



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 115 OF 21015

{Being an appeal arising from conviction and sentence of Resident Magistrate C.N. Mugo delivered on 22/10/2015 in Criminal Case NO. 4679 of 2014}

TOBIAS LUKOYE.....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(2) of the Sexual offence Act No. 3 of 2006**. The particulars of the offence were that on **diverse dates between 1st March 2014 and 13th November 2014 in Kitale within Trans Nzoia County intentionally caused your penis to penetrate the vagina of R W W a child aged 10 years.**

2. He was also charged with the alternative count of **Committing an Indecent act with a child contrary to Section 11(1) of the Sexual offences ACT No 3 of 2006**.

The Particulars of the offence were that **on diverse dates between 1st March 2014 and 13th November 2014 in Kitale in Trans Nzoia County intentionally caused the contact between your genital organ (penis) and the genital organ (vagina) of R O a child aged 10 years.**

3. The appellant denied the charge and the prosecution called several witnesses to establish their case whose evidence can be summarised as follows.

4. PW1 the complainant in her voire dire examination gave sworn testimony. She stated that the appellant was their neighbour and on several occasions, at least 5 times, he would call her to his two roomed house and proceeded to defile her. She said that after the exercise he would give her Kshs 50 or at time kshs 100. She used the said money to buy dolls and sweets. She said that the appellant warned her not to tell anyone and she actually did not do so as she would receive money from the appellant.

5. The complainant graphically described how the appellant would defile her and although she would feel pain she persevered as she would be paid at the end of the encounter. This went on till PW2 her mother who was staying in Uganda came and the complainant sibling told her that the complainant had a lot of money (kshs 150). Upon inquiry she confessed to her mother how she got the money. The mother then proceeded to the house of the appellant whereupon inquiry in the presence of the appellant's wife he acknowledged that indeed he gave money to the complainant. The complainant's mother then reported the matter to the police and was referred to the hospital where it was confirmed that the complainant had been defiled. The appellant was then arrested through the assistance of the village elder and his security

team.

6. PW2 C N the complainant's mother narrated the same story. She apparently stays and does business in Uganda while her husband stays with the children in Kitale. Upon inquiry from the child where she got the money, and upon the child confessing to her, she proceeded to the appellant's house. The appellant told her that she had given the child the money to buy a skirt.

7. PW4 Pharis Silali did a dental age assessment examination upon the complainant and concluded that she was aged 10 years. Earlier the complainant mother PW2 testified that she was born on 10/2/2005.

8. PW6 Gabriel Gichuki the Clinical Officer produced the P3 form in respect to the complainant and concluded that the hymen membrane was torn and old looking a probable sign that the complainant had engaged in sexual activity.

9. PW5 Michael Muchira was the investigating officer who testified that upon receiving the information at Kitale police station through PW2 he issued her with a P3 form and proceeded to record statements from the witnesses and charged the appellant with the offence.

10. The appellant tendered sworn evidence denying the offence. He gave an alibi stating that between 26/2/14 and 16/5/14 he worked at [particulars withheld] primary school and Lodwar where he stayed upto November 2014. He produced various exhibits to support his alibi which included bus tickets and letters from the said primary school. He did not deny though that they were neighbours with the complainant.

11. DW2 A C a treasurer at [particulars withheld] primary school produced documents which showed that the appellant was a mason at the said school having build and completed a toilet.

12. DW3 SM a businesswoman who stays at Mitume and a neighbour of the appellant stated that the appellant worked with her husband at Lodwar between 2013 and 2014. She confirmed too that the complainant and the appellant were neighbours.

13. The grounds raised in the appellant's petition of Appeal are mainly fold, namely, that there was no sufficient evidence to warrant a conviction and that the sentence was harsh and excessive.

Analysis and Determination

14. I have perused the entire record and the proceedings. The issue for determination was whether there was actual penetration and whether the perpetrator was identified and whether the said penetration was unlawful.

15. The evidence so far presented shows that there was no eye witness to the incident. The minor though young appeared to be truthful and categorical. Her evidence clearly described how the appellant lured her into his house and proceeded to take her to the bedroom where there was only a mattress on the floor. He then proceeded to undress her and defiled her and gave her Kshs 50 with a Vaseline oil to alleviate her pain. This occurred severally. The appellant would in fact ensure that there was nobody around, especially on Saturday when the appellant's wife had gone to church. These descriptions including the fact that the appellant had a hair chest in my view appear very vivid for a minor of 10 years.

16. PW2 evidence in my view corroborated the evidence of PW1. In fact the reaction from the appellant's wife was actually expected. Both women were shocked that such a thing could occur. It is not in despite that they were both neighbours a fact not denied by the appellant. Neither was it disputed that the same occurred during daytime. The question of recognition or identification of the perpetrator was therefore undenied.

17. As to whether the complainant was defiled, although the incident occurred over a period of time, the findings of the clinical officer were that there was a torn hymen and old looking. There was nothing to suggest that there could be anything else that caused the tearing of the hymen.

18. The age of the complainant was corroborated by the dental assessment report which found her to be 10 years old.

19. The defence by the appellant although an alibi did not oust in my view the fact that he could have committed the offence. Though he may have worked at [particulars withheld] primary school as well as Lodwar there is nothing to suggest that he did not come home. Infact there was no evidence to indicate that he resided at at [particulars withheld] primary school or Lodwar for that matter. The testimony by the defence witnesses were too general in the circumsatnces.

20. I find that the minor's evidence clearly felt within the armpits of **Section 124 of the Evidence Act**, where I am satisfied that she was truthful and clear in her testimony. There was no suggestion at all that there was any enmity between the appellant , the minor or her family or at all. It was natural for PW2 to inquire from her why she had such large sums of cash considering her age.

21. In the premises I do not find this appeal meritorious. The sentence was lawful as that is what is provided in law. The minor was proved to be 10 years old and thus the courts hands are tied pursuant to Section 8(2) of the Sexual offences Act.

The appeal is otherwise dismissed.

Delivered this 9th day of March 2017.

H.K. CHEMITEI

JUDGE

In the presence of;

Kakoi for Respondent

Kaosa for appellant

Appellant – presented

Kirong – Court Assistant