



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

HIGH COURT CRIMINAL APPEAL NO 4 OF 2016

ANJELIMO BARAZA OROMONI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. H.N Ndungu (Miss), CM delivered on 12th January 2016 in Criminal Case No. 107 of 2014)

JUDGMENT

1. The Appellant, Anjelimo Baraza Oromoni was on 12th January 2016 convicted of the offence of Defilement of a girl contrary to Section 8(1)(3) of the Sexual Offences Act, 2006. Consequently he was sentenced to serve 20 years imprisonment being the minimum prescribed sentence for that offence under the law. The Appellant dissatisfied with the conviction and sentence has preferred this appeal.
2. It was alleged that on the 10th day of October 2014 at [Particulars withheld] village, Bukhayo West location within Busia County the Appellant intentionally caused his penis to penetrate the vagina of M I , a child aged 13 years.
3. The Appellant had also been charged with an alternative offence of committing an indecent act contrary to Section 11(1) of The Sexual Offences Act No.3 of 2006. Correctly, no finding was made in respect to the alternative charge.
4. PW1, the complainant, was aged 13 years and in class 5 at the time she gave evidence. After conducting a *voir dire* examination, the Court formed the opinion that she could give sworn evidence. She told the Court that on 8th October, 2014 whilst she was heading home from school she met the Appellant on the road and he offered her 20/= which she took. She split the same with her cousin aged 8 years Y N the following day, 9th October, 2014.
5. On 10th October, 2014, at around 3:00p.m., the Appellant came to where she was collecting firewood armed with a panga and ordered her to lie down or he would kill her. He proceeded to remove her skirt, tore her underwear and inserted his penis inside her vagina. He thereafter gave her 100 shillings and warned her not to tell anyone or he would cut her with a panga. She nevertheless told her cousin Y N that the Appellant had forcefully raped her in the bush. She however did not find the money she was given that she had left in the kitchen.
6. After three days, her mother noticed that PW1 was not walking properly. When her mother enquired as to her difficulty in walking, she did not answer and after school for fear of her mother, decided not to go home and went to the home of her friend S N. She stayed there for three days until her mother came and

asked her about the events of 10th October, 2014. After her confession, PW1 was taken to the children's officer at Busia where she also met the Appellant. There after, she was taken to hospital and the incident reported at the police station where she was issued with a P3 form. She identified the Appellant and described that on both occasions that she had encountered him, he was dressed in a brown shirt and black trouser.

7. PW2 E I is PW1's mother. She recalled that on 4th October, 2014 she noticed PW1 walk with some sort of difficulty as she held her buttocks. Her enquiry was left unanswered. Her daughter did not return home after school. She later came to learn that her daughter had gone to her friend's place. She went to get her on 14th October, 2014 and on interrogation she learnt what had transpired on 10th October, 2014 between the Appellant and her daughter. She reported the incident and took her daughter to hospital on 17th October, 2014.

8. PW3 Kenneth Yatich is a clinical officer stationed at Busia County and Referral Hospital. He attended Court on behalf of his colleague Edwin Simiyu who was on paternity leave and had attended to the victim. He produced the treatment book and P3 form. His colleague's analysis was that on examination semen was found at the cervical opening of the victim. There was also swelling on the thighs. The conclusion was that PW1 had been defiled.

9. PW4, PC Bildad Omari, testified that on 17th October 2014, he received a call from the children's officer Matayos Sub-County. The call was to inform him that she had sent a driver with a defilement suspect and that the victim and the mother had been referred to hospital for treatment. He thereafter took the Appellant to hospital and preferred the charges against him after the victim identified the person who defiled her.

10. Upon being put on his defence, the Appellant denied the allegations and stated that the case was a fabrication against him by PW1 and PW2. Further, that the charges are a cover-up to a land boundary dispute that exists between him and Pw1's mother as they are neighbours.

11. The Petition of Appeal raises the following grounds of appeal:

“1. That the trial court erred in law and facts by relying on the contradicting prosecution witnesses testimonies.

2. That the trial court erred in law and facts adopting the entire prosecution evidence which was based on hearsay ignoring the primary evidence.

