REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO.22 OF 2008

SYLIVESTER WANDERA MWOLO...APPELLANT

=VERSUS=

REPUBLIC...RESPONDENT

[From the conviction and sentence of M.W. Njagi, Resident Magistrate in Busia Criminal Case No.1002 of 2007]

J U D G E M E N T

The appellant, Sylivester Wandera Mwolo, was convicted of defilement of a girl under Section 8(4) of the Sexual Offences Act and sentenced to 30 years imprisonment. He appealed against the conviction and sentence.

The prosecution facts in summary, were that the appellant went to the home of the complainant in the morning of 13.8.207 at about 7.00 a.m. In absence of all those who lived in that home, he persuaded the complainant, a girl of 17 years and an epileptic, to submit to him for sexual intercourse. Before the intercourse, the appellant removed the girl's pants after persuading her to enter her brother's bed. After finishing the act, he went away but soon after, one by the name of N., who had seen the appellant leave the home at the time, went and asked the complainant whether the appellant had done anything bad to her. That is when, as evidence shows, she opened up and told him what the appellant had done to her.

Apparently there-after nothing much happened apart from the news spreading to one or two more persons. In the evening at about 7.00 p.m the same day PW2 E.B.M., brother to complainant, got the relevant information from their grandmother, M.N. She told him that the appellant, Wandera, had raped the complainant that morning.

The next morning on 14.8.2007, E.B. and an uncle M.O., confronted the complainant about the alleged incident. The latter told the two that the appellant, had indeed raped her a day earlier, on 13.8.2007. The two then decided to go to the house of the appellant and confront him with the allegation. The appellant denied the allegation. Then a meeting of clan elders was summoned and the appellant was again confronted there. He once more denied the allegation. That is when they, nevertheless, decided to arrest and take the appellant to M[...] Police Station with the complaint of defilement.

PW3, M.N. was the grandmother of the complainant who on 13.8.2007, got a rumour that appellant had that morning raped the complainant. She passed the information to her son D.M., PW4.

PW4 D.M., got information on 14.8.2007 at 7.00 a.m, from PW3, that appellant had, a day before, had sexual intercourse with the complainant. When he, however, confronted the complainant with the said information, the complainant admitted. When he confronted the appellant similarly, the latter denied before him alone and later before clan-elders. The appellant was nevertheless taken to B[...] Police Patrol Base.

PW5, P.C. Paul Ngei of B[...]ni Police Patrol Base, received the appellant from members of the public on 14.8.07 at 9.31 a.m with a complaint of defilement. He recorded it in the O.B. and took the complainant who was present, to hospital. At the hospital PW6 examined her and recorded his findings in a booklet which was later produced in curt as exhibit 1.

PW6, George Wanga, was a registered Clinical Officer in B[...] District Hospital. He saw and examined the complainant, L.N., at the hospital on 14.8.2007. He found her to be 17 years old and had a history of defilement on 13.8.2007 at 8.00 a.m. He observed tenderness on the lower abdomen, and on both thighs, which he estimated to be one day old. He assessed the injuries to have been caused by a blunt object.

On examination of complainant's genitalia, he noticed that the labia majora and minora were swollen and tender to palpate. He saw a whitish foul smelling discharge. There was also pus with epithelial cells and spermatozoa. He concluded that there had been a rape. He signed a P3 on 16.8.2007, which he produced as exhibit 1.

On 14.8.2007, the witness also medically examined the appellant who had been taken to him by police from B[...] Police Station. On examining the penile shaft of the appellant, he noticed it coated with bruises and he concluded that the penis had penetrated a female genitalia. He filled and signed a P3 which he produced as exhibit 3.

The trial court put the appellant on his defence on the above evidence from the prosecution. However, the appellant chose to keep silence and so informed the court, that he would say nothing but would wait the court to decide. He also chose not to call any witness.

