



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 55 OF 2015

(Being appeal arising from sentence and conviction of Kitale Resident Magistrate C.C. Kipkorir delivered on 29/4/2015 in Criminal Case No. 1327 of 2014)

JAMES SIKUKU WEKESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. 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 Offences Act No 3 of 2006**. The particulars of the offence were that on the **4th day of April 2014 at [particulars withheld] village within Trans Nzoia County, unlawfully caused his penis to penetrate into the vagina of SAO a child aged 13 years.**

2. The alternative charge was **Committing Indecent Act with a child Contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006**. The particulars are that on the **4th day of April 2014 at [particulars withheld] Village within Trans Nzoia County intentionally caused the contact between your genital organs namely penis and genital organs namely vagina of SAO a child aged 13 years.**

3. The appellant was convicted and sentenced to 20 years imprisonment. He has filed an appeal to this court citing several grounds. Before determining the same it is worth while to summarise the evidence as presented at the trial court.

4. **PW1 the complainant** testified that he had come home from school (Grassland primary school) for lunch at 1 pm. Her step father whom she was staying with gave her food and because it was raining she decided to sleep. In the process the appellant came into the house and undressed and proceeded to defile her. She cried but did not scream as it was raining and the radio was on. She thereafter left for school but she had difficulty walking. When she came back in the evening she was asked by her father but she said that her leg was hurting as she was afraid to tell him. Later after pressing hard she told the father what the appellant had done. She said that the appellant was a person she knew and he had been given a bicycle by her father, which infact was returning that afternoon.

5. She was thereafter taken to hospital. Her father reported the matter at the police station and later the P3 form was filed as well as dental age assessment done.

6. **PW2 NOO** the complainant's father testified that on the material day he told the appellant to take home the bicycle which he had given him to use in getting him stock of clothes. By then PW1 was at home. He testified that the home and the shops are very close. After the rain he called PW1 so that she could go

back to school. The appellant equally left the house using a different route just as the complainant left for school. In the evening as she came back from school she saw that she was pulling her leg. Upon inquiry she told him that he had been defiled by the appellant. He called Francis Makokha the village elder as well as the Assistant Chief one Moses Bukuswa and took her to the hospital. The matter was then reported at the police station where subsequently the appellant was arrested.

7. **PW3 Pharis Silali** did a dental age assessment upon the complainant and opined that she was 13 years of age.

8. **PW4 Dr Kirwa Labbat** did examine the complainant and found that there was laceration on her vagina and that the hymen was broken. He concluded that she had been defiled. She found blood stains upon examination after 3 days.

9. **PW5 P.C. Rose Sambul** testified on behalf of the investigating officer, one Stella Kabin who had been transferred. She generally did not undertake anything else apart from confirming that her predecessor had carried out investigations.

10. When put on his defence the appellant gave unsworn testimony and did not call any witness. He said that PW2 wife Anne Nekesa was his secret lover and that on 3/4/2014 she came with the chief and 2 police officers and demanded Kshs 6000 he had promised. He did not have the money but they proceeded to take his phone as well as Kshs 1700. He denied the charge.

Analysis and Determination

11. This being the first appeal this court is enjoined to re-evaluate the evidence afresh and reach a fresh and independent finding. The offence of defilement requires that one ought to prove actual penetration and the identity of the perpetrator.

12. The appellant has raised various grounds of appeal.

Notably are that the entire prosecution evidence was insufficient and could not convict, that crucial witnesses were left behind and the entire evidence by the prosecution was full of contradictions.

13. I have perused the evidence on record as well as the lengthy written submissions on record. I have no doubt that the complainant as well as the appellant are well known to each other. It is not in dispute that the appellant had been given the bicycle to use by PW2. Both of these issues are not disputed.

14. There is no eye witness to the incident except the testimony of the minor. She vividly described how the appellant came in while asleep after lunch and defiled her. The appellant on the other hand denied this. As to whether the appellant went to the complainant home at that particular time and day taking the bicycle seemed not to have been disputed by the appellant. He did not deny this line of testimony by PW2 during cross-examination. He did not deny either that he usually uses the said bicycle to get stock for PW2. I therefore hold the view that there was every possibility that on the material day, the appellant had PW2 bicycle and because it was about to rain he decided to take it to PW2 house, where he found the complainant sleeping after taking lunch and waiting for the rain to subside so that she could go to school. The above observation is backed by PW2's testimony that after the rains he called PW1 so that she could go back to school.

15. Is it possible that he defiled the minor in the process. That evidence is corroborated by the evidence of PW4 the medical doctor as well as the father. For it was only later in the evening that he saw the child walking abnormally that he inquired from her. Pressed further she told the father what had transpired during the day. The medical report (P3 form) clearly indicated that she had been defiled. Even though there seemed to be no evidence that the complainant bled, the conclusion by the doctor clearly demonstrated that there was penetration which is an essential ingredient in such offences.

16. I have also perused the appellants defence and there is nothing to suggest that there was malice on the

part of the appellant or her father. If he was a boyfriend to PW2's wife then I do not see any relation as to why she should blackmail him as regards the minor.

17. Neither is the failure to call key witnesses according to the appellant sufficient to allow the appeal. Infact the key witness are R and K, whom I suspect are minors friends whom she alleged they took the Kshs 10 given to her by the appellant. I do not see how their testimony would have aided the appellant.

18. This matter in my vies is a classic case where the proviso to Section 124 of the Evidence Act applies which states:

“ 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 proceedings, the court is satisfied that the alleged victim is telling the truth.”

20. From the evidence on record I do not find any reason why the complainant who was well known to the appellant would implicate him. Even if there were any differences between him and PW2's wife there is nothing to suggest that the girl was a pawn in the whole difference. There is nothing to suggest that she was coached.

20. In the premises I do not find the appeal meritorious. The same is hereby dismissed.

Delivered this 9th day of March 2017.

H.K. CHEMITEI

JUDGE

In the presence of;

M/s Kakoi for Respondent

Appellant – present

Kirong – Court Assistant