



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 135 OF 2010.

THOMAS NANOK.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence by T. Nzyoki – SRM in Criminal Case No. 314 of 2009

delivered on 17th November, 2010 at Lodwar.)

J U D G M E N T.

1. The appellant, **Thomas Nanok**, was charged with the offence of attempted defilement of a girl contrary to section 9 (1) as read with section 9 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge stated that on the 9th day of March, 2009 at K[...] area in Turkana Central District within Rift Valley province, he intentionally and unlawfully attempted to cause penetration to genital organs of **A.L.**, a girl aged 14 years. The appellant was tried before the Senior Resident Magistrate, Lodwar. He was convicted and sentenced to 10 years imprisonment. Being aggrieved with the conviction and sentence, the appellant has appealed on the following grounds:-

(1) THAT, the learned honorable magistrate erred in law and fact in failing to find that evidence adduced about the identification of the appellant was unsafe, and could not support a conviction of the appellant.

(2) THAT, the evidence of identification and recognition was not sufficient to sustain a conviction of the appellant in the circumstances of the case.

(3) THAT, the learned honorable magistrate erred in law and fact by relying on a single witness evidence of identification and recognition which was uncorroborated and replete with mistakes, errors,

contradictions and in consistencies.

(4) THAT, the learned honorable magistrate erred in law and fact in failing to consider the defence of the appellant which was cogent and consistent.

(5) THAT, the learned honorable magistrate erred in law and fact in failing to find that failure by the prosecution to prove the age of the complainant either by birth certificate or age assessment report was fatal to the prosecution case.

(6) THAT, the medical evidence adduced was not in tandem with the testimony of the complainant and the learned honorable magistrate thus erred in law and fact in failing to find that the complainant was untrustworthy and her evidence could thus not support a conviction.

(7) THAT, the learned honorable magistrate erred in law and fact in failing to find that failure by the arresting officer to testify, and in absence of evidence as to the circumstances of arrest of the appellant, severely weakened the prosecution case and ought to have led to acquittal of the appellant.

(8) THAT, the judgment was against the weight of the evidence adduced at trial.

2. In further arguments in support of the above grounds of appeal, **Mr. Wanjala**, learned counsel for the appellant contested that the identification of the appellant was never resolved by the evidence on record. There was a gap in the prosecution's evidence regarding the identification of the appellant especially if the appellant's defence was taken into consideration. For reasons that the appellant was only identified by the complainant, the learned trial magistrate should have warned himself and given reasons why he choose to believe the evidence of the complainant and not the defence. This offence allegedly took place at night, and no evidence was adduced to show the intensity of the light that illuminated the scene, this left a possibility of a mistaken identity.

3. Moreover, the age of the complainant was not ascertained, which is also a serious oversight considering that under the Sexual Offences Act, the sentences are categorized according to the age of the complainant. Lastly, counsel submitted that there were many contradictions which were fatal to the prosecution's case. For instance the Doctor who examined the complainant found no evidence of sexual assault. The complainant testified that immediately after the ordeal, she suffered from a sudden eruption of pimples which appeared on her body for which she was treated at Lodwar District Hospital. This treatment was however not supported by the medical report.

4. On the part of the State, this appeal was opposed; M/s. **Bartoo**, the learned State Counsel submitted that the complainant identified the appellant by recognition which is more reliable than identification by a stranger. The complainant had seen the appellant 3 days earlier when he gave them a lift to Lodwar District Hospital. This was a second encounter and the complainant gave a description of the appellant as having a squinted eye. The court conducted a *voire dire* examination of the complainant and found she was truthful thus she proceeded to give evidence on oath. PW2 who examined the complainant found her without the inner wear which she left at the scene as she tried to escape the ordeal. There were no material inconsistencies in the evidence of prosecution. Counsel urged the court to dismiss the appeal for lacking merit.

5. This being a first appeal, this court is mandated to reconsider and re evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction and sentence. In so doing, this court should bear in mind that it never heard the witnesses as they testified before the trial court and give due allowance for that. I now wish to set out briefly the evidence before the trial court that led to the conviction and sentencing of the appellant. The prosecution's case was supported by the evidence of 5 prosecution witnesses. The key witness was A.L., **PW1**, who was also the complainant. After conducting a *voire dire examination*, the trial magistrate found the complainant was 14 years old and she possessed sufficient knowledge to give sworn evidence.

6. PW1 testified that on 9th March, 2009, at 7.00 p.m. she was at Lodwar District Hospital attending to her sick mother when the appellant offered to take her to Lodwar town and buy milk for her sick mother. PW1 drove with the appellant in a motor vehicle motor which she described as belonging to CDF. They went to Lodwar town and bought sodas and chips at M[...]s shop. They drove to Savanna shop and the appellant bought milk. The appellant drove the motor vehicle at a lonely place where there were trees. The appellant ordered the complainant remove her clothes but she resisted. The appellant pulled her out of the motor vehicle and dragged her behind the vehicle and removed her innerwear. The appellant threatened PW1 with death or rape and ordered PW1 to lie down. PW1 lay down on her back, the appellant removed his jeans trousers up to the knees and he had sex with PW1.

