



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 74 OF 2016

SAMWEL WAFULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Chief Magistrate Honourable M. Wambani

in Eldoret Criminal Case No. 1005 of 2014 dated 17th June, 2016)

JUDGMENT

In the lower court, the appellant herein one *Samuel Wafula* was charged in the main count with the offence of defilement, contrary to *Section 8(1)* as read with *Section 8(4)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this offence are that on the 24th day of February 2014 in Eldoret East district, within Uasin Gishu County, the appellant intentionally caused his genital organs (penis) to penetrate the genital organs (vagina) of *CJ*, a child aged 16 years.

In the alternative, the appellant faced an alternative charge of committing an indecent act with a child, contrary to *Section 11(1)* of *Sexual Offences Act No. 3 of 2006*.

The particulars hereof are that on the 24th day of February 2014 in Eldoret East District, within Uasin Gishu County, the appellant indecently caused his genital organs (penis) to come into contact with the genital organs (vagina) of *CJ*, a child aged 16 years.

The prosecution in this matter called 4 witnesses. The first one, PW-1 is the father to the complainant, one *CJ*, who gave evidence as PW-2. PW-1 according to the record, gave evidence partly upto a point where the prosecutor expressed that he appeared not to understand Swahili language. When he was asked about it he said he knows Swahili but would prefer Nandi. The court adjourned at that point to get a Nandi Interpreter.

On the hearing date that followed, on 28th May 2015, the issue of PW-1 was not revisited and he was not called to complete his evidence in chief, be cross examined and re-examined. Pw-2 who was to undergo an age assessment had not done so, and was called as a witness. The court indicated she'll be recalled after the age assessment to identify the report. At this time, 28th May 2015 she was 18 years old and already married to one, *AK*. Her case is that on 24th February, 2014 she was living at [particulars withheld] with a woman called *BW*. At the time she was aged 15 years and was schooling at [particulars withheld] Primary school in class 6. On the material day at about 6.30 a.m she was on her way to school. It was slightly dark then. At a narrow footpath, in the forest, while walking she just felt someone holding her from behind at the neck. She screamed. He held her throat and did not utter a word to her. The assailant tripped her, prompting her to fall on the ground, on her back. He removed her school skirt and panty and likewise removed his trouser and under pant. He then did what she described to as "bad manners" to her. She explained it as putting his urinating organ into her urinating organ. She saw his face while he was on top of her. She had not seen him before then. The incident took about 2 hours from 6.30 a.m upto 9.30 a.m. For the time nobody else appeared at the scene. She identified the assailant as the appellant herein, in court. He was armed with a panga. When she was set free she dressed up and went home. *BW* took her to her parent's home. She was asked whether she

could identify him and said she could. The matter was reported at Moiben police station. Complainant was taken to Moi Teaching and Referral Hospital. The appellant was arrested and taken to the police station. Complainant saw him there and identified him as the culprit. She had said how he looked and what he was wearing. She said he used to trap birds, "Kangas". He had a bird and a phone of B of which he gave her (the complainant).

On cross examination by the appellant, this witness among other things said the following of which is relevant in determination of this appeal: -

"Did not know that man. Did not know his name. I don't know both names. He is called Samuel Wafula. I don't know you. I had not seen him before. I saw you first in court".

On re-examination she said,

"I saw his face when he did it. I saw him at Moiben police station".

PW-3, is the doctor who examined the complainant at Moi Teaching and Referral Hospital on 24th February 2014, and filled her P3 form. She indicated that the patient (complainant) had fresh abrasions on the left side of her neck & pain on her left thigh. The hymen was broken. She had a whitish discharge in her vagina. The said injuries were fresh. Laboratory tests revealed she was HIV negative and did not have STD. There was no spermatozoa in her vagina. The P3 was thus filled. She produced it as an exhibit.

On cross examination the witness said she was not sure that the patient was then aged 16 years.

The last witness who is the investigating officer stated the complainant made the report on 24th February, 2014 at Moiben police station while in company of her father. He referred her to Moi Teaching and Referral Hospital for examination and treatment. The appellant was later that day availed at the police station by members of the public. He re-arrested the suspect and placed him in cells. Complainant later returned the P3 and identified the appellant as the man who defiled her. She also gave out her Birth Certificate which was kept as an exhibit.

On cross examination he stated,

"you were arrested by members of the public.They recorded statements.Complainant said she knew her defiler physical appearance".

On re-examination he stated the accused was taken to the police station by members of the public, among them William. He further said complainant positively identified the accused person at the police station.

