a Sunday. This lends credance to the fact that there was some element of half truths between PW1 and Pw2 and it was incumbent upon the trial court to have considered the defence evidence.

Consequently the appeal is allowed, the appellant released unless lawfully held.

Delivered this 25th day of January 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for state

Ngeiywa for Appellant

Appellant – present

Kirong – Court Assistant