REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 172 of 2010

GEORGE WAFULA NANGABO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No.10 of 2010 of the Principal Magistrate Court in Nyahururu, A. B. Mongare, SRM)

JUDGMENT

George Wafula Nangabo, the Appellant was charged on two counts in Nyahururu Principal Magistrate's Court Criminal Case No. 10 of 2010 of -

(i) Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act 2006 (No. 3 of 2006), and

(ii) Causing a child to be in need of care and protection contrary to Section 127(1)(b) of the Children Act, (Cap. 586, Laws of Kenya).

The Appellant was acquitted on the second count as no evidence was led on that count. He was however on the evidence found guilty on the 1st count, and was convicted and sentenced to 20 years imprisonment. Being aggrieved with both his conviction and sentence the Appellant appealed to this court on seven grounds that the trial magistrate erred in law and fact when -

- ***it failed to consider the defence evidence,***
- ***it ignored the evidence negating defilement,***
- ***it failed to conclude that the prosecution did not prove its case beyond reasonable doubt,***
- ***it meted a very severe sentence without regard to the law and facts of the case,***
- ***it ignored the law and thus reached an illegal decision,***
- ***it ignored the evidence on record hence arrived at erroneous conclusion,***
- ***it failed to analyse the evidence hence arrived at a wrong conclusion not informed by the law and***

evidence.

For those reasons the Appellant sought orders to quash his conviction, set aside the sentence, and set him at liberty.

The Appellant's Petition of Appeal raises two issues. **Firstly,** whether there was evidence to convict him for the offence for which he was charged, and **secondly** whether the sentence was proper or in accordance with the law.

The Appellant was charged under Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The said Section provides -

"8(1) A person who commits an act of defilement with a child is guilty of an offence termed defilement.

(2

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

To prove whether an accused has committed an act of defilement, the prosecution must prove the act of ***"defilement"*** that is an act which causes penetration**.** An act of penetration means ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*** The question is whether there was such an act.

It was the evidence of PW1 *(the complainant and the victim)* that she was with the Appellant for 4 days from 1.01.2010 at 3.00 p.m. To 4.01.2010 -

"The Appellant came in the evening. He forced me to sleep with him when he told me if I refused to sleep with him he would cut my throat. He did not say what he would hit me with. The Accused Person held my hands. He forced me to sleep with him. He is the one who removed my pants. He pushed his male organ into my female organ. In the morning he locked me in the house..."

When cross-examined by the Appellant, PW1 testified inter alia -

"my pant shows you slept with me …. my pants were torn. I tried to scream you closed my mouth. You used to lock all entries to your house."

PW5 Dr. Waite Kariuki testified on behalf of Dr. John Kahu *(pursuant to the provisions of SS. 33 and 77 of the Evidence Act, Cap. 80, Laws of Kenya)* who found that though there were no tears on the external genetalia, there were however bruises on the hymenal ring and there was evidence of sexual penetration. In addition PW4 produced the complainant's pant which was blood-stained.

From the evidence of PW1, *(the victim)* PW5 and PW4 there is no doubt that there was an act of penetration of the child, and the penetration was committed by the Appellant. The learned trial magistrate made a correct finding both in law and fact. I confirm that finding.

The second question concerned the Appellant's sentence which the Appellant described as harsh. It is correct that sentences under the Sexual Offences Act are harsh. They are intended to be so. They are intended to be severe to deter sexual predators against children who are often helpless in the face of older and stronger male opponents who lure them into places and circumstances in which the children end up abused, molested and defiled. This is one such case.

The Appellant *(whose age was not disclosed in the evidence, but is not material for purposes of this appeal)* lured the girl to his residence on the pretext that he wanted to show her his house. Foolishly believing that was all, the Appellant took the girl to his Manguo Estate house and once the prey was in the

nest, the Appellant went out and bought sodas and cakes. He forced the girl to eat and drink the soda. He left her in the house and did not spend the night in the house. In the morning of the second day, he returned to the house with tea and **"mandazi"** and enquired about the girls' family.

Treating her as wife or slave, the Appellant asked the girl to wash his clothes which the girl refused. The Appellant left and returned at 5.00 p.m. with a friend with a bag of potatoes. The victim refused to eat.

On the third day *(3.01.2010)* the Appellant took a bag and some documents, and came back with potatoes and forced her to wash his clothes. The Appellant and his friend cooked and ate. On the 4th day, *(4.01.2010)* worn out, the girl washed the Appellant's shirts, and spread the clothes. In the evening, the Appellant returned with ready rice. He forced her to sleep with him under threats of grievous harm – cutting her throat.

PW2, the victim's mother testified that the victim her daughter was 14 years of age. Her Birth Certificate and other documents were burnt during the 2007 Post Election Violence. This evidence was not controverted.

Confronted with this evidence, the Appellant made an unsworn statement relating to the incidents of 5th January 2010. He stated that he was visited by his friend, S as first visitor on 4th January 2010. The 2nd visitor was the complainant, with whom he stayed until 10.00 a.m. He does not say from what time the complainant visited him. He was interrupted by the appearance of the complainant's mother (PW2) and the Police (PW3) on 5th January 2010. His friend S dissapeared.

The Appellant's unsworn statement as the learned trial magistrate found, is not sincere. I will say it is cynical and hypocritical. It is lies. The evidence of the victim was detailed, day by day matter of fact on how he lured her into his Manguo Estate house, forced her to wash his clothes, threatened her with grievous harm unless she had sexual intercourse with him. He defiled her.

Indeed as Mr. Omutelema learned Senior Principal State Counsel submitted, the complainant was incapable of consenting to the act of sexual intercourse.

Age is a question of fact as the Court of Appeal held in the case of **KIGWARO VS. REPUBLIC [2009] KLR 269.** There was no challenge to PW2, the victim's mother's evidence that her daughter was 14 years of age. The punishment for the offence of defilement of a child aged between twelve and fifteen years is imprisonment for 20 years. The trial court came to the correct decision.

For those reasons, I find no merit in the Appellant's Petition of Appeal and dismiss the same. I confirm both the conviction and sentence imposed by the lower court.

It is so ordered.

Dated, signed and delivered at Nakuru this 30th day of November, 2012

M.J. ANYARA EMUKULE

JUDGE