The honourable trial magistrate first considered the age of the complainant which he settled at between 16 and 17 years old after relying on some booklet recorded by a Doctor Njau Z.B. Although PW5 referred to the booklet and appears to have produced it as exhibit 1, the witness did not state that the person who assessed the complainant's age was Doctor Njau Z.B. Furthermore Dr. Njau Z.B was not called to testify and no explanation for the omission was offered or recorded, notwithstanding the fact that the issue of age of the complainant was crucial in this case. The court will revert to this point shortly.

The trial Magistrate next observed the fact that the complainant's evidence as a minor, required

corroboration and after also observing the court practice that in a case of a sole witness, the Magistrate needed to warn himself of the danger of basing a conviction on such evidence before doing so. He indeed warned himself and found corroboration in the medical evidence of PW6 which established sexual activity in the complainant's vagina by the presence of bruises on the labia manora and majora.

The trial Magistrate rightly considered the evidence that linked the appellant to the said sexual assault. He found that the complainant's evidence connected the appellant to the sexual activity already described.

I have carefully considered the recorded evidence. The charge against the appellant under Section 8(4) of the Sexual Offences act Act No.3 of 2006, required that the evidence must prove the age of the complainant to be below 18 years. An age assessment by one Dr. Njau Z.B dated 4.10.2007 or soon thereafter showed that the complainant was 16 years old. It is not clear, however, how this document entered the record since Dr. Njau was not called to testify in this case. On the other hand there is the evidence of PW6, George Wanga a Clinical Officer, which gave the complainant's age as 17 years.

I have considered this piece of evidence. I would agree that where the age is shown to be 16 or 17 years, it would be fair to hold it to be 17 years since the higher figure would be in favour, if at all, of the accused. There was no evidence to suggest that the age might be beyond 17 years.

It is proper that the trial Magistrate warned himself of the fact that the evidence as to whether and who molested the complainant required corroboration. Her story that she was defiled was confirmed by the medical evidence which established the presence of spermatozoa and pus inside the vagina of the complainant's within a period of about 24 hours. This was corroborating the complainant story that she had been subjected into sexual intercourse by the appellant and no other person. There was no reasonable explanation from anyone else including the appellant, why the complainant should say she had been raped when she was not. Furthermore there was no reason why she should say that it was the appellant who did it. More important, the appellant did not even attempt to deny the claim even when she was given opportunity to do so in his defence. This left the complainant's evidence against the appellant totally unchallenged, although it was his right to choose to say nothing as he did.

It is my conclusion therefore that in the face of the complainant's evidence that it was the appellant who assaulted her and the fact that the molestation was corroborated by the medical evidence, the trial Magistrate was entitled to rely on it to convict after warning himself of the danger of doing so. That is more so since the appellant left the strong corroborated evidence unchallenged.

It is difficult to understand why the trial Magistrate who found the complainant to be 17 years old and intelligent, could not find it necessary to swear her. It is only children of tender years who do not understand the nature and meaning of an oath who are, out of caution, not sworn before testifying. The fact that the complainant was an epileptic and stammered did not make a difference since that did not negate her intelligence.

Be it what it may, however, I am satisfied that the evidence on record taken together, proved the charge of defilement against the appellant. The trial Magistrate was accordingly entitled and in order to convict as he did.

This court accordingly, finds that this appeal has no merit on the point of conviction.

As touches the sentence, the trial court meted out a sentence of 30 years where the minimum sentence due is 15 years. He gave no reason why he never gave the minimum sentence where the appellant was a first offender who had five children without a mother since she had died. The minimum sentences as they presently exist and as they were determined by Parliament, are indeed harsh and are an expression of society's anger to such offences. Furthermore there was evidence that the complainant was not a virgin at the relevant time. It is my view therefore, that 30 years sentence is under the relevant Act, probably set aside for second offenders who molest young girls between the age of 12-15 years. I accordingly find that the sentence of 30 years was manifestly excessive. I reduce it to 15 years taking into account the mitigating circumstances of the case. The appeal succeeds to that extent only, otherwise it is dismissed. Orders accordingly.

Dated and delivered at Busia this 13th day of July 2011.

D.A. ONYANCHA

JUDGE.