



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CRIMINAL APPEAL NO. 80 OF 2012

(An appeal from judgment in original Kitale CMCR Case No. 447 /2011

delivered on 25/6/2012 by J.M. Nang'ea Senior Principal Magistrate)

SILAS ESINYEN NAKALE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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(3) of the Sexual offences Act NO. 3 of 2006.**

The particulars of the Offence were that **on the 10th day of February 2011 at [Particulars withheld] Trans Nzoia County** intentionally caused his penis to penetrate the vagina of **L N K** a child aged 15 years.

The appellant was convicted and sentenced to 20 years imprisonment hence this appeal. The prosecution called a total of 6 witnesses and their evidence can be summarised as follows.

PW1 L N K who was born on 27/9/1996 and a standard 8 pupil at [Particulars withheld] told the court that the appellant was his boyfriend. At around 10 pm on 16/2/2012 she sneaked from her home through the window of their bedroom when the appellant came to pick her as they had agreed. They went to the appellant single room where they proceeded to have sex. In the process one **N M** alleged family friend came knocking the appellant room. When the appellant refused to open the said **N** pushed the door and a fight ensued between her and the appellant. In the process the complainant escaped back to her home where she went through the widow back to her room.

The following day the father of the complainant was informed by **N** of what had transpired that night.

By that time the complainant was already in school. The father followed her to the school and informed the school administration. She was then taken for medical assessment and thereafter matter reported to the police who carried out the investigation and later had the appellant arrested. The complainant all along maintained that the appellant was his boyfriend and this was not the first time they were having sex.

PW2 Dr Kiprop Jonathan carried out age assessment of the complainant and concluded that she was 15 year old.

PW3 PC(W) M U received the report from the complainant's father and she took their statement. She accompanied the father and daughter to Kitale district hospital where a P3 form was filled. By then the appellant had been arrested by Kwanza police post and the police reservist.

PW4 Kirwa Labat a clinical officer did examine the complainant and found that the hymen had been torn though it was old looking.

She had already changed her clothes and had taken bath.

PW5 K K N the complainant's father and also a teacher testified that he was informed through a phone call by N M of the incident that happened that night between the complainant, her daughter, and the appellant. By then the complainant had gone to school. He went to the school where he met the girl as well as the school management.

Upon being questioned she admitted and the matter reported to the police which led to her being taken for medical examination and later the arrest of the appellant.

PW6 Moses Mackenzie Nabiswa upon receiving complaint from PW5 proceeded with a colleague to arrest the appellant and handed him over to Kwanza police station.

When put on his defence the appellant denied the charge. He said that he was training his grandfather oxen that day. He was called by his mother and informed that some people were looking for him. He was then arrested and taken to Kwanza centre and later handed over to the police.

Analysis and Determination

The appellant has filed this appeal citing several grounds. The learned state counsel supported the sentence and conviction. From the entire reading of the evidence on record it is apparently clear that the only person who witnessed the incident is one N M. For some reason she was not called to testify yet it was her who triggered the whole exercises.

The appellant conceded on appeal that the complainant was his girlfriend. The complainant too stated as much in her evidence in chief and during cross-examination. She even went further to state that that was not the first time they were having sex. Is it possible then that they were together that night. He denied the charge. I find that the complainant although her age was not disputed, seemed to have had sexual relations probably with the appellant and it is also possible not to rule out with other men. She rightly conceded that she sneaked out through the window at 10 pm and again came back through the same. If this is true then the only logical thing and to ascertain that she was actually with the appellant was to call the said N.

Although the prosecution need not call a specific number of witnesses to establish their case. I find that in this case the evidence of N was fundamental. In any event PW5 the complainant father's did not even meet her but he received news via a phone call. Neither did the police bother to get statements from N to verify whether indeed the complainant was with the appellant that night or elsewhere.

What is interesting further is that the incident did not happen at the complainant's home but the appellants. If this is so then N would have been the right person to tell the court.

Although the provision of **Section 124 of the Evidence Act** provides that in the Sexual Offences the evidence of the victim alone if it is believable need not be corroborated, I find that in the instant case I do not think given the prevailing circumstances the evidence of the complainant can be taken wholesale. This is because as she confessed in her evidence this was not the first time she had sex. The evidence of the clinical officer stated as much.

I think I have stated much to show that it would be unsafe to sustain the conviction herein. Had N been called to shed light on what she witnessed that night perhaps it would have altered the landscape. For

now I shall allow the appeal, set the appellant free unless lawfully held.

Delivered this 6th day of October 2016.

H.K. CHEMITEI

JUDGE

In the presence of;

Abele for prosecution

Appellant present

Kirong – Court Assistant