



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 9 OF 2012

(An appeal from judgment in original Kitale CMCR Case NO. 2815 of 2010 delivered on 26/1/2012 by T.A. Odera Principal Magistrate)

HASSAN JUMA WAFULAAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

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 were that **on the 26th day of October 2010 at [Particulars withheld] Estate in Trans Nzoia West District within Rift Valley Province** by use of your genital organ namely penis unlawfully and intentionally caused a penetration into the genital Organ namely Vagina of **V A** a girl aged 8 years.

The appellant was convicted and sentenced to life Imprisonment hence this appeal.

The Prosecution case can be summarised as hereunder.

PW1 the complainant who is class 4 pupil said that on the material day her father who works at [Particulars withheld] hotel gave her some sugar, rice, tomatoes and onions to take home. He also gave her Kshs 100/- plus 10/- for her own use. On the way she stopped to buy Samosa which was being sold by the appellant. He told her to enter the house and wait as he cooks the Samosa which was yet ready. She obliged. The accused then entered the door. She then put a cellotape on the complainant mouth and defiled her till the following morning. In the morning a certain girl (the appellant sisters) came and inquired from her who she was but she never responded. The complainant mother then came from school and found her in the same house. The appellant had gone to buy cooking oil for cooking Samosa.

She then left with her mother who discovered that she was not walking properly. Upon examining her in a toilet at [Particulars withheld] Hotel she found that she did not have her panty and she was bleeding. She told her the ordeal she had gone through. They reported the matter at school and later police station. The complainant was treated at Kitale District hospital and P3 form filled. The appellant was later arrested.

PW2 J O the mother to the complainant testified that the complainant did not arrive home from school that afternoon as she was supposed to bring food for supper from her husband C O. She called the husband who informed her that he had send the same with the complainant. The following day she went to school and spoke with the teacher who informed her that the child had left school the previous day.

In the process one of the children told her that they had left the complainant at the Kiosk where Samosas

are sold. She went to the said Kiosk and found the child with a certain lady. She saw that the child was not walking normally and she checked her. She found that she had been defiled. Her private parts was bleeding. She took her to school but was advised to report to the police. She took the police to the scene where out of the 3 boys they found the child singled out the appellant.

She then took the child for treatment.

PW3 P.C. Woman Lucy Nyaboke carried out the investigation. She testified that the appellant was brought to the station with the minor whom he had defiled. She recorded the statements and took the child for treatment. She also on cross-examination said that she visited the scene but did not take any photographs.

PW4 Linus Ligare examined the minor and filled the P3 form which he produced. He found on examination that the hymen was torn and fresh looking .

When put on his defence the appellant gave unsworn evidence. He said that on 26/10/2010 he was selling Kangumu in his place of work when people in a Saloon vehicle asked for the house of one Centrine Nafula. He showed them the house but did not find her. He was accused of lying and was arrested and taken to Kitale Police station and charged.

The appellant has mounted several grounds of appeal which can be summarised as lack of sufficient evidence to sustain the charge.

The learned state counsel supported the conviction and sentence arguing that there was sufficient evidence to convict the appellant.

That penetration was proved and the age of the child as well.

Analysis and Determination

I have perused the entire proceedings as well as the Submissions by the parties. The question of the defilement of the minor was well settled by the medical evidence and corroborated by PW2 the mother who saw blood flowing from the minors private parts. Further the question of the age of the complainant was not contested and I shall take that by then she was aged 9 years.

Is there sufficient evidence to suggest that indeed it was the appellant who defile the minor? The only evidence available is that of the minor. The other girl whom the minor referred to as the sister to the appellant was not called. The appellant has argued that it was inconceivable that no one else would see the minor between the time she locked her inside the house till morning. The minor however countered this argument when she testified that she could not scream as the appellant had gagged her mouth using a cellotape.

Against all the above evidence who then defiled the minor?

Is it possible that she was defiled elsewhere that night and not at the premises of the appellant?

Section 124 of the Evidence Act Cap 80 Laws of Kenya states as hereunder.

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceeding against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

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.”

The test here is whether the victim is telling the truth. In the instance case, I do not see any evidence to suggest that the minor lied.

Taking into consideration her age, I find her evidence consistent with that of her mother who found her the following morning stranded.

I do not find any reasons why she would implicate the appellant and not the other 2 persons he was with when they went to the scene. In any case the defence raised by the appellant does not really explain where he was the previous night.

All in all I do find that taking into totality the evidence as presented by the prosecution I find that the complainant though young was believable.

Consequently I shall disallow this appeal by dismissing the same.

Orders accordingly.

Delivered this 6th day of October 2016.

H.K. CHEMITEI

JUDGE

Ms Abele for prosecution

Appellant - present

Kirong – Court Assistant