



REPUBLIC OF KENYA

High Court at Kitale

Criminal Appeal 2 of 2010

FRED WANYONYI SIMIYUAPPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(Being an appeal from the original conviction and sentence of D.M. Ochenja – PM in Criminal case No. 3451 of 2006 delivered on 26th January, 2010 at Kitale)

J U D G M E N T.

Fred Wanyonyi Simiyu (herein, the appellant), appeared before the Principal Magistrate at Kitale facing a charge of defilement contrary to section 8 (1) read with section 8 (2) of the Sexual offences Act, in that on the 12th October, 2006 at Trans Nzoia District, intentionally and unlawfully defiled AN a girl aged nine (9) years.

After pleading not guilty to the charge, the appellant was tried and convicted. He was sentenced to a prison term of twenty (20) years.

Being aggrieved by the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds contained in his petition of appeal dated 3rd February, 2010. he appeared in person at the hearing of this appeal and opted to rely on his written submissions.

The respondent opposed the appeal by submitting through the Learned Prosecution Counsel, **Mr. Chelashow**, that it was proved by the prosecution that the appellant indeed defiled the minor complainant who previously knew him and was able to properly identify him.

The learned prosecution counsel submitted that even if the minor referred the appellant by three names, no injustice was caused to the appellant and in any event, the error was curable under section 382 of the Criminal Procedure Code and in fact, the appellant was an uncle to the minor complainant. The learned prosecution counsel contended that the issue raised by the appellant regarding his identity was an afterthought and that the contradiction alluded to by the appellant did not go into the substance of the evidence against him.

The Learned Prosecution Counsel submitted that although the minor reported the incident to PW2 rather belatedly, she indicated that it was not the first time for her to be defiled by the appellant.

The Learned Prosecution Counsel contended that there was no compromise in the preparation of the P3 form as alleged by the appellant and that the doctor (PW3) confirmed that the minor had indeed been defiled and infected with a disease by the appellant. Further, the trial court believed the minor after

finding her credible.

The Learned Prosecution Counsel, urged this court to dismiss the appeal while contending that there was no grudge against the appellant as alleged by himself.

For this court to draw its own conclusions, it must re-consider the evidence adduced at the trial with the full knowledge that the trial court had the advantage of seeing and hearing the witnesses.

Briefly. It was the prosecution case that the complainant **AN(PW1)**, aged nine (9) years at the time and living with her grandmother was at home on the material date at about 3.00 p.m. When her uncle, the appellant, visited and requested for maize to be roasted for him. This was done by the complainant's grandmother who thereafter left to attend a women's meeting thereby leaving the complainant and the appellant alone in the house. It was then that the appellant held the complainant and placed her on sacks. He thereafter removed her underpants and his. He then proceeded to defile her while threatening that he would kill her if she cried. The complainant's grandmother, TN (PW2) confirmed that she proceeded to a women's meeting leaving the complainant and the appellant at home. Upon her return, she found the complainant sleeping and on making enquiries was informed that the complainant was sick. The information came from the complainant herself. It was after four days that the complainant informed her that she had been defiled by the appellant amid threats. The grandmother reported the matter to the village elder (Mukasa) who referred her to hospital where the complainant underwent a period of treatment before the matter was reported to the police.

Stephen Chepkos (PW3), a clinical officer at Kwanza health centre examined the complainant and confirmed that she had been defiled. He compiled his findings in a P3 form which was tendered in evidence.

P.C. Patrick Muiruri (PW4) of Kitale Police station, received the necessary report and issued the P3 form for completion by a medical officer. He learnt that the suspect (appellant) was a police reservist. He summoned the appellant to the police station and on his arrival, arrested him.

After completing investigations, PC. Muiruri, prepared the present charge against the appellant.

In his defence, the appellant denied the offence and indicated that he was at his home on the material date and was arrested on the 17th October, 2006 and taken to the police station where he was asked about his rifle. He was a police reservist at the time. He was later informed that he had defiled a young girl, an allegation that he refuted. He attributed his predicament to a person called John Mangeya, whom he had previously arrested.

In the opinion of this court, after having considered the foregoing evidence and the submissions by both sides, there was no substantial dispute that indeed the complainant (PW1) was defiled as alleged. This was established by the complainant's own evidence as corroborated by that of the clinical officer (PW3). Indeed, the learned trial magistrate correctly found as a fact that not only was the complainant defiled but that she was also in the process infected with a venereal disease. The basic issue for determination was therefore the identity of the assailant.

The appellant in his defence denied responsibility for the offence and suggested that he was implicated by a person he had previously arrested while in the course of his duty as a police reservist. However, the offence occurred in broad daylight in surroundings which were familiar with the complainant i.e. her grandmother's house where she lived. She did not hesitate in identifying the appellant as the person who defiled her. Indeed, the appellant was her uncle, a fact not disputed by the appellant. The complainant knew the appellant very well in that there was no possibility of having identified him wrongly nor was there any possibility that she may have incriminated him for no apparent reason.

The complainant's grandmother (PW2) confirmed that the appellant was her nephew and that she left him with the complainant when she went to attend a meeting of women. She returned home later only to be told that the complainant was sick and to learn four days thereafter that the complainant had actually been

defiled.

Clearly, there was sufficient credible evidence from the complainant that the appellant was the assailant. Besides, medical examination of both the complainant and the appellant revealed that they were suffering from a form of venereal disease thereby lending credence to the fact that the appellant defiled the complainant and infected her with a disease. His defence was sufficiently disproved and rendered unworthy of credit. His quarrel or grudge with a third party called John Mangeya was of no relevance as it had nothing to do with the fact that he was the person responsible for sexually assaulting the complainant who undisputedly was aged 9 years old at the time. The prosecution evidence against him was credible, corroborative and cogent. Consequently, his conviction by the learned trial magistrate was sound and proper.

In sum, this appeal must and is hereby dismissed for want of merit.

[Delivered and signed this 13th day of November, 2012.]

**J.R. KARANJA.
JUDGE.**