7. PW1 went on to testify that while the appellant was trying to penetrate into her sexual organ, she kept on moving her body. Suddenly she heard a vehicle coming from the direction of K[...] and told the appellant that there were people approaching. She managed to escape and ran to the road but the motor vehicle passed. She ran towards L[...] High School and entered a house where she found a woman and narrated to her what had happened to her. She narrated how she boarded a CDF vehicle driven by a man with squinted eyes. The husband of the woman who testified as **PW3, John Kaituku** found PW1 in his house at about 10.00p.m. He interviewed PW1 who had by that time started swelling on the body so he decided to escort to Lodwar police station and made a report.

8. They were issued with a note for PW1 to go Lodwar District Hospital. After 2 days PW3 was called by members of the Catholic Peace and Justice Commission to record a statement at the police station. PW1 was attended to at Lodwar District Hospital by **Bernard Bundotich**, PW2, who is a clinical officer at Lodwar District Hospital. He examined PW1 and found;

“Normal external genital that is both the labia majora and labia minora were normal. No bruises or lacerations. There was no blood or discharge fro the general genitalia. Upon conducting further investigations, the HIV test was negative. There was nothing detected upon conducting urinalysis and venereal disease investigation. I conducted that there was no evidence of any sexual contact. I noted that PW1 did not wear underwear at the time of the examination.”

9. The other prosecution witness was **CPI. Samsom Longopito** who investigated this matter. He testified that PW1 referred to the man who had defiled her as a pastor who had earlier assisted her and her mother to travel from Likchar to Lodwar District Hospital. He recorded statements from PW1, PW3 who gave refugee to PW1 when she escaped from the assailant. He had also recorded a statement of PW1's mother. Unfortunately, PW1's mother passed away on 27th March, 2009 while undergoing treatment at Lodwar District Hospital and this was confirmed by **David Mutai**, a deputy Civil Registration Officer who also testified in this matter.

10. When the appellant was put on his defence, he gave sworn evidence and denied having committed the offence. He however admitted that on 6th March, 2009, in the company of the brother's driver they had gone to Lokichar to visit his family and while he went to pick a sick relative at Lokichar hospital, the doctor at Lokichar requested them to assist a sick woman to travel for treatment at Lodwar District Hospital. The appellant allowed the patient. He drove the vehicle with his wife at the driver's cabin, the wife of the brother's driver and a child. They arrived at Lodwar District Hospital at 3.00p.m. And the sick people alighted and he proceeded to his home. Thereafter the driver of the vehicle took it. On 10th March, 2009 he was informed that the police were looking for him on rumors that he had defiled a girl. He took himself to the police station. He denied that he committed the offence and the vehicle that he was driving belonged to Josephat Nanok who is his brother.

11. Against the above evidence, the issue for determination is whether there was sufficient evidence to support the conviction of the appellant. First, the issue of identification should be revisited because the attack took place at night and there was no identification parade that was mounted by the police for PW1 to identify her attacker. According to the appellant, he was at Lokichar in the company of the driver who normally drives the pickup that belonged to his brother. This court is concerned that no investigations

were carried out by the police to ascertain that the motor vehicle that was described by the complainant as belonging to CDF was indeed the one that was driven by the appellant. The appellant mentioned the presence of a driver when they picked the patients from Lokichar to Lodwar District Hospital. He also contested that after dropping the patients, he went to his home and the motor vehicle remained with the driver. This evidence creates doubts in my mind whether the identification of the appellant was free from error.

12. Another matter that causes anxiety in my mind is the number of contradictions that I find in the evidence of PW1. I particularly refer to page 8 where the PW1 testified as follows:-

“I laid down on my back. The accused person removed his jeans trousers upto the knees point. The accused person then had sex with me. He inserted his male organ into my sexual organ. The accused person while he was trying to fully penetrate my sexual organ I kept on moving myself away. Suddenly a motor vehicle which was coming from K[...] area arrived. I told the accused person that there was a motor vehicle approaching but the accused person insisted that the motor vehicle occupants were not able to see us. When the motor vehicle was nearby I woke up and ran towards the road.”

The question I have to ask is whether there was sex or was it attempted defilement because PW1 says there was sex and at the same time there was no penetration. Secondly, it is also not clear how PW1 managed to remove herself from the grips of the appellant who was lying on her, and managed to run to the road. In my opinion, these contradictions should have been addressed during the trial and by the judgment of the learned trial magistrate.

13. The evidence by PW2, the clinical officer showed there was no defilement when he testified as follows:-

“Normal external genital that is both the labia majora and labia minora were normal. No bruises or lacerations. There was no blood or discharge fro the general genitalia. Upon conducting further investigations, the HIV test was negative. There was nothing detected upon conducting urinalysis and venereal disease investigation. I concluded that there was no evidence of any sexual contact. I noted that PW1 did not wear underwear at the time of the examination.”

I need not say anymore in this appeal, I find it has merit. There were numerous gaps in the prosecution's case which should be solved in favour of the appeal. The conviction is quashed and the sentence of 10 years is set aside. The appellant is to be set at liberty unless otherwise lawfully held.

Judgment read and signed this 3rd day of June, 2011.

MARTHA KOOME.

JUDGE.