3. That the trial court erred in law and facts by ignoring the evidence act in the production of medical/ expert evidence.

4. That the trial court erred in law and facts by ignoring the entire defence and its evidence.

5. That the trial court erred in law and facts by failing to acknowledge the gross violation infringements, threats and denials of my rights to fair trial rendering the entire trial a mistrial and unfair.”

12. The Appellant filed written submissions reiterating the grounds of appeal and pointing out the discrepancies of the prosecution's evidence to warrant a safe conviction. He questioned the 100 shillings that disappeared when PW1 confided in her cousin; the fact that the victim stated her mother did not examine her contrary to PW2's evidence; the presence of the spermatozoa on examination seven days after the alleged incident; the fact that the victim was missing from her home for three days and her hosts were not called to give evidence as to her whereabouts; and the infringement of his right to fair trial enshrined in Article 50 of the Constitution, in which he was rushed with the hearing by the trial Court and not given enough time to prepare for his defence.

13. Responding to the appeal, Mr. Owiti for the State argued that the evidence adduced in Court was water-tight to say the least. PW3's evidence corroborated the testimony of the victim that she was indeed defiled. His evidence was given under the provisions of Section 77 of the Evidence Act as the author of the said documents was on leave. As per the report, the victim was said to have had swelling on her thighs and the conclusion was that there was indeed defilement that had occurred. According to Mr. Owiti, the presence of sperm at the cervical opening of the victim and the marks on her thighs even after seven days, was proof that defilement had occurred. His concluding remarks were that the trial court had indeed considered his defence and there was no violation of his constitutional rights to a fair trial.

14. As a court sitting on appeal, I am guided by the fact that I never saw nor heard the witnesses testify. I have a duty to re-evaluate the evidence tendered before the trial court and reach my independent conclusion - see **Okeno v Republic [1972] E.A. 32**.

15. The evidence of PW1 is that she was defiled by the Appellant. She shared her ordeal with her cousin and at one time proceeds of the money that she received. She however did not report the incident to her mother.

16. The prosecution's case is that the victim left home for three days. The explanation given was that she was at her friend's home. No evidence was led by the prosecution to confirm this fact.

17. The only direct evidence is that of the victim. The incident however involves a sexual offence and the Court as per the proviso to Section 124 of the Evidence Act, may convict on such evidence alone if it is satisfied that the victim is telling the truth.

18. Is the evidence of PW1 believable? The evidence of Pw3, the clinical officer was that on examination of the victim by his colleague, there was presence of spermatozoa on the cervix and swelling on the thighs. This was seven days after the alleged incident. Of these seven days, the victim had been away from the home for three days.

19. This whole scenario and sequence of events causes anxiety and created doubt in the mind of the court. Could the whole ordeal as narrated by PW1 have been a fabrication? The gap between the date of the incident and the date of the examination leaves a lot to be desired.

20. No explanation was given by the prosecution for its failure to call the "hosts" of PW1. Unlike the trial court, doubt that has been raised is if it is indeed the Appellant who defiled the minor and the spermatozoa was his. The prosecution ought to have created a nexus from the date of the incident to the date of the medical examination. This could have been cured by calling the "host" family to PW1 where she spent three days immediately after the incident occurred. The prosecution ought to have gone further and had the cousin and the "host" family to the victim testify as to the events between 10th October, 2014 and 17th October, 2014.

21. The report by the clinical officer that spermatozoa could still be seen seven days after the alleged defilement is indeed disturbing. It gives room for doubts as to the whether the spermatozoa seen actually belonged to the Appellant. The corroboration that would have been provided by the medical evidence leaving the evidence of the complainant which in itself shaky unsupported. It is risky to return a conviction on the kind of evidence that was adduced in the trial.

22. For this reason alone, the Court finds that the evidence by the prosecution's case was too weak to return a safe conviction even on the alternative charge. From the evidence adduced, it was not safe to convict the Appellant.

23. The upshot is that the appeal succeeds. The conviction is quashed and the Sentence set aside. The Appellant is hereby set free unless held for some other lawful reason.

Dated, signed and delivered at Busia this 18th day of August, 2016

W. KORIR,

JUDGE OF THE HIGH COURT