



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 28 OF 2012

(Being an appeal arising from the judgement of Kitale Principal Magistrate T.A. Odera delivered on 14/2/2012 in Criminal Case NO. 2697 of 2010)

TOYOS LOTIYOLE LOMUKERENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of **Trafficking for Sexual Exploitation Contrary to Section 18(2) of the Sexual offence Act No 3 of 2006**. The particulars of the offence were that on diverse dates between **29th September 2010 and 7th October 2010** at [Particulars Withheld] in **Trans Nzoia County, intentionally facilitated the travel of W K N from Kapkoi farm to Uganda across the borders of Kenya with intent to defile the said W K N after the journey.**

The second count is **Defilement of a Child Contrary to Section 8(1) of the Sexual offences Act No 3 of 2006**. The particulars of the offence are that on diverse dates between **29th August 2010 and 7th October 2010** at Kenya [Particulars Withheld] village in **Trans Nzoia County intentionally caused his penis to penetrate into the vagina of W K N a child aged 15 years.**

The appellant was convicted to 15 and 20 years respectively.

The facts as presented during trial were that PW1 the complainant was heading home from church on 29/8/2010 at around 5.50 pm. On the way she met two men sitted near the road who ordered her to stop or else they shoot her with a gun. They then took her to Uganda and one of them was the appellant. They then crossed over near Suam and slept in a certain room where he proceed to defile her till morning. He then left her under a guard of 5 men together with his old mother. She said that she would herd sheep. After about 2 weeks the appellant went back to Uganda and had sex with her again. In the morning she escaped when the appellant and his brothers left for river. She was helped by the fishermen to cross the river and slept in some homes of strangers before reaching home.

When she arrived home she told her parents the incident and in the process saw the appellant riding a bicycle and his father gave chase and arrested him. He was taken to the police station and charged.

PW2 J C the complainant's mother stated that the complainant disappeared on 29/5/10 after going to church and they began a search the following day. She even went as far as her grandmother's home at Japata. She reported the matter to the police as the place was not secure.

On 8/10/2010 at 5.30 pm she returned home and narrated the ordeal. In the process the appellant arrived in her home and demanded her back. He was chased and arrested by police reservist. She then took the child to hospital and a P3 form was filled.

PW3 P.C. Sahala Abdi testified that on 8/10/2010 at around 8 pm the appellant was brought by the complainant's parents in the company of police reservist and accused of defilement.

He carried out the investigations and charged the appellant. He also produced the age assessment report for the minor.

PW4 Linus Ligare a clinical officer produced the P3 form which showed that there was torn hymen and no other abnormality detected in the urine.

When put on his defence the appellant denied the charge and he gave long explanation on his whereabouts between 5/8/2010 when he went herding his animals at Siyoi and Chepchoina. That when he arrived at Cheptiya and Chepchoina he met many people and that is the place he was arrested and placed in police custody. He also said that a police officer took Kshs 15000 from him as well as his identity card and that of his mother. He was later charged with the offence.

Analysis and Determination.

I have perused the submissions of both the learned state counsel as well as the appellant's. In his grounds of appeal the appellant has contented that not all material witnesses were called to testify especially those who arrested him; that there were inconsistencies in the evidence as presented by the witnesses; the medical evidence was insufficient.

This being a first appeal the court is enjoined to re evaluate the evidence a fresh and arrive at independent findings.

The state submitted that the age of the complainants was clearly demonstrated, there was penetration and the identity of the perpetrator and that the complainant was taken across the border by the appellant.

As to the age of the complainant although there is no other documentary evidence the dental age assessment report by Dr Kiprop, in my view was sufficient to establish that she was about 15 years.

Since there were 2 counts I shall propose to deal with the 2nd count of defilement. It was the minor's evidence that after being abducted she was defiled by the appellant twice. Once on the first day and the second time after he came back from Kenya. Those were the only two occasions. The complainant was then treated and examined when she came back to Kenya after several months and according to PW4 the hymen was torn and nothing else significant was established.

I find this to be a little bit general and more importantly so weak to have led the lower court convict. I did not see any sufficient testimony even after the charge sheet was amended to include the new charge of defilement. In fact when the complainant was recalled the prosecution did not bother to lead her into shedding more light on this count. On the contrary she only explain how she was abducted and not how she was defiled. I expected that she would have been led to explain how she was defiled in detail by the appellant. But to only state in her initial testimony that she was defiled twice without much input in my view was insufficient.

Neither did the P3 form elicitate any significant results. The fact that the hymen was torn does not ipso facto indicate that she was defiled by the appellant only. She would have been defiled even prior to this.

The next aspect is whether the complainant was abducted by the appellant. She narrated how she was abducted and held under guard in Uganda. She also narrated how she escaped through assistance of some fishermen till she arrived home. What is intriguing however is how the appellant was arrested. The evidence of a minor ought to be corroborated and I find the best corroboration would have been by her

mother.

In explaining how the appellant was arrested she stated as follows;

“On reaching home I started narrating my ordeal to my father and I saw accused person while riding on a bicycle and I showed my father that he is the one who abducted me. My father told him to stop but he jumped out of the bicycle and my father chased him. My father called a police reservist. My father and some students chased accused on the foot. The reservist found him father and he arrested him.”

PW2 stated as follows

“As I was conversing with the child accused emerged near my home. I went out of the house and found accused seated on a bench outside my house. I asked him what he wanted and he told me he had followed his wife. We argued and I called a police reservist. Accused tried to run away but he was arrested by the reservist and school children.”

These are two contradictions by the complainant and the mother. PW1 stated that the appellant was riding a bicycle while PW2 stated that he was sitting on a bench. Clearly one ought to be right.

I find that both the complainant's father and the police reservist should have been called. This was a case of a minor. Her evidence essentially needed corroboration. For the mother to have explained differently from PW1 on how the appellant was arrested casts doubts on the whole incident. More importantly the minor explained the ordeal to her father and not the mother. What then was difficult is the father testifying.

This argument could be stretched further as the minor did not go through voir dire examination. It is not clear whether she knew the nature of the testimony. Since her evidence needed corroboration, the trial court should have satisfied itself of whether she knew the aspects of speaking the truth.

In the case of *Julius Kiunga Mrithia Vs Republic (2011) eKLR* the court stated as follows on this aspect;

“ Under Section 19 of the oaths and Statutory Declaration Act (Cap 15 Laws of Kenya) when 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.”

The court further stated

“..... the procedure for conducting voir dire examination was properly enunciated in *Francisco Matore Vs Republic (1961) EA 260* and emphasized in subsequent decision of the court of Appeal. The trial magistrate should question the child's understanding of the nature of the oath and (2) if the court does not allow the child to be sworn it should record whether or not in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth. Applying that procedure, the record of the trial shows that the magistrate clearly recorded the voir dire examination of the child.”

Based on the above I hold that had the evidence of Pw2 been consistent with PW1 perhaps the question of whether there ought to have been voir dire examination would have been lesser. For now it is not

clear whether she spoke the truth or not.

In the premises I do not think that there was sufficient evidence to prove that the appellant abducted the minor. Infact the other key witnesses included the complainant girlfriend's who went to church together on that particular day. In fact there was nothing to suggest that even for those months the complainant disappeared a report was made to the police. Nothing was shown by the investigating officer to suggest that there was such a report of a missing child.

For the above reasons the appeal is hereby 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