



NAHASHON ONGWAE NYANGAU APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGMENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate’s Court at Keroka, Hon. J. Were in Criminal Case No. 1224 of 2010 dated 17th May, 2011)

The appellant, **Nahashon Ongwae Nyangau** was charged with the offence of defilement contrary to section 8 (i) and (2) of the **Sexual Offences Act**, 2006. He is said to have committed the offence on the 1st day of October 2010 at [particulars withheld] in Borabu District within Nyanza Province. He pleaded not guilty to the charge and was tried and convicted. The trial court sentenced him on 17th May, 2011 to life imprisonment.

Briefly the facts of the case were that the accused way laid the complainant while on her way to school, grabbed her and pulled her to a house where he defiled her. The prosecution relied on the testimony of 7 prosecution witnesses. The complainant testified as PW1 and narrated how the appellant accosted her on her way to school and in her words “*he did for me stupid things. He removed my clothes and did for me bad things...*” she told the court that she was rescued by one **Shadrack** who also beat the appellant. The incident happened at around 7.00a.m.

Shadrack Mosoti who testified as PW2 told the court that he witnessed the appellant defiling the minor and immediately set upon him to arrest him. He called for help and many people responded. A police vehicle was passing by and was stopped. The police took away the appellant to [particulars withheld] Police Station. The complainant’s father one **J.B.** testified as PW3. He said that he was called and he joined his daughter, two teachers and the accused in the police vehicle. He took the daughter to the hospital. One of the teachers who went to the rescue of the complainant, one **Isabella Mochere Kumenda** testified as PW4. She had rushed to the scene and found the complainant crying and the appellant already tied. Her testimony was corroborated by that of PW5 one **Enock Ragira** also a teacher. The Investigating Officer one **PC Hemo Guyo** testified that he received the appellant and the complainant at [particulars withheld] Police Station and issued P3 forms. He took both of them to the Masaba District Hospital where they were examined. The investigating officer produced the P3 reports.

PW7 one **Dr. Joab Mbeki** of Masaba District Hospital told the court that he examined the complainant on 1st October, 2010. He found that she had bruises on her genitalia and the hymen was broken. He concluded that she had been defiled. PW7 also testified that he examined the appellant and found that he had torn clothes and blood was oozing from his body. He had been assaulted and had a swollen face.

The trial court was satisfied that the appellant had a case to answer and put him on his defence. The appellant gave an unsworn statement. He stated that he was a form four student at Rikenye Secondary School. He testified that on the material day he was arrested while on his way to visit his grandmother on

allegation of having defiled a minor. He denied that he was the one who defiled her as there had been another man at the scene. He further testified that he had visited the hospital for treatment and that the whole incident was a frame up. The court was satisfied that the prosecution had proved its case and convicted the appellant.

The appellant has now appealed to this court against both conviction and sentence. His petition sets out the grounds that the medical report was dubious; that there were contradictions in the prosecution evidence; that there was mistaken identity; and, that his constitutional rights were violated.

The appeal came before me for hearing on 7th February 2012. The appellant presented written submissions. In the submissions, he states that the complainant's sibling one W. who was said to have been with the complainant when she was defiled was not called to testify. He takes issue with the fact that the complainant did not specifically state that he penetrated her and instead stated that '*he did bad things to me*' meaning that no offence was committed. The appellant has also questioned the authenticity of the P3 form and states that it was not conclusive. Finally, the appellant submitted that the age of the complainant was not conclusively determined.

The appellant in further oral submissions told the court that he was arrested on mistaken identity. He concluded that no proper investigations were done.

Mr. Mutai, learned counsel for the respondent opposed the appeal. He submitted that the conviction was safe as it was based on sound evidence. Going through the prosecution evidence, counsel submitted that the complainant gave a vivid account of the incident and was found to be a credible witness. The testimony of PW2 and the medical evidence corroborates the testimony of the complainant. On the issue of how the appellant was arrested, counsel submitted that the same was not material. Finally, counsel submitted that the alleged contradictions in the prosecution witness testimony pointed out by the appellant were not material in any way.

I am under duty as a first appellate court to subject the evidence to a fresh evaluation and come to an independent conclusion. In doing so, I am aware that I do not have the benefit of seeing or hearing the witnesses. See **Pandya –vs- Republic (1957) 336** as restated in **Okeno –vs- Republic (1972) E.A 32**.

