



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.136 OF 2014

(From CM's Bungoma Cr.No.1210 of 2013 by: Hon. M. Agutu (RM))

MOSES WAMALWA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

This is an appeal by Moses Wamalwa which arises from the decision of Hon. M. Agutu R.M. The appellant was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act.

The particulars of the charge are that the appellant on 24/6/2013 about 6.30 a.m. in [particulars withheld] Village, Busia County, intentionally and unlawfully caused his penis to penetrate the vagina of B.A. a girl aged 14 years old.

In the alternative, the appellant faced a charge of committing an indecent act Contrary to Section 11(1) of the Sexual Offences Act.

The particulars are that on 24/6/2013, at [particulars withheld] Amagoro Village, intentionally and unlawfully touched the breast and vagina of B.A. a girl aged 14 years.

The appellant was convicted on the main charge and sentenced to serve 20 years imprisonment. He is aggrieved by the conviction and sentence and filed this appeal seeking that the appeal be quashed and sentence set aside.

The duty of this court as a first appeal court is to examine all the evidence tendered in the trial court afresh, analyze it and make its own determination but of course, bearing in mind that this court had no chance to see or hear the witnesses testifying in order to assess their demeanor. It is the trial court which had the opportunity to see and hear the witnesses see **Kiilu v Republic [2005]KLR 175.**

The prosecution called a total of five witnesses in support of their case. **PW1 B.A** told the court that she was born in 1998 and was 14 years old. She identified the appellant as a neighbor; that she had sold sugarcane to the appellant on Saturday and he claimed he had no money but would pay later; that on 24/6/2013 at 6.30 a.m. when going to school, the appellant stopped her as she passed near his house. She thought he wanted to give her the money for sugarcane but he got hold of her and pulled her into his house; he tied her hands, gagged her mouth; pushed her onto the bed, tore her pants and lay on her; that she kicked some things in the house and the neighbor heard and called the lady whom PW1 lived with, who came and started to beat both of them; that in the process, the appellant escaped but was chased and caught by members of the public. Later she was taken to hospital. She denied that the appellant was her friend.

PW2 Rose Omasacha, identified the appellant as a neighbor, having rented a house near hers, while PW1 is a daughter of a neighbor; that on 24/6/2013 she woke up and was going to check on how PW1 and her siblings were getting on because their mother was away due to domestic problems and the father was also away PW2 found PW1's brother who said PW1 had left for school and she wondered why PW1 left early without her brother; PW2 saw PW1's brother come back and said that PW1 had been found in the appellant's house by a neighbor who saw her enter the said house. PW2 went and found PW1 in appellant's house and the appellant still in bed. He dressed up and tried to escape but members of public arrested him.

PW3 Catherine Amoiti Omusi is a teacher at [particulars withheld] Primary School where PW1 was schooling. She produced a letter from the school confirming PW1 was in class 5. On 24/6/2013, the head teacher informed her that PW1 had been found in the appellant's house engaging in a sexual act. PW3 went to the DC's offices and found PW1 and the appellant there. PW3 escorted PW1 to the Police Station and then the Hospital for treatment and examination.

PW4, PC (W) Carolyn Gakuo of Malaba Police Post was the investigating officer in this case. On 24/6/2013, about 10.00 a.m. police from Amagoro DC's office took the appellant and complainant to the police station. PW1 was in school uniform. She recorded the complainant's statement who said that the appellant had pulled her into his house and defiled her. PW4 Produced in evidence the age

assessment report and treatment notes.

PW5 Samuel Kibet, a Clinical Officer at Kocholia Hospital, Teso examined PW1 on 26/6/2013 and found that the hymen was torn, but no bruises or tears were found on the labia. She was HIV positive and had gonorrhoea. He also examined the appellant who was found to have gonorrhoea. 2nd test on PW1 showed negative HIV test.

The appellant was called upon to enter his defence and in his unsworn defence stated that on 24/6/2013, he left home at 5.00 a.m. and went to work at a construction site; that on the way to the site, he met a group of 15 people walking towards them, one got hold of him and started to slap him and his companion Wycliffe left. He was taken to DC's office and it was said he had colluded with criminals who slashed people in [particulars withheld] at night. He denied knowing **B.A.** the complainant and never committed the offence.

