



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CORAM: F. AZANGALALA J.
CRIMINAL APPEAL NO. 65 OF 2008

BETWEEN

BONFACE SHEMWAMWA LOSENO :::::::::::::::::::: APPELLANT

A N D

REPUBLIC :::::::::::::::::::: RESPONDENT

*[Being an appeal from the Judgment of the Senior Resident Magistrate -
G.A. Mmasi, dated 28th August, 2008 at Eldoret in CMC.CRC.NO1187 of 2008]*

JUDGMENT

The appellant, **Bonface Luseno Shamwama**, was charged before the Eldoret Chief Magistrate’s Court – **G.A. Mmasi**, Senior Resident Magistrate with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual offences Act No. 3 of 2006. He faced an alternative count of indecent assault contrary to section 11(1) of the same Act. In the principal count, it was alleged that the appellant, on the 5th day of April, 2008, at N[...] Village, L[...] Sub-location, L[...] Location in Lugari District, within Western Province, unlawfully defiled P.N., (hereinafter “**the Complainant**”), a girl aged 15 years.

In the alternative count, it was alleged that on the very same day, at the same place, the appellant unlawfully and indecently assaulted the complainant by touching her breasts and private parts.

The appellant appeared before **W.N. Njage** (P.M.) and pleaded not guilty. The trial was however, conducted by **G.A. Mmasi**, a Senior Resident Magistrate. The prosecution called five witnesses and after hearing their evidence, the court found that the appellant had a case to answer and put him on his defence. The appellant made an unsworn statement in which he denied the offence contending that he was arrested by members of the public for an offence he never committed. Upon analyzing the evidence of both the prosecution and that of the appellant, the learned Senior Resident Magistrate found the appellant guilty on the principal count of defilement, convicted him and after regarding the appellant’s mitigation, sentenced him to twenty (20) years imprisonment.

The appellant was not satisfied and has appealed to this court against both conviction and sentence. When the appeal came up for hearing on 5th May, 2011, the appellant appeared in person and **Mr. Oluoch**, learned Senior Deputy Prosecution Counsel, appeared for the State. The appellant in his address to the court merely stated that he would rely upon his grounds of appeal. There are however, no specific

grounds of appeal stated in his petition of appeal. **Mr. Oluoch**, on his part, submitted that there was no reason to disturb the conviction of the appellant as the same was based on sound evidence in that the complainant knew the appellant and the incident took place in broad daylight. He further submitted that if corroboration was necessary, the same was available even in the condition of the complainant who was crying and bleeding when **D.N.W.**, (P.W.3), her father, met her shortly after the defilement.

Briefly, the facts were as follows: the complainant and her sister, **P.N.**, (P.W.2) on the material date at about 4.00 p.m., went to fetch firewood from a forest near their home. While in the forest, they were accosted by the appellant who was armed with a knife. He warned the pair not to scream or else he would kill them. He chased away P.W.2 and knocked down the complainant. He removed her pant and he undressed. He then had sexual intercourse with the complainant without her consent. When he was done, he left warning her not to leave. She left all the same and on her way home, met an old man who decided to take her to hospital. On the way, they met her father, (P.W.3). The father had been informed of her ordeal by (P.W.2). The complainant reported to him of the defilement. P.W.3 found the complainant crying in pain. She was also bleeding from her private parts.

The complainant was taken to the police station where the defilement was reported. The next day, she was taken to Webuye District Hospital where she was admitted from 6th to 13th April, 2008. **Dr. Ludenyo Maxwell**, (P.W.4) of the said hospital examined her and observed that she had blood stained clothes. He further found that she had sustained a tear between her vagina and rectum. She was also discharging a foul whitish discharge from those parts. P.W.4 filled and signed the P.3 which had previously been issued by P.C. **Grace Mwaura** (P.W.5) of Lumakanda Police Station. The appellant was arrested by members of the public and taken to Lumakanda Police Station where he was re-arrested by P.W.5. He was thereafter charged as already stated and on being put on his defence, denied committing the offence as already stated.

On the above facts, the learned Senior Resident Magistrate found that the offence of defilement had been proved against the appellant as required in law and convicted him as already stated. She then sentenced him to twenty (20) years imprisonment as already stated. In convicting him, the learned Senior Resident Magistrate found that the offence was committed in broad daylight and the appellant was at the time known to the complainant.

The complainant was convicted mainly on the evidence of the complainant and P.W.2. The testimony of P.W.2 should not have been relied upon as it was not tested by cross-examination. However, even if the testimony of P.W.2 had not been taken into account, the testimony of the complainant passed muster. I say so, because the complainant testified that she had previously known the appellant and when he accosted her, she recognized him. The appellant was not disguised in any way.

When her father, (P.W.3) met her shortly after the ordeal, the complainant was crying from pain. She was also bleeding from her private parts. That distressed condition in my view corroborated her testimony and the learned Senior Resident Magistrate could have still convicted the appellant without the testimony of P.W.2.

Besides the distressed condition of the complainant, the medical evidence adduced by **Dr. Ludenyo**, (P.W.4) corroborated the complainant's evidence of defilement. The doctor testified that the complainant suffered very severe injuries to her private parts which would affect her health adversely. In his own words:-

“On examination, she had blood stained clothings. She was defiled on 5/4/2008. She was in fair general condition. On examination of genitalia, she had blood stains. She had tear between vagina and rectum. She was discharging foul whitish discharge.

I assessed degree of injury as grievous harm the tear of the vagina and rectum. There was penetration in that the stool may just being coming out without restraint.”

Those were, no doubt, severe injuries and the learned Senior Resident Magistrate was entitled to find as

she did that:

“The injuries she sustained were quite severe as the doctor has elaborated on the lasting effect the defilement will have on the girl.”

In all those premises, I have come to the conclusion that the appellant was convicted on sound evidence. His appeal against conviction is therefore without merit. I have come to that conclusion notwithstanding that the appellant was charged under section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006 which would have attracted a life sentence. The evidence adduced before the learned Senior Resident Magistrate clearly proved that the complainant was aged 15 years. Indeed in the charge particulars, her age was given as 15 years. The appellant should therefore have been charged with the offence created under section 8 (1) as read with section 8 (3) of the same Act. As the learned Senior Resident Magistrate could have convicted under the said section, and appears to have indeed done so, I have come to the conclusion that she amended the section charged from 8 (2) to 8 (3) without expressly saying so. I further find that the appellant suffered no prejudice. He has not in any event complained of any prejudice.

With regard to sentence, the learned Senior Resident Magistrate had no discretion on finding that an offence under section 8 (1) as read with section 8 (3) had been committed because under the latter, the minimum sentence provided is twenty (20) years which was the sentence imposed against the appellant. In the event, the appeal against sentence is also without merit and is dismissed.

The entire appeal is accordingly dismissed.

DATED AND DELIVRED AT ELDROET THIS 16TH DAY OF JUNE 2011.

**F. AZANGALALA
JUDGE.**

Read in the presence of:-

1. **Bonface Shemwamwa Loseno**, the appellant in person and
2. **Mr. Ouoch**, Senior Deputy Prosecution Counsel for the State.

**F. AZANGALALA
JUDGE.**

16/6/2011