



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. 08 OF 2015

BETWEEN

DANIEL WAMBURA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 289 of 2014 at Principal Magistrate's Court at Kehancha, Hon. C.M.Kamau, RM dated on 16th January 2015)

JUDGMENT

1. The appellant was charged with defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act, 2006***. The particulars of the charge were that on 3rd May 2014 at [Particulars Withheld] area in Kuria West District within Migori County, he intentionally caused his penis to penetrate the vagina of EK, a child aged 15 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** grounded on the same facts. He was convicted and sentenced to 20 years imprisonment. He now appeals against the conviction and sentence.
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. After a voire dire, EK (PW 1), was sworn and she testified that she was 15 years old and in standard 6. She recalled that on the evening of 3rd May 2014 at about 6 pm she went to the appellant's shamba to buy sukuma wiki. After picking the sukuma wiki, the appellant told her to follow him at the edge of the shamba and had intercourse with her. She described her ordeal as follows;

At the edge, he removed my skirt. I started crying, He then removed my trousers and also shorts the he was wearing on the inside. At the time I was lying down face up. He then inserted his penis into my female private part which I use to urinate. He then started to have intercourse with me. He covered mouth with a piece of cloth. He then finished and got up and went away. I got up slowly and went home. There I found my father, my grandfather and my grandmother. My father is mentally unstable. I therefore went to my grandfather and told him what happened. He waited for my mother to arrive and then told her what I told him. My mother came the next day which was a Sunday. The following day, on Monday, my mother and I went to the Children's officer at

Kehancha

4. PW 2, MS, the complainant's 10 year old brother, gave unsworn testimony. He stated that he was with his sister when they went to the appellant's place to buy sukuma wiki. He stated that the appellant told him to wait by the side and as he waited about 100 metres away, he heard PW 1 scream. He ran toward the screams and found the appellant on top of PW 1 putting a piece of cloth in her mouth. He testified that the appellant had removed his trousers to the knees. The appellant threatened him when he saw him. Thereafter, he left with his sister and informed their grandfather.
5. PW 5, the complainant's mother, testified that PW 1 was his daughter and that she was born on 30th October 1998 and she produced the immunization card as evidence. She testified that on the material day she sent PW 1 the appellant's shamba to buy sukuma wiki. When she did not come back on time, she went to look for her and found her on the road at about 8 pm walking with her legs wide apart. PW 1 narrated to her the ordeal and PW 2 confirmed what had happened. She also confronted the appellant about the incident on the same night but he denied the accusation. She testified that on the next day, 4th May 2014, she reported the incident to the authorities including the Children's Officer and the police.
6. PW 6, a police constable, testified that on 6th May 2014, PW 5 reported that PW 1 had been sexually assaulted by the appellant on 3rd May 2014. He recorded the report and issued a P3 form. He visited the scene of the incident and issued an arrest order for the appellant. PW 3, an administration police officer, received the arrest order on 9th May 2014 at Tarang'anya AP Post and whereupon he proceeded to arrest the appellant at his home after he was identified by PW 5.
7. PW 4, the clinical officer, examined PW 1 on 6th May 2014 when she was brought by PW 5. He examined her and found that she had no hymen and her genitalia had no injuries. He did not see any spermatozoa after conducting a vaginal swab. He concluded that PW 1 had had sexual intercourse before due to sexual history and the lack of a hymen. He filled the P3 form and post rape care form which were produced in evidence.
8. After the close of the prosecution case, the appellant was placed on his defence. He elected to give sworn testimony. He recalled that he was arrested on 9th May 2015 and he was not informed why he was being arrested. He denied the offence and stated that he knew PW 1 and her mother and that they brought the charges due to difference that they had. He testified that he had bought land near then and they did not want him to live there.
9. On the basis of the evidence I have outlined, the learned magistrate was satisfied that the prosecution had proved its case and proceeded to convict the appellant. He now appeals against the conviction and sentence on the grounds set out in petition of appeal filed on 28th January 2014. The gravamen of his appeal is that the learned magistrate misdirected himself when he failed to observe that the case against the appellant had been fabricated as demonstrated by the testimony of PW 1 and PW 2. He submitted that the learned magistrate erred in convicting the appellant without proof of medical evidence.
10. Ms Owenga, learned counsel for the respondent, supported the conviction. She submitted that the prosecution proved its case beyond reasonable doubt as PW 1 gave clear and convincing testimony and the incident was witnessed by PW 2. She submitted that the medical evidence was merely corroborative and in light of the oral testimony, the conviction was sound. She urged that the sentence, being the minimum mandatory sentence was proper and should be upheld.
11. The appellant also argued that there were material inconsistencies in the prosecution case. I have evaluated the evidence as the first appellant court and I find serious inconsistencies in the testimony of PW 1 and PW 5. PW 1 was clear she reported the matter initially to her grandfather who then reported to her mother, PW 5. PW 5 stated that she met the appellant on the material night. Likewise PW 2 stated that the report made to the grandfather. PW 1 and PW 2 did

not allude to the fact that they met PW 5 on the way home after the ordeal. The person PW 1 first saw and reported to immediately after the incident is a key and material fact matter worth recalling particularly where it is one's mother. Moreover, PW 1 did not mention that she was with PW 2 when she went to the appellant's place or reported the incident.

12.The testimony of PW 5 is further undermined by that of PW 6 who testified that PW 5 reported the incident on 6th May 2014, yet PW5 testified that she reported the incident on the day after the incident, that is, 4th May 2014.

13.The inconsistencies in the evidence of the prosecution are quite glaring and went to the credibility of the key witnesses. These should have been addressed by the learned trial magistrate's and resolved one way or another. If the inconsistencies were material and important to the prosecution case and were of substance and not merely of form, in the trial court's view, then the appellant ought to have been given the benefit of doubt. On the other hand, if the same were of form and could not be resolved by the evidence, the the conviction would not be affected. The inconsistencies I have pointed out did not receive any consideration from the learned magistrate.

14.On my part I find that the inconsistencies in the evidence were material and affected the credibility of the prosecution witnesses particularly in light of the fact that the appellant stated that he was being framed. The inconsistencies remain unexplained upon consideration of the testimony and as a result, I find the conviction unsafe.

15.The appeal is allowed. The conviction and sentence are quashed. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at MIGORI this day of 13th April 2015.

D.S. MAJANJA

JUDGE

Appellant in person.

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