The appellant in his defence raised an alibi, in which he stated on 22nd February, 2014 he, together with his wife attended burial in Kitale. He returned home alone on 24th February, 2014 at 9.00 p.m, as he had left his wife in Kitale. The following day at 9.00 a.m, the village elder while in company of 2 members of Nyumba Kumi, went to his house and held him for not having an identification card. He was taken to the police station where his finger prints were taken. On 26th February, 2014 he was charged for an offence he did not commit.

The trial magistrate evaluated the evidence and found the appellant guilty for the offence in the main count. He was convicted of it and sentenced to serve 15 years imprisonment.

The appellant, aggrieved by the said conviction and sentence, appealed against both on the grounds that: -

- (1) He was identified by the complainant at the police station and court, and not at the scene.
- (2) Penetration was not proved.
- (3) Complainant's age was not proved.
- (4) He was wrongly arrested.
- (5) Crucial witnesses did not testify.
- (6) The many unnecessary adjournments in the case prejudiced his position fundamentally.
- (7) His defence was unfairly dismissed.
- (8) Voir dire was not conducted on the complainant.

(9) The case was shoddily investigated, evidence was wanting and his right to representation was not observed.

During the hearing of the appeal the appellant put in written submission of which I have gone through.

The state prosecutor submitted orally on age of the victim, penetration and identification of the appellant. Her position is that the victim was 16 years old then as is alleged in the charge sheet and as shown in her Birth Certificate. On penetration, relying on the evidence of the complainant on what actually took place, and that of the doctor who filled the P3 form, she averred that penetration was proved. It further was averred in relation to identification that the complainant saw his face as it was during the day, and the incident took 2 hours.

I have weighed the evidence on record, judgment of the court, grounds of the appeal and the submissions by either side.

The first issue which was not addressed by parties in this appeal is the incomplete evidence of PW1, of which the appellant did not challenge by way of cross examination, and of which the court wrongly weighed or considered in judging the appellant guilty. Page 53 of the typed proceedings, shows the evidence was considered and given weight. The evidence given that it was incomplete and the accused was not accorded a chance to challenge it by way of cross examination, should have been discarded.

On identification of the appellant as the culprit by the only eye witness who is PW2 is not stable. Though she claimed she saw his face, she never gave his descriptions to the court. She allegedly disclosed how he looked and what he was wearing, but the details of such was not disclosed to the court. The court could not find that the appellant fitted the descriptions she allegedly gave to whatever persons and was therefore the right culprit. The appellant was not a person she knew before though her other statements contradicted that as when she claimed that he used to trap birds, "Kanga" and gave her a bird and the phone of *Beatrice*.

Those who arrested the appellant and took him to the police station were not called as witnesses. The complainant was not with them as she was in hospital then. We don't know how he was identified by his arresters as the culprit. Chances that they get the wrong culprit cannot be ruled out, given the shaky available evidence on his identification. In such circumstances, the police would have been safer and certain on identification if a proper identification parade was conducted. A witness can easily be mistaken in identification of a suspect who is presented to her as the only arrested suspect for the offence as it happened in this case. The evidence on identification is not corroborated, it is shaky and unreliable. The trial magistrate erred in finding that the complainant's evidence was corroborated by that of PW3, who was not capable of corroborating other issues other than those relating to the penetration, as she was not an eye witness to the incident.

Age was not properly established. The Birth Certificate was taken after the alleged incident and the prosecutor had indicated the need for an age assessment as such Birth Certificate was suspect. The court bought the position when it ordered for age assessment. The matter was adjourned several times but age assessment was never done and the report availed.

When PW2 gave evidence it was indicated she would be recalled to identify it but she was not. She said she was 15 years old while the Birth Certificate showed she was 16 years old. It was obtained after the incident as stated earlier. By the time she gave evidence she stated she was married and was 18 years old. She never indicated when she got married. The case was adjourned irritatingly so many times for failure to avail witnesses by the prosecution. It was indicated they were reluctant to offer evidence. All these circumstances when weighed together raises doubts as to whether the complainant was a child or an adult during the incident. The alleged school uniform she was wearing was not availed as an exhibit and nothing was produced to show that she was a pupil then. She could as well have been an adult. While the available evidence suggest strongly that she was penetrated, her age and identification of the appellant as the culprit were not proved beyond reasonable doubt. The appellant deserves benefit of doubt on these two important ingredients of the offence. He deserved an acquittal.

On the grounds the appeal succeeds. Conviction is quashed as well as the sentence. He should be set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 24th day of October, 2018

In the presence of:-

Appellant

Ms Kagali for the state

Mr. Mwelem - Court assistant