



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 194 OF 2019

RONALD NAMUKUNGU NGOLI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. I.G. Ruhu, RM, dated 19th November 2018 in the PM's Court at Kimilili, in Criminal Case No. 194 of 2019, Republic vs Ronald Namukungu Ngoli)

JUDGEMENT

The appellant has appealed against his conviction and sentence of ten (10) years imprisonment in respect of the offence of attempted defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.

In this court the appellant has raised seven (7) grounds of appeal in his petition of appeal.

It is convenient to start with considering grounds 2 and 3 together in which the appellant has in a coalesced form faulted the trial court in convicting him on an offence that was not proved beyond reasonable doubt in view of the fact that the prosecution witnesses were not reliable. In this regard, the evidence of the complainant (Pw 1) was taken after a voir dire examination. The court found that she was not possessed of sufficient knowledge and intelligence to appreciate the sanctity of an oath. As a result, she was allowed to make an unsworn statement. She testified that on 5/10/2015 at about 4.00 pm her mother sent her to the river to go and fetch water from the river. She found the appellant who asked her to accompany him to the house of mama Shekina but she refused. As a result, the appellant forcefully took her to that house. At that house the appellant undressed her. He then applied saliva on her vagina. He then inserted his penis into her vagina. In the course of that sexual intercourse the complainant felt very painful. She screamed. As a result, Titus (Pw 2) answered her screams and went to her rescue.

After seeing Pw 2 the appellant stopped what he was doing. The complainant dressed up and left that house with Pw 2 and the appellant. The complainant went and fetched the water and went home. Upon arrival she told her mother what had happened. Her mother took her to hospital; where she was treated.

The evidence of the complainant was supported by that of Titus Kiboi (Pw 2). Pw 2 testified that he went to the river to bathe on 5/10/2015. After bathing Pw 2 heard someone screaming from one of the houses nearby. He rushed there and found the appellant lying on top of the complainant. Both the appellant and the complainant were naked. They looked like they were having sexual intercourse.

Upon seeing Pw 2 the appellant grabbed him by the neck. Pw 2 struggled and freed himself. The appellant then gave Pw 2 his phone and told him not to tell people what had happened. The appellant also promised to give him shs 2,000/- if he (Pw 2) kept quiet. Pw 2 met two people along the way and he told them what had happened. They then arrested the appellant and took him to the grandfather of the complainant. Pw 2 further testified that he had known the appellant for two months before this incident. He also testified that he had no personal differences with the appellant.

PAW (Pw 3) is the grandfather of the complainant. Pw 3 testified that Pw 2 took the appellant to his home and he told him that he found the appellant on top of the complainant in an abandoned house. Pw 3 then interrogated the appellant who admitted having defiled her granddaughter. Pw 3 then took the appellant to Mbakalu police station. Thereafter Pw 3 took her granddaughter to Naitiri district hospital. Pw 3 also testified that the complainant was born on 4/10/2009. Pw 3 identified the birth notification from the registrar of births which was eventually produced as exhibit 2.

In addition to the foregoing witnesses the prosecution called No. 111426 PC Mwitwa Chacha (Pw 4), who was the investigating officer. He visited the scene of crime. He also interrogated the witnesses and as a result he charged the appellant with defilement. Pw 4 further testified that the appellant was found on top of the complainant. When the appellant saw Pw 2 he got up and left his identity card and phone at the

scene.

The prosecution finally called No. 219491 PC Naboth Onyango (Pw 5). Pw 5 testified that he took over the investigations from Pw 4 who had been transferred. He testified that he received the following exhibits namely the P3 form, the mobile form and the identification card of the appellant. Pw 5 then produced them as follows. The mobile form exhibit Pexh 4. A copy of the identification card, exhibit Pexh. 5.

Thereafter the prosecution closed its case and informed the court that they were not calling the clinical officer since the offence charged was that of attempted defilement.

In his defence the appellant testified on oath denying the offence. The appellant further testified that on 5/10/2018 he had gone to the river where he bathed. Thereafter someone by the name Tito started to beat him. He wrestled with him. In the process his phone fell down. Suddenly a woman appeared on the scene claiming that the appellant had attempted to defile her daughter.

Furthermore, the appellant testified that Tito took the phone to the grandparent of the complainant and the matter was eventually reported to the police.

This is a first appeal. As a first appeal court I have re-evaluated the entire evidence. I find that the prosecution evidence was credible as the appellant was found by Tito (Pw 2) lying on top of the complainant in his attempt to defile her. Upon seeing Pw 2 the appellant got up and wrestled with Pw 2. I find that the appellant was caught red-handed by Pw 2. He was stopped from completing his act of defilement by the appearance of Pw 2 at the scene.

I find no merit in grounds 1 and 2 which I hereby dismiss.

In ground 4 the appellant has faulted the trial court for convicting him in the absence of corroboration. I find that the evidence of the complainant was corroborated by that of Tito (Pw 2) who found the appellant on top of the complainant in his attempt to defile her. He was stopped in his tracks from fulfilling his intentions by Pw 2 who had gone to the rescue of the complainant. Pw 2 had answered the screams of the complainant. This ground lacks merit and is hereby dismissed.

In grounds 5 and 6 the appellant has faulted the trial court for imposing an excessively harsh sentence; since he was a first offender.

I do not find any basis to interfere with the sentence imposed by the trial court; which I hereby dismiss for lacking in merit.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THROUGH VIDEO CONFERENCE AT NAIROBI THIS 24TH DAY OF FEBRUARY 2022.

J M BWONWONG'A

JUDGE

In the presence of:-

Mr. Kinyua court assistant

The appellant – present in prison

Ms Mukangu for the respondent