



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRA NO.61 OF 2011

(Being conviction and sentence by the Resident Magistrate Hon. P. Achieng in Bungoma court in Cr. Case no.1776 of 2010)

PETER WANYONYI MULONGO

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APPELLANT

~VRS~

REPUBLIC

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RESPONDENT

JUDGMENT

The Appellant was convicted of defilement contrary to section 8 (1) and 8 (4) of the Sexual Offences Act no.3 of 2006 whose particulars were that on 13/9/2010 in Bungoma Township in Bungoma South District of the Western Province he unlawfully and intentionally caused his penis to penetrate the vagina of S.A.O (PW1) a child aged 13 years old. He was sentenced to serve 10 years in jail. He was aggrieved by the conviction and sentence and preferred this appeal.

The evidence on which the Appellant was convicted was that PW1 was aged 13 and in class four at (*particulars withheld*) Primary School. The Appellant was their neighbor. On 13/9/2010 at about 5.00 p.m she was coming from school when she met the Appellant who told her that her father’s items were in his house and wanted her to go and collect them. She accompanied him to his house. When they entered the house he instead locked the door. When she wanted to know why he was locking the door he slapped her. He used his hand to cover her mouth and demanded that she removes her pant. She refused. He tore off her pant. She wanted to scream but her mouth was covered. He threw her on the bed and had sexual intercourse with her. When he was through she asked him to open the door. He opened the door for her to leave but warned that he would kill her if she reported. She went home. Her father was there but she did not tell him as she was afraid. Her mother C.A (PW2) had gone to a funeral in Homa Bay. A day after she returned PW1 complained to her that she felt pain in her private parts when urinating, when sitted or when sleeping with her legs together. PW2 noticed tears in her private parts. The girl told her that she had been defiled by the Appellant. PW2 took her to Bungoma District Hospital for examination and treatment. A report was made to Bungoma Police Station whereupon the Appellant was arrested and charged.

The Appellant gave sworn statement in defence in which he denied that he had seen or defiled PW1. He did not call any witnesses.

The trial court believed the prosecution evidence, rejected the defence and found that it had been proved beyond doubt that the Appellant had defiled PW1. The Appellant complained in the grounds of appeal that the charge had not been proved beyond doubt, the charge was defective in view of sections 8 (3) and 4 of the Act and that the prosecution evidence was accepted without regard to his defence.

It is the responsibility of this court to subject the entire evidence as recorded to fresh and exhaustive consideration and evaluation to be able to determine whether the Appellant was properly convicted and sentenced (**Okeno v. Republic [1972] EA 32**). It will be borne in mind that the trial court had the advantage of seeing and hearing the witnesses who testified before it.

PW1 testified that the Appellant defiled her and left her in pain. PW2 found her in this condition when she returned from Homa Bay. She was taken to Hospital after it was noted that she had tears in her private parts. Dr. Ogot who examined her, however, found that her genitalia was normal without any lacerations. There was no evidence of penetration. She had whitish discharge and the analysis of her urine showed the presence of pus cells and epithelial cells. The doctor opined that this was a case of “*most likely attempted penetration.*” The trial court wondered how the doctor had reached that finding. The truth of the matter, however, is that the medical examination did not show any evidence of penetration or attempted penetration. The examination did not reveal that PW1 was in any pain. The tears that PW2 testified she noticed in her genitalia were not revealed during the examination. In short, the medical evidence did not support what PW1 and PW2 told the court. I bear in mind that the examination was carried out five days after the alleged defilement, but if the girl was still in pain and her mother noted she had tears the medical report should have revealed these. In short, the medical evidence did not support the prosecution case. If the defence version was that the Appellant did not meet the girl or defile her then the medical evidence appeared to agree with him.

The record shows that PW1 was a minor who was aged 13 and in class 4. She was made to give evidence on oath without any decision being made on whether she understood the nature of the oath. In **John Mururi v. Republic [1983] KLR 445** the Court of Appeal recalled its decision in **Peter Kiriga Kiune v. Republic, Criminal Appeal no.77 of 1982 (unreported)** in which it had held as follows:

“Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is not his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, Oaths and Statutory Declarations Act, Cap.15. The evidence Act, (section 124, Cap. 80).

It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the Appellate court is able to decide whether this important matter was rightly decided, and not to be forced to make assumptions.”

In this case, PW1 was made to testify on oath before she was examined for an opinion to be formed that she was possessed of sufficient intelligence to justify the reception of her evidence, she understood the duty of speaking the truth and that she sufficiently appreciated the solemnity of the occasion to be able to give sworn evidence. It should also be noted that even when it is decided that the child should give sworn evidence, the court should warn itself that it would not be safe to convict unless there was corroboration. There was no such warning here, and the medical evidence called to corroborate the testimony of PW1 was not conclusive. It did not provide corroboration.

Mrs. Leting for the State conceded that the evidence called by the prosecution did not establish the charge but that it proved the alternative charge of indecent assault contrary to section 11 (1) of the Act whose particulars were that the Appellant had unlawfully and intentionally caused his penis to come into contact with the vagina of PW1. The evidence of PW1, however, was that she was defiled, she was penetrated. Her evidence would therefore be at variance with the particulars of the charge that there was contact without penetration. But more important, the fact that the trial court did not comply with the requirements of section 19 (1) of the Oaths and Statutory Declarations Act, in a case where the evidence of PW1 was vital, must lead this court to find that there was a miscarriage of justice (**Kibangeny Arap Kolili v. R. [1959] EA 92**). The fact that the court did not warn itself of the danger of convicting on uncorroborated testimony of PW1 did not make the matters any better. So whether one is dealing with the main charge or the alternative charge, the standard of proof would be the same.

I further note that since PW1 was aged 13 the Appellant should have been charged under section 8 (3) of the Act in which case the sentence would have been imprisonment for a term of not less than 20 years. He was instead charged under sections 8 (1) and 8 (4) of the Act which are applicable in case where the victim is aged between sixteen and eighteen. Even then, the sentence is imprisonment for a term of not less than 15 years. Whichever is the case, the sentence meted to the Appellant was illegal.

The result is that the appeal is allowed. The conviction is quashed, the sentence set aside and the Appellant ordered to be set at liberty forthwith unless he is otherwise being lawfully held.

Dated and delivered at Bungoma this 21st day of March, 2012.

A. O. MUCHELULE

JUDGE