



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM; CHERERE-J)

CRIMINAL APPEAL NO. 166 OF 2015

BETWEEN

EMMANUEL SIMIYU WANJALA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Criminal Case Number 2338 of 2014 in the Chief Magistrate's court at Bungoma by Hon. D.C.Mutai (RM) on 18.09.15)

JUDGMENT

The trial

1. **EMMANUEL SIMIYU WANJALA** (*hereinafter referred to as the Appellant*) has filed this appeal against his conviction and sentence on a charge of defilement of a girl contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that ***On diverse dates between 09th August, 2014 and 13th September, 2014 in Nzoia Market within Bungoma County intentionally and unlawfully caused your genital organ namely penis to penetrate the genital organ namely vagina of SNS a girl aged 11 years***

THE PROSECUTION'S CASE

2. The prosecution called 5 witnesses in support of the charges. **PW1 SNS**, the complainant recalled that on the material date, she met a man she did not know but who introduced himself to her as her uncle. It is here evidence that the man took her to his house where he defiled her every day until 25th September, 2014 when she escaped. She stated that she reported the matter to her uncle **ASS** at a later date and was taken too the police station and also to hospital where she was examined. **PW2 ROSE NALIKA**, Appellant's neighbor stated that she saw a girl in Appellant's house and she reported the matter to a village elder consequent to which Appellant was arrested. **PW3 DR. ELIAS ADOKA** examined complainant on 22.09.14 found that complainant had no fresh tears or cuts but her hymen was broken. He produced her P3 form as **PEXH. 2** and age assessment report which showed that complainant was 11 years as **PEXH. 3**. **PW4 ASS** complainant's uncle told court that he sent complainant to her father's house on 13.09.14 and when she returned on 14.09.14 reported that a man had given her fare. He testified that complainant on 19th September, 2016 identified the Appellant at Nzoia Market as the person that had given her fare and he was arrested. **PW5 PC Edward Mutahi** the investigating officer received complainant's report on 19.09.14, arrested the Appellant on the same day and after investigations caused him to be charged.

THE DEFENCE CASE

3. When the appellant was put on his defence, he denied the offence.

4. The learned trial magistrate considered the evidence and finding the charge proved sentenced appellant to life imprisonment on 18th September, 2015.

The Appeal

5. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on 01st November, 2018. From the 4 grounds of appeal and written submissions filed by the appellant on 21st January, 2019, I have deduced the following issues: -

1. That the prosecution case was not proved beyond reasonable doubt

2. That the sentence is unlawful

6. When the appeal came up for hearing on 06th August, 2019, Mr. Kebiro learned counsel for the Appellant submitted that he was wholly relying on submissions. Mr. Akello, learned Counsel for the state conceded to the appeal on the ground that there was a dispute as to whether complainant was 11 or 14 years and that the complainant did not have fresh injuries in her genitalia.

7. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under the Sexual Offences Act which are:

- i. Age of the victim.
- ii. Identity of the offender
- iii. Penetration.

8. Together with the ingredients, I will also consider the grounds of appeal raised by the appellant.

9. The complainant told court that she was born on 08th August, 2000 but her age assessment report **PEXH.3** shows that her age was probably 11 years. There was a variance between the complainant's evidence but after considering her age, I find the assessment report by a medical officer that placed her age at 11 years more persuasive and also find that the Appellant was rightly charged under to section 8(1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.

10. The complainant told court that she did not know the Appellant before the material dates. From the reading of complainant's evidence, she alleges to have stayed in her assailant's house first for 3 days from 09th August, 2014 and later on 23.9.14 or 25.09.14

11. **PW2 ROSE NALIKA** stated that she had seen a girl staying in the Appellant's house in the month of August, 2014 and the trial magistrate considered her evidence as corroborating the complainant's evidence that she had been to Appellant's house.

12. I have considered the evidence by the complainant vis a vis the evidence by PW2 and I find that the trial magistrate's finding that the evidence by PW2 corroborated the complainant's evidence that she stayed in Appellant's house for several days is with respect a misdirection for the reason that PW2 say that the girl she saw in Appellant's house was the complainant herein and her evidence therefore ought to have been rejected.

13. I have also considered the evidence by the complainant vis a vis the evidence by **PW4 ASS** who is her uncle and guardian and noted with interest that PW4 did not give any evidence concerning complainant's disappearance for the days she alleges to have been detained in Appellant's house and defiled thereby casting doubt on the complainant's evidence that she had been defiled at the material time.

14. From the evidence by PW4, the only time the complainant left home was on 13.09.14 when he sent her to her father's home and she returned on 14.09.14. The only report she made to PW4 upon return was that she had arrived early because a man she did not name had given her fare. A second incident of the complainant being given money by a man was reported to PW4 by his daughter Sharon on 18.09.14. PW4 stated that she took the complainant to her teachers on that day and it was then that she stated that one Emmanuel Wafula had given her money and defiled her.

15. With respect, there is evidence that the complainant did not know the person that defiled her before the material date. It is therefore illogical and far from the truth that she would know the name of a person she did not know. Her evidence that it was the apparent that defiled her is mired with doubt that was not resolved.

16. Concerning the question of penetration, the law under **Section 2 of Sexual Offences Act** defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”

17. The P3 form **PEXH. 2** produced by **PW3 DR. ELIAS ADOKA** examined complainant on 22.09.14 about 3 days after the alleged last encounter of defilement found that complainant had no fresh tears or cuts but her hymen was broken. The doctor's failure to tell court if the hymen was freshly broken and the absence of any other injury casts a doubt on the prosecution case that the complainant had been defiled.

18. Appellant denied the offence and the trial had an obligation to ensure that the prosecution case was proved beyond any reasonable doubt considering that the Appellant was staring at a term of life imprisonment which is a substantial length of time.

19. Reasonable doubt is logically derived from the evidence or the absence of evidence and if a single circumstance creating reasonable doubt in a prudent mind exists about the guilt of an accused, the same is sufficient to give an accused the benefit of doubts. This case fell short of that threshold of proof and the conviction cannot therefore be sustained.

20. *Having said that*, I am convinced that the prosecution case was not proved to the required standard of prove beyond any reasonable doubt. grounds for allowing this appeal. Had the appeal not succeeded, I would have been obligated to interfere with the sentence of life imprisonment imposed on the Appellant for the reason that mandatory sentences have been declared unconstitutional. (See the Supreme

Court decision in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** and Court of Appeal decisions in **B W v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014)**

21. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty.

DATED AND DELIVERED IN BUNGOMA THIS 09th DAY August 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Brendah

Appellant - Present

For the Appellant - Mr. Kebiro

For the State - Mr. Akello