



REPUBLIC OF KENYA



KENYA LAW
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**Wanyonyi v Republic (Criminal Appeal 117 of 2019)
[2022] KEHC 12479 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 117 OF 2019
LK KIMARU, J
JULY 25, 2022**

BETWEEN

BERNARD WEKESA WANYONYI APPELLANT

AND

REPUBLIC PROSECUTION

(From original conviction and sentence in Sexual Offence Case No. 111 of 2018 of the Chief Magistrate's Court at Kitale delivered by Hon. D. Wangeci - PM on 8th November 2019)

JUDGMENT

1. The appellant Bernard Wekesa Wanyonyi was charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on July 13, 2018 at [particulars withheld] village in Trans Nzoia County, the appellant intentionally caused his penis to penetrate into the vagina of ELM, a child aged 15 years. In the alternative, the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, the appellant intentionally caused his penis to get into contact with the vagina of E.L.M a child aged 15 years. When the appellant was arraigned before the trial court, he pleaded not guilty to the charge. After full trial, he was convicted as charged of the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. He was sentenced to serve ten (10) years imprisonment.
2. Aggrieved by his conviction and sentence, the appellant filed an appeal to this court. In his petition of appeal, the appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he was convicted on the basis of the testimony of the complainant on penetration that was not supported by medical evidence. He faulted the trial magistrate for relying on weak evidence adduced by the prosecution witnesses which was based on shambolic investigation that excluded forensic evidence. The appellant was of the view that if the trial court had properly evaluated the evidence, it would have found that the prosecution's evidence was contradictory, inconsistent,



uncorroborated and not sufficient to secure his conviction on the charge brought against the appellant. The appellant was aggrieved that his defence had not been considered by the trial court before it reached the impugned decision. In the premises therefore, the appellant urged the court to allow the appeal, quash the conviction and set aside the custodial sentence that was imposed upon him.

3. During the hearing of the appeal, both the appellant and the prosecution presented to court written submission in support of their respective opposing positions. Whereas the appellant urged the court to find that the evidence adduced by the prosecution witnesses did not meet with the legal threshold to secure a conviction, the prosecution on its part was emphatic that it had discharged the legal burden placed on it to establish the appellant's guilt to the required standard of proof beyond and reasonable doubt. This court shall revert to the argument made on this appeal after briefly setting out the facts of this case according to the prosecution witnesses.
4. The complainant ELM testified that she as 15 years at the time the offence was alleged to have been committed. She testified that on July 13, 2018 at around 1.00 a.m., she was asleep at their home at [particulars withheld] . On that night, she was alone in the house as her mother had attended a funeral vigil at a neighbour's home. The complainant testified that her mother had locked the house from the outside and therefore she was surprised when the appellant, who was well known to her, gained access to the house, got into her bed and forcefully had sexually intercourse with her. The complainant testified that she was unable to raise alarm because the appellant covered her mouth in the course of sexually assaulting her. When her mother PW3 MOA returned home at about 6.00 a.m in the morning, she found the complainant not in her usual mood. She did not communicate to her mother what had happened. However, when she went to school, she told her class teacher who reported to the head teacher who in turn reported to the chief and the chief in turn reported to the police. The complainant was taken to Kiborom dispensary for medical examination but was referred to Kitale County Referral hospital where she was examined by PW1 Linus Ligare who noted that there was a whitish discharge from her vagina. The hymen was torn. According to PW1, his examination had established that indeed the complainant had been sexually assaulted.
5. PW3, the mother of the complainant testified that the appellant was well known to her and was her customer in her green grocer business. It was her testimony that on the particular night, the appellant had escorted her to the funeral vigil and from her evidence, it appeared that there was an agreement between the appellant and PW3 that he would escort her back after the funeral vigil. PW3 testified that when she was ready to leave the funeral vigil, at around midnight, she looked for the appellant but did not find him. Due to the fact that she feared to go home alone, she remained at the funeral venue until 4.00 a.m when she started her journey back home.
6. It was the prosecution's case that the appellant returned back from the funeral vigil, and knowing that the door to PW3's home could not be properly secured, took the advantage of this knowledge and gained entry into PW3's house in her absence and sexually assaulted the complainant. As regards proof of age of the complainant, the prosecution produced the complainant's birth certificate which indicated that the complainant was born on February 15, 2003.
7. When he was put on his defence, the appellant attributed his travail to a disagreement he had with PW3 who framed him after he failed to accede to her request for marriage. The appellant testified that he used to give money to the complainant's mother. She took offence when he told her that she was too old for him to marry her.
8. This being a first appeal, it's the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction. In doing so, this court is required to be conscious of the fact that it neither saw



