REPUBLIC OF KENYA

High Court at Bungoma

Criminal Appeal 136 of 2011

(Appeal from the judgment of the conviction and sentence by the Senior Resident Magistrate

Hon. R. O. Oigara in Kimilili court in cr. case no.1295 of 2009)

ALFRED JUMA SHEMU.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was the 2nd accused and together with Joseph Mukanda Wasike (1st accused) were charged with gang rape contrary to section 10 of the Sexual Offences Act no.3 of 2006 in two counts. In count 1 the particulars were that on 21/8/2009 at Bungoma North District of the Western Province in association they intentionally and unlawfully committed an act which caused penetration by using their genital organs (penis) against a child PW aged 10 years. In count 2 it was alleged that during the incident they did the same to a child CW aged 15 years. The 1st accused was found not guilty and was acquitted. The Appellant was convicted on each count and sentenced to life imprisonment. He was aggrieved by the conviction and sentence and preferred this appeal which the State through Mrs Leting opposed.

CW (PW1) was aged 15 and a student at KF Secondary School and PW (PW2) was aged 10 and a pupil at N Primary School. They are daughters of NN (PW3) and FMW (PW4). PW3 had another wife, GW, who could not give birth. On 21/8/2009 evening PW3 invited the Appellant and the 1st accused to his home after they posed as herbalists who could treat GW to be able to get children. During the night the family was kept busy by these people and their witchcraft. There was a time in the night that PW3 and PW4 and the family were asked to go outside the house with the visitors. The Appellant then took PW1 by hand and brought her back to the house. He had an object that could speak like an elderly bukusu man. He used the object to threaten the girl who was made to undress and lie on a blanket. The object threatened to kill the girl if she did not obey. The Appellant then slept with her without a condom. He took her back to where the family was and took PW2 by hand beside the house and she was made to lie down and undress. He slept with her after which he threatened her that the object (they were calling it *"grandpa")* would kill her. She was released back to the family. The visitors went on with their witchcraft until 6.00 a.m when they were paid by PW3 and left. At about 8.00 a.m the girls informed their mother that the Appellant had defiled them. The mother saw blood all over PW2's clothes. In the evening PW3 was informed and next day the incident was reported to local administration and to police. On 24/8/2009 PW1 and PW2 were examined and found to have been sexually assaulted. PW1 was found to have contracted S.T.I. in the process. PW2's vulva was bleeding on touch, she had torn hymen and had bruised labia.

The Appellant gave sworn defence and did not call any witness. He stated that PW2, PW3 and PW4 were all known to him as they went to the same church. On 26/8/2009 PW3 found him talking to his wife (PW4) which annoyed him. He called members of public who arrested and beat him up before being handed to police where he was framed. He denied that he had defiled the girls.

The trial court considered the entire evidence and accepted the prosecution version that the Appellant had defiled the complainants. I have anxiously re-evaluated and re-considered all the evidence. One of the issues raised by the Appellant while he was prosecuting the appeal was that the medical reports on which

the court based its finding that the complainants had been defiled had been produced as person other than the maker. Indeed, Nickson Dide (PW5), Clinical Officer at Kitale District Hospital, who produced the P3 reports was neither the person who had examined the complainants nor the maker. She testified that the P3 forms had been completed by her colleague Beatrice Nekesa who was on leave. The Appellant was not represented and he was not asked whether he could wait for Beatrice to resume to come and testify. He was not asked whether he wished to cross-examine Beatrice. The prosecution did not present evidence to show that waiting for Beatrice could entail undue delay or cost. A civil servant on leave should be easily found to testify. The P3 reports, I find, were irregularly admitted. Considering that PW1 and PW2 gave unsworn statements and were not cross-examined, one would not say that, without the medical reports, the conviction can stand.

However, it was court's mistake that the medical evidence was irregularly received. It is my view that if the medical evidence is properly received there would be strong basis to convict the Appellant of the offence of defilement contrary to section 8 (1) of the Sexual Offences Act. I have considered the ages of the complainants and the gravity of the offence in question. I bear in mind the direction by the Court of Appeal in **Mwangi v. Republic [1983] KLR 522**. I allow the appeal, quash the conviction and set aside the sentence. I direct that the Appellant be retried by a competent court.

Dated, signed and delivered at Bungoma this 17th day of October, 2012.

A. O. MUCHELULE

JUDGE