The grounds of appeal are as follows:

- (1) ***That the lower court proceedings violated his rights;***
- (2) ***That the court erred in considering extraneous matters;***
- (3) ***That the court erred by finding that the charge had been proved;***
- (4) ***That the sentence is excessive.***

In the written submissions, the appellant also alleged that there are contradictions in the names of the person who came to rescue PW1; that while PW1 said she was **Rose Namasalia**, PW2 said she is called **Omusacha**.

Ms. Njeru opposed the appeal for reasons that the complainant was a neighbour of the appellant and they knew each other; that the appellant pulled the complainant into his house; that during the struggle, PW1 kicked some items in the house which attracted neighbours, i.e. PW2 Rose who found the appellant still in the bed but he dressed and fled; that PW3 a teacher at Amagoro Primary School confirmed that PW1 is a student there; that upon examination by a doctor, she was found to have taken part in a sexual activity and infected with gonorrhoea. The appellant was also examined and found to have gonorrhoea.

I have now considered the appeal, all the evidence on record and the rival submissions; the appellant was charged with the offence of defilement contrary to Section 8(1) of the Sexual Offences Act and the burden squarely lies on the prosecution to prove the following ingredients:

- (1) ***That the victim is a child;***
- (2) ***Proof of penetration;***
- (3) ***Positive proof of the perpetrator's identity.***

PW1 testified that she was then 14 years old and in class 5 at [particulars withheld] Primary School. PW3 a teacher at the said school confirmed that indeed PW1 is a student at the said school in class 5. An age assessment was carried out on PW1 and she was found to be 14 years old as per evidence of PW5. The said report was produced in evidence as P.Ex.6. There was medical proof that indeed PW1 was 14 years of age.

PW1 told the court that the appellant got hold of her, pulled her in his house, tied her hands, gagged her, pushed her to the bed, lay on her and tore her pants and that he defiled her. She did not explain exactly what the appellant did to her and what she meant by the appellant defiling her. Neither the court nor the prosecution enquired what she meant because defilement is a legal term.

The complainant was taken to hospital on the same day in company of her teacher PW3, the police and even the appellant. PW5, the Clinical Officer examined PW1, found that her hymen was broken though there were no injuries (tears or bruises) to the labia. However, PW1 was found to be infected with gonorrhoea. On examination of the appellant, he was also found to have gonorrhoea. PW2 found the two, PW1 and the appellant in the appellant's house with the appellant without his trouser.

I am satisfied that PW1 did take part in a sexual act with the appellant. The act took place in the appellant's house and he was found at the scene with the PW1.

I find that the prosecution did prove beyond any doubt that PW1 took part in a sexual act.

As earlier found, PW1 and appellant were found together in the appellant's house. The incident took place at daytime, between 6.00 a.m. and 7.00 a.m. There is overwhelming evidence that the appellant is the culprit.

He tried to escape but was apprehended.

His defence is a mere sham and not believable. I am satisfied that the trial court arrived at the correct finding that the appellant defiled the complainant.

The appellant complained that his rights were violated but he did not specify which rights they were. The appellant also alleged that the court considered extraneous matters, but again, he did not allude to any.

I find that the conviction is sound and this court has no reason to disturb it.

The appellant complained that the sentence is harsh. Under Section 8(3) Sexual Offences Act, where the victim of defilement is between the age of 12 years and 15 years, one is liable, upon conviction, to imprisonment for a term of not less than 20 years imprisonment.

The appellant was handed the minimum sentence under the said section and this court has no discretion to reduce it.

In the end, I find that the appeal lacks merit and is hereby dismissed in its entirety.

Signed and Dated at Bungoma this **23rd** day of ***November***, 2018.

R.P.V. Wendoh

JUDGE

Coram:

Court Assistant: Gladys

Court Prosecutor: Mr. Akello

Appellant: Present