nor heard the witnesses as they testified. (See *Okeno vs. Republic* [1972] EA 32. In the present appeal, the issue for determination by this court is whether the prosecution established the Appellant's guilt on the charge of defilement to the required standard of proof beyond any reasonable doubt.

9. For the prosecution to establish the charge of defilement, it is required to establish the three essential ingredients being the age of the complainant, penetration (which is the sexual act or assault) and finally the identity of the perpetrator. In the present appeal, the prosecution relied on both the testimony of the complainant, her mother and a birth certificate to support the testimony of the complainant that was 15 years at the time the offence was committed. This court is satisfied that the prosecution established the complainant's age to the required standard of proof beyond any reasonable doubt. The complainant was therefore a child within the meaning ascribed to the term under section 2 of the *Children Act*.
10. As regard penetration, the trial court found that the issue of penetration had not been conclusively proved because the complainant's medical examination did not establish the presence of spermatozoa nor infection caused by sexual assault. This is what the trial court stated:

“ the offence is said to have taken place on July 13, 2018 which is the same day treatment was sought at Kiboromo dispensary and from Kitale Referral hospital dated July 13, 2018, the state of the hymen is stated as torn and old looking. All the laboratory test returned negative including high vaginal swab meant to check the presence of spermatozoa and VDRL of the presence of infection. The only thing noted was a whitish discharge. It is my findings that the issue of penetration has not been conclusively proved. As the hymen was found to be torn but old looking yet treatment was sought the same day the incidence took place.”
11. This court's re-evaluation of the medical evidence that was adduced leads it to a different conclusion than that which was reached by the trial court. The trial court ignored the complainant testimony and that of her mother relating to the circumstances in which the sexual assault took place. The complainant's mother testified that when she arrived home at 6.00 a.m. in the morning, she found the complainant returning from the bathroom after she had taken a shower. Victims of rape and defilement are usually advised not to take a shower before medical examination. However, due to the traumatizing and humiliating nature of rape and defilement, victims more often than not would like to remove all the traces of their trauma and humiliation by taking bath after the sexual ordeal.
12. The complainant's reaction was therefore not surprising in the circumstances. The fact that she may have had a previous sexual experience (by the fact that her hymen was old looking and not fresh) should not have distracted the trial court from dispassionately evaluating the evidence. The complainant knew the appellant well and her identification of the appellant during the sexual ordeal was not that of a stranger but of someone she recognized and knew well. Infact it was her testimony that she had attempted to warn off the appellant from sexually assaulting her by indicating that she would report him to the authorities as she knew him.
13. Upon re-evaluation of the evidence that was adduced by the prosecution regarding penetration, this court reaches a different conclusion than that reached by the trial court. This court found the complainant's testimony regarding the circumstances which she was sexually assaulted to be compelling and truthful. The fact that she reported the incidence to her teacher immediately she reached school, is proof to this court that the complainant was telling the truth. Irrespective of whether or not medical evidence supported her evidence, the proviso of section 124 of the *Evidence Act* was sufficient to enable the trial magistrate convict the appellant of the main charge of defilement. However since the prosecution did not cross-appeal the finding, this court will led the finding be.



14. In the premises therefore, it is clear from the foregoing that the appellant's appeal is for dismissal. It is hereby dismissed both on conviction and sentence. The appellant should ride his luck because he would have faced a more severe sentence if the prosecution had cross-appealed and this court had found him guilty of the more serious main charge of defilement and not the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* that he was found guilty by the trial court. It is so ordered.

DATED AT KITALE THIS 25TH DAY OF JULY 2022.

L. KIMARU

JUDGE

