REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRA NO.70 OF 2010

(Appeal from Senior Resident Magistrate Hon. J. O. Magori in Sirisia Court in Cr. No.100 of 2010)

SHADRACK WANGILA..APPELLANT

VS

REPUBLIC..RESPONDENT

JUDGMENT

The Appellant was convicted by the Senior Resident Magistrate at Sirisia of defilement of a girl contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act no.3 of 2006 whose particulars were that on diverse dates between 13th and 31st December 2009 [....] Malakisi location of Bungoma West District in Western Province, he unlawfully committed an act of penetration by inserting his penis into the vagina of A.W (PW1) who was aged 17. He was sentenced to serve 15 years in jail. He was not satisfied with the conviction and sentence and preferred this appeal.

The prosecution evidence was that PW1 was a 17 year old girl who on 13/12/2009 was sent by her father to take his trouser to the tailor for stitching. Between 4.00 p.m and 5.00 p.m she was on her way back when she met the Appellant and his sister. The two were strangers. The Appellant’s sister asked PW1 to greet them and said the Appellant wanted to talk to her. In the process of talking, the Appellant took PW1’s father’s trouser. By this time the Appellant’s sister had left. The Appellant had a bicycle. He went away with the trouser. This is what forced PW1 to follow him up to his home. He was not there but came at 8.00 p.m. When PW1 came to his house he locked the door behind her and detained her in his house until 31/12/2009 when he released her. During this period he was sleeping with her. When she was released she went and reported to her sister-in-law M.M (PW3) and her brother V.J.W (PW2). She was eventually taken to Malakisi Police Station to report and then treated at Bungoma District Hospital. She

was found with no visible injuries in her genitalia but her hymen was not intact. Vaginal swab showed presence of spermatozoa and she had sexually transmitted infection. She was pregnant.

The Appellant gave unsworn statement in defence and did not call a witness. He denied defiling PW1. He stated that on 20/12/2010 he was at Malakisi buying unga when PW2 and four other people came to arrest him saying he had defiled PW1 which he had not.

The trial court accepted the evidence of the prosecution witnesses, discounted the version by the defence and came to the conclusion that the guilt of the Appellant had been proved beyond doubt. The Appellant complained in the Petition of Appeal that he had been convicted against the weight of evidence and that the charge was defective in substance. Mrs. Leting for the State conceded the appeal.

It is the duty of this court to look afresh at all the evidence that was adduced before the trial court and to be able to make its own independent determination whether the Appellant was properly convicted while appreciating that it was the trial court that had the advantage of seeing and hearing the witnesses **(Okeno v. Republic [1972] EA 32).**

The evidence of PW1 was that after she was detained by the Appellant he defiled her on 14/12/2009 and on 15/12/2009. She stated as follows:

"On the 2nd day he raped me. It was on 14/12/2009 the accused made me his wife the entire of the period. He used to lock the door when he left the house. He had sealed the window with nails. He raped me till 15/12/2009. On 31/12/2009, the accused came and asked me to leave the house immediately."

When she was examined at Bungoma District Hospital on 1/1/2010 she informed the doctor that she had been raped on 14/12/2009, 18/12/2009 and on 30/12/2009. Mrs Leting wondered how spermatozoa could still be traced in the girl's genitalia on 1/10/10 given the dates on which she said she had been defiled.

But more important, the medical records, including the notes from Bungoma District Hospital and the P3, were produced by a clinical officer Benard Nyukuli (PW4) of Malakisi Health Centre. He did not examine her. He used the notes from Bungoma District Hospital to complete the P3 which he was allowed to tender in evidence. The doctor from Bungoma District Hospital who had examined her was not called to testify. The result was that the records form Bungoma district Hospital were hearsay evidence and not admissible. The consequence was that there was no admissible evidence called to back PW1 that she had been defiled by the Appellant. It is material that the trial court convicted the Appellant on the basis of her testimony, the medical evidence and the evidence of the other prosecution witnesses. However, only PW1 testified as to the fact of defilement. The other witnesses did not witness the incident. Regarding the evidence of these other witnesses, the Appellant pointed out that PW2 had to be locked up in custody for 9 days by the court before he could testify *"as per his statement"* to police. In detaining him the court noted as follows:

“The witness is not consistent   and is messing up his testimony despite the prosecution trying to lead him.”

It would appear he was giving evidence that was not furthering the prosecution case. He was a hostile witness, although he was not declared so by the court. The act of detaining PW2 because he was not giving evidence favourable to the prosecution was illegal. The court was descending into the arena of conflict, as it were. The Appellant was entitled to be tried by an impartial arbiter. One can not know what PW2 would have said had he not been detained. Would he have given evidence favourable to the defence? Did the detention of the witness prejudice the Appellant?

In conclusion, I find that the Appellant was convicted on evidence that was not safe. I allow the appeal, quash the conviction and set aside the sentence. The Appellant shall be set at liberty forthwith unless he is otherwise being legally detained.

Dated and delivered at Bungoma this 19th day of March, 2012.

A. O. MUCHELULE

JUDGE