The facts of this case have already been set out above. I will therefore examine the grounds of appeal and submissions thereon as against the said facts as hereunder:-

i. Whether or not the conviction was safe

The appellant has stated that the prosecution witnesses offered contradictory evidence. He has pointed out that the witnesses PW2 and PW3 gave different accounts of how he was arrested. He has raised the issue of mistaken identity and that crucial prosecution witnesses were not called. The record demonstrates that the complainant PW1 gave the court a vivid account of the incident. She was on her way to school, the appellant grabbed her near a neighbour's gate and defiled her. She used rudimentary terms like '*he lay on me and did bad things to me*'. The trial court taking into account the age of the complainant, understood her testimony to be a direct reference to an act of sexual intercourse. The appellant stated that since the complainant did not state specifically that he penetrated her, then he did not commit the offence. I find, taking into account the minor complainant's age, that the trial court correctly understood her testimony.

I find further that the complainant's testimony was corroborated in all material effects by the testimony of PW2 who was an eye witness and effected the first arrest, and the medical evidence tendered by PW7 the doctor who examined both the complainant and the appellant. After re-evaluating the evidence, I am satisfied that the conviction was safe. It was not, as alleged by the appellant, based on hearsay or untested evidence. Further, I dismiss the appellant's complaint that the prosecution did not call the complainant's sibling who was said to have been at the scene as baseless. The prosecution did prove its case through the witnesses it identified and called.

ii. Mistaken identity

The appellant was arrested first by PW2 one **Shadrack Moruri Mosoti**. He testified that the incident took place outside his compound behind a K-apple fence. He testified that as he was getting out of his gate, “...I suddenly chanced on an adult lying on a child..... he was startled and stood. The short was near his knees. We struggled and I held him we struggled for about 3 -5 minutes, I called for help a teacher came and got a rope and we tied the accused”. It is this testimony of PW2 that displaces the allegation of mistaken identity. The appellant was caught in the act, arrested and handed over to the police.

iii. Inconclusive medical evidence.

The appellant has taken issue with the medical evidence tendered. He has sought to impugn the P3 report stating that it did not conclusively determine that he is the one who had defiled the complainant and that it did not demonstrate that there was any bleeding or injury. Further, he has stated that the absence of spermatozoa showed that the complainant had not recently been defiled. The record shows that **Dr. Joab Mbeki** of Masaba District Hospital examined the complainant on 1st October, 2010. He testified as PW7 that he examined the complainant and found her genitalia with bruises and the hymen penetrated. He concluded that she had been defiled. PW7 issued a P3 report which indicated that the examination was carried out 5 hours after the incident. The complainant was put on post exposure prophylaxis treatment as a preventive measure against possible HIV infection. I find that the report which I have perused and the examining doctor’s testimony displaces the complaints raised by the appellant. The report conclusively states that the minor was defiled.

The same witness examined the appellant and observed that he had torn clothes and blood. He had been assaulted as a result of mob justice when he was being arrested by members of the public. He estimated the age of the appellant at 17 years.

The trial court convicted and sentenced the appellant to life imprisonment. This warrants my investigation as to whether the sentence was lawful.

The P3 report in respect of the appellant referred to above estimated the age at 17 years. Subsequently during the trial, the court ordered an age assessment to be carried out on the appellant. A report bearing the rubber stamp of the medical superintendent Kijauri sub-district hospital was tendered by the prosecution and marked as exhibit c-2. It placed the age of the appellant at 21 years. It is also instructive that the appellant has not raised an issue regarding his age either on the grounds of appeal or in his submissions before court. I therefore find on the basis of the age assessment report presented before the trial court that the appellant was an adult at the time of commission of the offence. I further find that the sentence imposed by the trial court was in accordance with section 8 (2) of the **Sexual Offences Act** and therefore lawful.

In sum and for the foregoing reasons, I find that the conviction was safe and the sentence imposed lawful and affirm the same. Consequently the appeal is dismissed.

Judgment dated, signed and delivered at Kisii this 27th day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

Nahashon Ongwae Nyangau :for appellant (present/absent)

..... :counsel for respondent (present/absent)

Edwin Mongare :court clerk

R. LAGAT-KORIR
JUDGE