



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI Criminal Appeal 80 of 2009

JUSTUS WAHOME CHOMBA.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of L. Mbugua, Principal Magistrate in the Senior Resident Magistrate's Criminal Case No.966 of 2007 dated 7th April 2009 at Karatina)

JUDGMENT

This judgment is in respect of two appeals which were consolidated, i.e., HC.CR. Appeals No. 80 of 2009 and HC.CR. No. 85 of 2009. The record shows that, **JUSTUS WAHOME CHOMBA**, the appellant herein, was arraigned before M/S L. Mbugua, learned Principal Magistrate, vide Karatina Senior Resident Magistrate's Court Criminal Case No. 966 of 2007 to face a charge of defilement contrary to *Section 8 (1) (2)* of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that on the 9th day of December 2007 at N Village in Nyeri District within Central Province, willfully and intentionally committed an act of penetration to V NW, a girl under the age of 18 years. The Appellant also faced an alternative charge of indecent act contrary to *Section 11 (1)* of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative count is that the Appellant unlawfully and intentionally committed an indecent act to VNW, a girl under the age of 18 years by touching her sexual organs with his genital organ on 9th December 2007. The learned Principal Magistrate heard the case and in the end she convicted the accused (Appellant) on the main count. He was sentenced to 15 years imprisonment. Being dissatisfied the Appellant preferred this appeal.

On appeal, the Appellant put forward the following grounds of appeal in his Petition:

1. *The learned Magistrate erred in law and in fact in convicting and sentencing the appellant for the offence of defilement contrary to the evidence of the medical report produced by the doctor.*
2. *The learned Magistrate erred in law and in fact in convicting and sentencing the accused on contradicting evidence given by the prosecution witnesses.*
3. *The learned Magistrate erred in law and in fact in sentencing the appellant to a harsh sentence merely on grounds that the offence is grave, a fact never proved in this case.*
4. *The charges against the appellant were not proved beyond reasonable doubts as required by law.*
5. *The learned Magistrate erred in law and in fact in failing to appreciate that the appellant was a first offender and a bread winner to his siblings who are orphaned.*

Before delving into the merits or otherwise of the appeal, let me first set out the case that was before the trial court. The prosecution submitted the evidence of five witnesses to support its case. V W (P.W.1), the complainant, was the first to take the witness stand. She told the trial court that on 9th December 2007 she and her cousin E Wi boarded motor vehicle registration No. KAD [...] K, a Nissan Matatu as a fare paying passenger. P. W. 1 claimed that the Appellant, who was also a passenger, prevented her from alighting at Kaharo. By that time her cousin had alighted. The motor vehicle is said to have driven off despite her screams. P. W. 1 said the Appellant promised to take her to her aunt's place. It is said the matatu was parked at a home next to Gatiki bridge at 10.00 p.m. P. W. 1 said the conductor and the accused (appellant) escorted her to her aunt's place. The conductor is said to have walked in front of them. P. W. 1 claimed the Appellant tripped her whereupon she fell down. The conductor is alleged to have come back, held her by the hand and mouth as the Appellant raped her. P. W. 1 said the duo escorted her to her aunt's place where they disappeared. On arrival at her aunt's place, P. W. 1 said that her uncle beat her and her cousin for coming home late. P. W. 1 said she did not explain to her aunt and uncle what had happened to her until the next morning. She claimed the incident was reported to Karatina Police Station before visiting Karatina District Hospital where she was examined and treated. On cross-examination P. W. 1 claimed it was her first time to meet the Appellant in the motor vehicle. EW M (P. W. 2), confirmed that she also travelled on the same matatu with P.W. 1 from Karatina to her home. She said she alighted at Kaharo along with other passengers. P. W. 2 said P. W. 1 was seated at the back while she sat at the front. The Matatu's doors were locked and the matatu sped off before P. W. 1 alighted. P. W. 2 said she went home and told her mother M.W (P.W. 3) what had happened. P. W. 2 and P. W. 3 went out to search for P. W. 1. The duo found P. W. 1 at home when they came back. P. W. 3 said that she was told by her daughter (P.W. 2) that P. W. 1 had been locked in motor vehicle registration No. KAD [...] K by Joe and Nderitu. She claimed the duo were people well known to her. She said she knew the Appellant was called either Joe or Wahome. She (P. W. 3) said she interrogated P. W. 1 the next morning upon which she revealed to her that Joe (Appellant) had raped her. P. W. 3 said she took the Police to the Appellant's home where he was arrested. Dr. Amil Quresh (P. W. 4) produced the medical report on behalf of Dr. Ngetha. The medical report indicated the complainant had periods at the time of examination. The doctor stated that it was difficult to tell if sexual intercourse took place.

The Appellant (D. W. 1) on his part tendered the evidence of three witnesses. The Appellant admitted he travelled on the same motor vehicle with P. W. 1 and P. W. 2. He claimed one alighted at Kaharo while the other (P.W. 1) proceeded with him. He said he walked the complainant to P. W. 3 gate where he left her. He denied having had sexual intercourse with her. CHARLES KARIUKI (D. W. 2), said he was with the Appellant in the same motor vehicle. He said they, that is, D. W. 1 and D. W. 2 escorted the complainant to her aunt's place since it was late. D. W. 2 claimed that after a week he heard that D. W. 1 had been arrested.

On appeal, Mr. Karweru, learned advocate for the Appellant, argued two main points:

First, is that the learned trial magistrate erred when she convicted the Appellant on the basis of contradictory evidence. Secondly, that there was no conclusive medical evidence to connect the Appellant with the offence. Thirdly, that the complainant (P. W. 1) is a witness of doubtful integrity whose evidence should not be relied on. Mr. Makura, learned Senior State Counsel, was of the view that the appeal should be allowed because the charge was not proved beyond reasonable doubt. It is also stated that the medical report was improperly produced.

I have considered the grounds argued in support of the Appeal and I think this appeal should be allowed. At this stage, I must comment Mr. Makura for rightly conceding the appeal. It is obvious from the evidence of P. W. 4 that the complainant (P. W. 1), contradicted the medical evidence. According to the P3 form, the complainant was examined seven (7) days after the incident yet P. W. 1 claimed she was examined the next day after the incident. This is a serious contradiction which makes the evidence of P. W. 1 unreliable. Furthermore, the medical evidence was produced by another doctor who did not examine the complainant. Before allowing a witness to tender evidence on behalf of another, a basis must be laid first under *Section 77* of the Evidence Act. That was not done in this case. Even assuming that the medical evidence was properly tendered, I do not think it would be of any evidential value because the same clearly indicates that there was no conclusive evidence that sexual intercourse took place. It is clear that there was no nexus between the Appellant and the offence. With respect, I agree with Mr. Makura that the prosecution's case was not proved to the required standard of beyond reasonable doubt.

In the end and on the basis of the above reasons, I allow the appeal. The conviction and sentence are quashed and set aside respectively. The Appellant should be set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 7th day of May 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Nganga holding brief for Appellant and Mr. Makura for the State.