



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 10 OF 2013.

KATOTO ABUBAKAR :::APPELLANT.

VERSUS

REPUBLIC ::: RESPONDENT.

(Being an appeal from the original conviction and sentence of E.K. Mwaita - PM in Criminal Case No. 10 of 2011 delivered on 4th July, 2012 at Lodwar.)

J U D G M E N T.

The appellant, **Katoto Abubakar**, appeared before the Principal Magistrate at Lodwar charged with defilement contrary to section 8 (1) read with section 8 (4) of the Sexual Offences Act, in that on the 9th December, 2010 at (*particulars withheld*), in Turkana West District, defiled H.C, a girl aged seventeen (17) years.

After full trial, the appellant was convicted and sentenced to ten (10) years imprisonment but being dissatisfied with that outcome, he filed this appeal on the basis of the grounds in his petition of appeal filed herein on 12th April, 2013. He appeared in person at the hearing of the appeal and relied on his written submissions in support of his case.

The Learned Prosecution Counsel, **Mr. Kimanzi**, opposed the appeal on behalf of the state respondent by submitting that PW1 had previously known the appellant and that she identified him on the material date. That, due to his hurry, the appellant left behind his T-shirt. That, PW2 identified the appellant using a torch while in the attempt to arrest him.

The Learned Prosecution Counsel contended that the appellant was properly convicted for attempted defilement and that the sentence was proper. He urged this court to dismiss the appeal.

Both the appellant's written submissions and the respondent's oral submissions have been given due consideration by this court whose duty is to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.

In brief, it was the prosecution case that on the material date at about 1.00 a.m., the complainant **H.C (PW1)**, was asleep with her children at her house in Kakuma when she suddenly woke up and found a man strangling her on the neck. The man gagged her with a piece of cloth, removed her underpants and defiled her. She identified him by voice and by his name of Nza. She said that he was the appellant herein and that he was at the time wearing a red, brown and white striped T-shirt.

After the incident, she sought treatment at the IRC Main hospital and reported the matter to the police.

N.M (PW2), a sister to the complainant was in her nearby house when she heard the complainant crying and saying “*Oh my sister I am dying save me*”. She (PW2) left her house carrying a torch and met the appellant at the door step of the complainant's house. She held and struggled with him. He removed his T-shirt and managed to escape despite all efforts made by her (PW2) to apprehend him. She said that she knew him by his name of “Nzao” and although it was during the night she came close and saw him clearly. She went into the complainant's house after his escape and found the complainant unconscious. An ambulance came to the scene and took her (complainant) to the hospital.

M (PW2) and others including **Niziaiyimana Salvator (PW3)** and **John Peter Choris (PW5)** escorted the complainant to the IRC Main hospital.

Hilda Thuo (PW4), an Assistant Protection Officer LWF (*particulars withheld*) who dealt with gender based violence was informed that the complainant had been sexually assaulted. She proceeded to the IRC Main hospital where she found the complainant and escorted her to the Kakuma police station to make the necessary report.

Dr. Stephen Kyalo (PW6), appeared in court with a view to producing a medical report (P3 form) compiled by his colleague at the IRC Main hospital but was stood down by the court only for one **Dr. Victoria (PW7)**, to produce the report compiled by a Dr. Musawa and the age assessment report prepared by a Dr. Wambuzi which placed the age of the complainant to be between 17 and 18 years.

PC Yusuf Shune (PW8), of the (*particulars withheld*) police station investigated this case and charged the appellant with the present offence. He produced a T-shirt allegedly belonging to the appellant and left behind by him after escaping from the scene of the offence.

The appellant denied the offence and contended that he was framed and was not at the scene of the offence when it was committed. He said that two weeks prior to the material offence, he had been framed with another similar offence but was found innocent after the complainant recanted her statement and admitted that she had made false allegations. Thereafter, he turned down an invitation by the present complainant (PW1) to see her. He related his tribulations to a long standing and acrimonious relationship between his family and that of the complainant which started in their country of origin, Burundi, and which spread to (*particulars withheld*) where they all lived at the material time. The appellant further contended that he was framed due to jealousy, harboured by the complainant's family against his family. He denied that the T-shirt allegedly found at the scene belonged to him.

From all the foregoing evidence, it is apparent to this court that the offence of defilement was not proved despite the allegation by the complainant that she was offended in that regard. None of the prosecution witnesses witnessed the alleged offence and could not therefore have been in a position to say that the complainant was defiled and that the culprit was the appellant.

N (PW2), did not find the complainant in the act of being defiled by any person. She entered her house only after being engaged in struggle with a person she allegedly met at the door step of the complainant's house. She said that the person was the appellant but she did not give convincing and satisfactory explanation of the circumstances which enabled her to allegedly see and recognize the appellant. She said that she had a torch but did not state how she used it to identify the appellant in circumstances which were clearly not favourable for positive identification since it was in the hours of darkness.

A T-shirt allegedly found at the scene and which was used to link the appellant to the offence and somehow corroborate the evidence by the complainant and N (PW2) that the appellant was involved in the offence was never proved as belonging to the appellant. There was nothing unique about the T-shirt so as to exclusively link it to the appellant.

The medical report (P3 form) disproved the fact of defilement thereby implying that the complainant (PW1) was not a credible witness when she alleged that she was defiled by the appellant.

The medical report went further to show that the complainant did not suffer any form of bodily harm

during the alleged offence. This was a clear indication that not even an attempt was made to defile the complainant and all that she stated regarding a sexual assault against herself may not have been the truth thereby vindicating the appellant against any charge to that effect and rendering his defence a true reflection of what may have caused him to land in court.

The defence clearly showed that the appellant may have been a victim of a long standing dispute and/or misunderstanding between his family and that of the complainant.

Suffice to say that the evidence by the prosecution against the appellant was neither sufficient nor credible to link him to any sexual offence allegedly committed against the complainant.

Even if it were proved that the complainant was indeed sexually offended, there was still no cogent and credible evidence proving that the appellant was responsible.

Consequently, it is the finding of this court that the appellant's conviction by the trial court for the offence of attempted defilement was neither safe nor sound. This appeal is therefore allowed to the extent that the conviction is hereby quashed and the sentence of ten (10) years imprisonment set aside.

The appellant shall forthwith be set at liberty unless otherwise lawfully held.

[Delivered and signed this 21st day of January, 2014.]

J.R. KARANJA.

JUDGE.