



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CRIMINAL APPEAL NO. 106 OF 2014

(Being an appeal arising from the judgment of Kitale Senior Principal Magistrate

J.M. Nang'ea delivered on 3rd October 2014 in Criminal Case No.. 1163 of 2013}

PROTUS LUKHALE BARASA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement of a child contrary to Section 8(3) of the Sexual offences Act . The particulars of the offence were that on diverse dates between 3/ 4/2013 and 18/5/13 at Sokomoko area within Trans Nzoia County intentionally caused his penis to penetrate the anus of N J W a child aged 15 years.

The appellant was convicted and sentence to 20 years imprisonment hence this appeal. The appellant has filed several grounds of Appeal but before looking at them it is appropriate to consider in summary the evidence presented at the trial court.

PW1 the complainant said that the was 15 years old and a standard 7 pupil at [*Particular Withheld*] primary school. That on 3/ 4/2013 as he was heading home he met the appellant on the way who requested him to help in smearing the house. This was around 6 pm. As the work was completed late he could not go home and he decided to spent the night with the appellant. In the cause of the night he was raped by the appellant and efforts to stop him were fruitless as he threatened to stab him with a knife. He locked him in the house and did defile him again the following night. On 20/6/2013 the appellant wife came and he chased the complainant away. He told his parents who helped in apprehending the appellant. He was taken for treatment and later the matter reported at the police station and the appellant arrested and charged.

PW2 FWN is the complainant father. He said that when he arrived from his place of work at 8.30 pm he did not find the complainant at home and nobody knew where he was. He left for work the following day and told his wife to look for him. On 16/4/2013 the boy was brought by a vigilantly. The said witness disciplined the boy but again the following day he disappeared and he was told by the neighbour that he had gone back to the appellantsplace. On 20/5/13 he was brought back home. The complainant told him that the appellant had sodomised him 6 times. He also took him to Kitale district hospital for treatment.

PW3 Samson Webi Makokha is the Assistant chief Nabiswa sub location. He testified that on 22/5/2013 he had a baraza at Masaba farm where members of the public complained about the appellant who sodomised boys and in particular the complainant. He proceeded thereafter to the complainant home where he interviewed him and he confirmed that the allegations were true. He organised for the arrest of the appellant .

PW4 Linus Ligare is the clinical officer who examined the complainant. He concluded that the anal region was having slight tenderness but no obvious injuries. He opined that the complainant had been sodomised.

PW5 Dr Kiprop Jonathan a dentist assessed the complainant's age and concluded that he was aged between 14-15 years.

PW6 Evaline Nasimiyu testified that in April 2013 at 8.30 pm he saw the appellant sodomising the complainant and she screamed. Both the appellant and the complainant took off. She then informed the complainant's mother. When put on his defence the complainant gave unsworn evidence denying the charge . He said that he had attended the office of the area Chief when he was called. He was then accused of defiling children. He was then arrested and later charged. He did not call any witness.

Analysis and Determination

I have perused the submissions of both the appellant and the learned state counsel. The court is fully alive to the fact that it did not conduct the trial and thus it did not have the benefit of seeing the witnesses as well as the complainant. Further it ought to arrive at an independent decision and finding. This matter is equally grave as the appellant was convicted to serve a mandatory 20 years imprisonment. The proof therefore ought to be beyond any shadow of doubt and if there is any such shadow, it ought to be decided in favour of the appellant.

The appellant has raised several substantive grounds which I propose to deal with them wholesomely.

The first ground is that the court did not conduct a *voire dire* evidence against the minor. It is not in dispute that the minor was 15 years old and consequently a child as per the provisions of Section 2 of the Children Act . The age of the minor was confirmed by the dentist also who opined that he was aged between 14-15 years.

The proceedings at the trial court does not show that there was such *voire dire* evidence. The court simply proceeded to swear the witness who apparently in his opening remarks stated that he was born in 1998 and he was in standard 7 at [*particular withheld*] primary school. Ordinarily the purpose of *voire dire* evidence is to test the veracity of the minors if indeed they understood the meaning of an oath. Although sometimes the physic of the minors betray their age it is a good practice always to confirm whether they understand the meaning of an oath.

This case can be appreciated in evaluation of the minors evidence against those of the witness. In principle there was no eye witness to the first incidences of 3/ 4/2013. The only probable witness was PW6 one Evaline Nasimiyu who stated that he saw the accused committing the act with the complainant in April 20013 at 8.30 pm. The only trouble with this is that the incident took place at night but the date was never specified. Further and according to her the minor as well as the appellant took off. If indeed the minor who was crying "**Nasikia Uchungu**" was truly being defiled why did he take off.

Secondly and of great importance was the behavior of the minor. His father stated that after disciplining him he still went back to the appellant home. One would be at pains to understand why after being forcefully defiled and threatened with a knife the minor would still go back to the assailant house. Even if he was afraid of his parents disciplined, logically going back to the appellant house in my view would be the last consideration.

The other issue that I find disturbing is the period which it is alleged that the appellant confined the

complainant in his house. This was between 3/ 4/2013 and 18/5/13 this was over one month. I do not find any credible evidence to this . Other than being sodomised 6 times, there is nothing to suggest that after being chased away by the appellant's wife the minor was defiled again.

In his testimony the minor stated that

“ He defiled me again the following night on 20/6/13 the accused wife came and found me in the house. She chased me . I went to work for one day and decided to go home. I told my parents what Protus had been doing with me”.

What I find disturbing is that the minor was a student yet on the same breath he stated that he went back to work for one day. Where was this and who had employed him?

The other unclear piece of evidence as presented by the prosecution is the medical report, that is the P3 form. According to Pw4 he opined that;

“ On the anal region there was slight tenderness. There was no obvious injuries except the tenderness.”

On cross-examination he said;

“ The tenderness I observed meant that something had penetrated.”

This in my view was not conclusive. Tenderness could be cause by anything. To conclude the way the witness did was not factual. PW6 stated that the minor was in pain and crying of pain when he saw the appellant defiling him. Surely, common sense would dictate that there should be some serious injuries not some tenderness.

Based on the above observations it would be unsafe not to allow this appeal. There was too much loopholes in the prosecution case. There was not consistency in the prosecution evidence. The evidence of the minor was not tested though voire dire evidence. No eye witness to the offence and even if I was to rely on Section 124 of the Evidence Act Cap 80 Laws of Kenya it would be unfair to

the appellant in other words I do not think that the evidence of the complainant would be believed totally.

The appeal is allowed. The appellant set free unless lawfully held.

Delivered this 25th day of January 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for state

Appellant – present

Kirong – Court Assistant