



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 184 OF 2010

(From Original Conviction And Sentence In Criminal Case No. 87 Of 2009 Of The Chief Magistrate's Court At Nakuru- Hon. E. Tanui [R.M] Dated 25/10/2010)

SAMUEL WANJALA DAVID.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1)(4) of the Sexual Offences Act 2006 (*No. 3 of 2006*). He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The Appellant was on the evidence found guilty and convicted on the principal charge and sentenced to 20 years imprisonment. Aggrieved by both his conviction and sentence, the Appellant has appealed to this court on the 8 grounds of appeal which may be summarized as follows-

(a) *that the trial court erred in law and fact when it convicted the Appellant against the weight of the evidence;*

(b) *that the learned trial magistrate erred in law and fact in convicting the Appellant on the basis of contradictory and inconclusive evidence; and*

c. *that the learned trial magistrate erred when he failed to consider the Defence evidence.*

2. When the appeal came for hearing on 7th May 2014, the Appellant relied on his written submissions filed together with Amended Petition of Appeal. Prosecution Counsel for the State, in opposition to the appeal, submitted that the evidence of PW1 and PW2 on the circumstances of the incident was not challenged. The fact that the complainant was defiled was also confirmed by the medical doctor, PW4 and the P3 Form. Therefore the appeal herein has no basis and should be dismissed.

3. The prosecution case was that on diverse dates between 1st January 2009 and 4th April 2009 the Appellant caused the penetration of his genital organs into the genital organs of the complainant. The complainant, PW2 was a child aged 16 years and a standard 7 student at M Primary School. After conducting a *voire dire* examination of the complainant, the court was satisfied that she understood the nature of an oath and allowed her to give sworn testimony. She testified that on 25th February 2007, the Appellant, who she referred to as Sammy, came into her room, removed her pant, took his "thing" which he uses to urinate and inserted it in her vagina and anus. He put his hand over her mouth to prevent her from screaming and warned her against telling anyone of the incident. Although this was the first time he

had defiled her, the Appellant had committed indecent acts to the complainant before, by inserting his fingers into her vagina. She told PW1 of the incident and later reported the matter at Njoro Police Station.

4. Her evidence was corroborated by that of PW1 Evaline Wanjiru. On the day in question, at about 9.00 am, PW1 had gone to the complainant's home to return a knife she had borrowed earlier that morning. While at the door she heard the Appellant who she knew before as N boyfriend, saying “*pole mum pole mum*”. She then heard the complainant sobbing and on peeping through the window, she saw the Appellant lying on top of the complainant with his trousers pulled down. He was defiling her.

5. The complainant was examined on 27th February 2009 by PW4, a clinical officer at Molo District Officer. He found that the complainant had a torn hymen but no tears were visible. She had white discharge from the genitals which upon being tested was found to be pus cells. The urine analysis revealed a lot of red blood cells. From this he concluded that the complainant had been infected with a Sexually Transmitted Disease. He filled in the P3 Form (exhibit 2a) and produced the treatment card (exhibit 2b) in court.

6. The Appellant, on being examined by PW3, a medical officer at Nakuru Provincial General Hospital, was found to be HIV Positive and without any injuries in the genitalia. According to PW1 the Appellant was arrested by members of the public on 7th April 2009 after he attempted to defile *particulars withheld*. He was taken to the Police Station by the PW1 and other neighbours.

7. The matter was investigated by PW5 No. 61268 PC Leah Chesang of Molo Police Station. She reiterated the evidence of PW1 and PW2 and confirmed that the Appellant had been arrested on allegations of attempting to defile another girl on 7th April 2009. She further stated that the complainant had disclosed to her that the Appellant had defiled her a second time on 4th April 2009. It was on the basis of this evidence that she preferred the charges against the Appellant.

8. On being put on his defence, the Appellant gave sworn evidence. He denied having committed the offence with which he had been charged or attempting to defile MM as alleged. According to the Appellant, PW1 had framed the charges against him because he had rejected her advances. He also called DW2 N W, the complainant's mother. She only gave testimony on what transpired on the morning of the Appellant's arrest. She however did not give any evidence nor was she cross-examined on the allegation that the Appellant had defiled her daughter, the complainant.

9. It was on the strength of this evidence that the Appellant was convicted of the main charge of defilement and sentenced to 20 years imprisonment.

10. This court is alive to its duty as the first appellate court to analyse and re-evaluate the evidence afresh to arrive at its own independent findings and in doing so, bearing in mind that it did not have the opportunity to observe the demeanor of the witnesses.

11. The main ground of appeal was that the evidence was not credible and did not satisfactorily prove the charges preferred against him. The Appellant alleged that the medical evidence did not establish beyond reasonable doubt that he is the one who defiled the complainant. Firstly, although on examination it was found that the complainant's hymen was torn, there were no injuries on her genitalia or noticeable tears to prove that she had been defiled. Secondly, the Appellant was found to be HIV positive but the medical examination did not show that that the complainant had been infected and thirdly, there were no tests carried out on the Appellant to confirm that he was the one who committed the offence.

13. The prosecution evidence demonstrated that the complainant, a girl of sixteen years was defiled. The complainant's evidence in this regard was corroborated by the medical evidence which revealed that her hymen had been torn and the presence of white discharge (pus cells) and a high red blood cells count in the urine, an indication that she had been infected with a Sexually Transmitted Disease.

14. The question that follows is whether it was demonstrated by the prosecution that it was the Appellant

who committed this heinous act. The identity of the Appellant was not in contention as the complainant and PW1 knew him well before the date of the incident. The complainant testified that on 25/02/2009, the Appellant came into her bedroom and caused his “*thing*” which he uses to urinate to enter into her vagina and anus. She says that this occurred in her bedroom which the Appellant unlocked using the key given to him by her mother. This testimony was further corroborated by the evidence of PW1 who witnessed the act. She saw the Appellant with his pants down as he defiled the complainant. She stated that the two were lying on the complainant's bed placed in the sitting room.

15. Their evidence was similar on material aspects of the incident and remained consistent even during cross-examination. The trial court which observed the demeanor of the two witnesses found them to be credible and believable and I have no reason to doubt this assessment. I find their evidence on its own proved beyond reasonable doubt that it was the Appellant who defiled the complainant and need not have been corroborated by conclusive medical evidence.

16. The Appellant also faulted the trial magistrate for failing to consider his defence. He alleged that PW1 framed him and fabricated all the charges against him after he rejected her advances. However this defence did not cast even the slightest doubt to the prosecution case. I say so because there was no evidence of bad blood between the Appellant and the complainant who had accused him of defiling her. It was not demonstrated that the complainant and other prosecution witnesses were testifying on the prompting of PW1 to enable the court conclude that she had a vested interest in the matter.

17. In addition, DW2, the complainant's mother could not be deemed as an impartial witness. The complainant herself had testified that she had told DW2 of the defilement, DW2 had accused her of trying to interfere with her relationship with the Appellant. She did not take any steps to protect the complainant and took her to hospital only after the intervention of third parties.

18. I am satisfied that the prosecution, was able to establish beyond reasonable doubt that the Appellant defiled the complainant. In the premises I agree with the learned trial magistrate's findings and the conviction of the appellant. The sentence of 20 years was also appropriate and find no reason to interfere with it.

In the end, I find that the appeal has no merit and dismiss the same.

It is so ordered.

Dated, signed and delivered at Nakuru this 27th day of June, 2014

M. J. ANYARA EMUKULE

JUDGE