



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 143 OF 2010

GEORGE WANYONYI APPELLANT VERSUS

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. D. M. Ochenja, PM in Kitale Chief Magistrate's Court in Criminal Case No. 3285 of 2009)

J U D G M E N T

The appellant, **George Wanyonyi**, appeared before the Principal Magistrate at Kitale charged with defilement contrary to Section 8 (1) read with Section 8 (3) of the Sexual Offences Act, in that on the 19th September 2009 at [*particulars withheld*] Village Trans-Nzoia West District, defiled S N, a girl child aged 12 years.

In the alternative, the appellant was charged with indecent act with the said S W contrary to Section 11 (1) of the Sexual Offences Act.

After a full trial, the appellant was convicted on the main count and sentenced to serve twenty (20) years imprisonment. He was however dissatisfied with the conviction and sentence and preferred this appeal on the basis of the grounds contained in the petition of appeal filed herein on 8th December 2010.

The grounds are generally a complaint that the appellant was convicted on the basis of evidence which was insufficient, incredible and contradictory. Further that, the Learned Trial Magistrate failed to consider that a grudge existed between the appellant and the complainant's mother and that the Learned Trial Magistrate rejected the appellant's defence and shifted the burden to him.

The appellant 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. Chelashaw**, appeared for the State Respondent and opposed the appeal by submitting that the appellant was identified by the complainant (Pw 1) as they met on the way. He then grabbed and pulled her into a maize plantation where he defiled her. That, the complainant's evidence was corroborated by that of Pw 2 who observed the complainant after the fact and noted that she was distressed and her clothes were torn. He (Pw 2) saw her coming out of the maize plantation.

Learned Prosecution Counsel also submitted that the complainant was taken to hospital by Pw 3 and it was confirmed that she had been defiled. That, although there was no medical examination report (P3 form), Section 124 of the Evidence Act does away with the need for corroboration in sexual offences and therefore, the unavailability of the P3 form was not fatal to the Prosecution case. That, the age of the complainant was established as being 12 years.

Learned Prosecution Counsel contended that the appellant's conviction was proper and urged this Court to

dismiss the appeal.

In his rejoinder to the respondent's submissions, the appellant contended that there was no medical evidence to confirm defilement and prove the age of the complainant.

After due consideration of the rival submissions, the duty of this Court is to re-consider the evidence and draw its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses.

In summary, the Prosecution case was that the complainant, **S N (Pw 1)**, was at the material time a standard four (4) pupil at *[particulars withheld]* primary school. She lived with her uncle having lost her parents. She was at home at about 7.30 pm on the material date. She was with her cousin and it was at the time that the appellant went there and asked her to accompany him to his home so that he could give her milk. On the way, he grabbed and pulled her into a maize plantation where he knocked her down and defiled her while holding her throat to prevent her from screaming. However, two people (i.e. Simon and Felix) came to her rescue. They apprehended the appellant and handed him over to the Area Chief.

Felix Matwi (Pw 2), confirmed that he was among those who apprehended the appellant and handed him over to the Area Chief. **Simon Nafula (Pw 4)**, a Village Elder was also among those who apprehended the appellant as was confirmed by **J O N (Pw 3)**, the complainant's aunt. The appellant was after his arrest by members of the public taken to and re-arrested by **APC Joseph Marwa (Pw 5)**, who handed him over to the regular Police at Saboti Police Patrol Base. He was later arraigned in Court where he denied the offence and stated in his defence that he was a posho mill operator and that he was going home on a day in the month of September 2009 when he met a group of three people who included the complainant, a Police Reservist and a Village Elder. The three insisted to accompany him to where he was coming from before they apprehended and escorted him to a nearby AP Camp without being told what he had done. He was later taken to Saboti Police Post and thereafter to Kitale Police Station where he was charged with the present offence which he did not commit.

The Learned Trial Magistrate after considering the evidence in its totality concluded that there was sufficient and credible evidence against the appellant thereby rendering him guilty of the offence of defilement.

In the opinion of this Court, it is apparent that the fact that the complainant was defiled was not disputed and the only issue for determination was the alleged involvement of the appellant in the offence.

The offence of defilement is established on proof of an act which causes penetration. Herein, the evidence by the complainant (Pw 1) showed that a male person using his genital organ caused it to penetrate her genital organ. The evidence was established and proved that she was defiled. This was confirmed by Jane (Pw 3) who examined her and found that she was bleeding from her genital organ.

There was indication from the same J (Pw 3) that the complainant was also examined at the Kitale District Hospital where it was further confirmed that she had been defiled and the necessary P3 form duly compiled and signed by a medical officer. Although the said P3 form was marked for identification (P. MFI 4), it was never formally tendered in evidence. As it were, the Prosecution failed to tender medical evidence confirming that the complainant was defiled. Nonetheless, such evidence was basically for purposes of corroborating the complainant's evidence and in particular the fact of defilement which fact could still be established by any other evidence such as the complainant's evidence and that of Jane (Pw 3). However, for purposes of solidifying the Prosecution case, medical evidence would be vital but not by any means mandatory. Indeed, such fact was appreciated by the Learned Trial Magistrate in his judgment when he stated that corroboration was no longer mandatory in sexual offence cases and that the failure by the Prosecution to produce the P3 form did not render its case a nullity or incurably defective.

Both J (Pw 3) and Felix (Pw 2) stated that when they saw the complainant immediately after the ordeal, her clothes were torn and dirty. This was a further confirmation of her story that she had been defiled and in the process subjected to a harrowing experience.

In as much as the P3 form was lacking in this case and in as much as the act of defilement was not disputed by the appellant, the act was nonetheless established and proved by the complainant's evidence coupled with that of J (Pw 3) and Felix (Pw 2).

With regard to the identification of the offender, the sole evidence was that of the complainant (Pw 1). Although the appellant's defence was a denial and an indication that he was arrested and charged without good cause, the evidence by the complainant indicated otherwise. He was a person known to her. She narrated to the Court how he took her from her home on the pretext that he was going to give her milk in his home but instead turned against her by grabbing and pulling her into a maize plantation where he defiled her.

The Learned Trial Magistrate believed the complainant and found her evidence to be credible enough for a sound conviction of the appellant.

On matters of credibility of witnesses, the Learned Trial Magistrate was in a better position than this Court to make appropriate findings since he saw and heard the witnesses. This Court cannot, therefore interfere when his findings on the credibility of the complainant.

Consequently, this Court must also find that the complainant's evidence was sufficient and credible enough in establishing that the appellant was the person who defiled her on that material date and time. His conviction by the Learned Trial Magistrate is hereby upheld.

With regard to the sentence, it was indicated without dispute that the complainant was aged 12 years at the time of the offence. He was thus sentenced in accordance with Section 8 (3) of the Sexual Offences Act which provides for a minimum sentence of twenty (20) years imprisonment.

The sentence imposed upon the appellant by the Learned Trial Magistrate was therefore lawful. In sum, this appeal is devoid of merit. It is hereby dismissed in its entirety.

(Delivered and signed this 13th day of November, 2013)

J. R. KARANJA

JUDGE