



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. 91 OF 2014

BETWEEN

WASONGA FRANCIS SUSA APPELLANT

AND

STATE RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 354 of 2012 at Principal Magistrate's Court at Migori, Hon. P. Y. Kulecho, RM dated on 23rd December 2013)

JUDGMENT

1. The appellant was charged with defilement contrary to **section 8(1) and (4)** of the ***Sexual Offences Act, 2006***. The particulars of the offence were that between 9th and 14th June 2012 at [Particulars Withheld] Village in Migori County he intentionally and unlawfully caused his penis to penetrate the vagina of CS, a girl aged 17 years. He was convicted and sentenced to 15 years imprisonment.
2. As this is a first appeal, I am required to review the evidence and come to an independent conclusion as to whether or not to uphold the conviction making an allowance for the fact that I neither saw nor heard the witnesses testify. In order to proceed with task, it is necessary to outline the evidence as it emerged before the trial court.
3. On 8th June 2012, the PW 1 had come to visit her aunt, PW 2, in Kenya. After the visit PW 2 organised for her to be taken back to school in Tanzania by the appellant, who was a motorbike rider. The appellant was with his mother whom she also knew. Later on 15th June 2012, she received a message from the Chief that PW 1 was at his office and had not gone to school. The prosecution case was that on 9th June 2012, the appellant, instead of taking the PW 1, the complainant, to school on his motorbike took her to his home. He kept her locked up until 15th June 2012 whereupon she was rescued by the appellant's elder brother. PW 1 testified that the appellant had sexual intercourse with her 13th June 2012. When she was rescued, she reported the matter to the Chief and thereafter to the police. PW 2, a sister to the complainant, testified that she was with PW 1 when she reported the matter at the police station and that she took her sister to hospital.
4. PW 4, a clinical officer at Migori District Hospital, testified that on 19th June 2012, PW 1 came to the hospital accompanied by PW 2, for examination after reporting that she had been sexually assaulted. After examination, he observed that there was tenderness on the anterior and posterior

chest wall and tenderness on waist hips and thighs. Her genitalia was normal with no injury to vulva while the hymen was broken which was suggestive of penetrative sexual intercourse.

5. PW 5, the Assistant Chief of Kopanga Sub-location testified that on 15th June 2012, he received a report from a village elder that PW 1 had been locked a room for four days by a man. PW 1 was brought to her office and he advised her to report the matter to Migori Police Station. He later arrested the appellant and recovered a phone belonging to PW 1. He also recovered the appellant's photo from PW 1. PW 6, the investigation officer, testified that on 16th June 2012, he received complainant from PW 1 accompanied by PW 2. He investigated the matter and caused the appellant to be charged.
6. When the appellant was put on his defence, he elected to make an unsworn statement in which he denied that he committed the offence. He stated that he was a driver for a motor vehicle plying Muhuru Bay – Migori Road and on that on 9th June 2012, he was with a customer whom he took to Kisumu where he stayed until 12th June 2012. On the next day, he was requested to take a customer to Nairobi but he could not as he had to service the vehicle. He nevertheless left for Nairobi on 14th June and stayed there until 17th June 2012 when he returned at night. When he came back, he was summoned by the Chief and was arrested and taken to court.
7. The appellant was convicted on the basis of the evidence I have outlined. He now appeals against the conviction and sentence on the grounds set out in the supplementary grounds of appeal. The grounds of appeal may be summarized as follows;
 - a. The prosecution failed to prove its case beyond reasonable doubt.
 - b. The prosecution failed to prove the age of the complainant.
 - c. The learned magistrate failed to consider the appellant's alibi defence.
 - d. That the evidence led by the prosecution was at variance with the particulars in the charge sheet.
8. The State opposed the appeal. Ms Owenga, learned counsel, submitted that the prosecution had proved all the elements of the offence.
9. In order to secure a conviction for the offence of defilement under **section 8(1)** of the **Sexual Offences Act**, the prosecution must establish that the person has committed an act which causes penetration with a child. "*Penetration*" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"
10. The first issue is whether the appellant committed the offence. The appellant's defence was that of an alibi. In **Wangombe v Republic [1976-80] 1 KLR 1683**, the Court of Appeal addressed the treatment of the defence of alibi by a court trying a case and held that even where the accused does not call witnesses, it is the duty of the court to weigh the evidence adduced in totality and make a finding on the culpability or otherwise of the accused.
11. The tenor and effect of the appellant's unsworn statement is that he could not have committed the offence as he was in Nairobi attending to a customer. The prosecution evidence is that he was the owner of the motorbike which took PW 1 to school. PW 3, who arranged for PW 1 to be taken to school knew the appellant well and the fact PW 1 was with the appellant from 9th June to 15th June 2012 lessens the opportunity for mistaken identity.
12. In light of the prosecution evidence, the appellant's alibi lacks any weight and is accordingly dismissed. I therefore find and hold that it is the appellant who took the PW 1 to his house and kept her there.
13. PW 1 gave clear testimony how the appellant sexually assaulted her on 12th, 13th and 14th June 2012. Her testimony did not require corroboration in light of the proviso of **section 124** of the **Evidence Act** which states;

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

14. There was no reason for her not to tell the truth and in any event, the testimony of PW 4 confirmed that there was penetration. There is no evidence that PW 1 had sexual intercourse with any other person other than the appellant. I therefore find and hold that penetration was proved by the prosecution.

15. The appellant complains that the charge facing him was defective on the ground that PW 1 stated in her testimony she was at the appellant's home between 9th and 15th June 2012 while the charge sheet stated that the defilement occurred between 9th and 14th June 2012. **The appellant relied on the decision of *Jason Akumu Yongo v Republic* [1982 -88] 1 KAR 167 where the Court of Appeal held that a charge was defective, if did not accord with the evidence. In this case PW 1's testimony brought dates on which she was defiled was within the dates stated in the charge and no prejudice was occasioned to the appellant.**

16. Proof of age is required in prosecution of defilement in order to establish the fact of defilement and to determine the necessary penalty for the offence. Proof of age is a question of fact. PW 1 stated that she was 17 years old. As a student there is no reason to doubt that she did not know her age. PW 6 also produced a birth certificate issued by the United Republic of Tanzania which showed that she was born on 18th May 1996. The appellant, on his part, did not ask any questions to suggest that PW 1 was lying about her age. In my view, the prosecution proved that PW 1 was 17 years old.

17. As regards the sentence, the court below imposed the minimum penalty provided for under the ***Sexual Offences Act***.

18. The conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at MIGORI this 13th day of February 2014.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.