



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 223 of 2007

MWANGUO GWEDE MWARUA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

This is the appeal of **MWANGUO GWEDE MWARUA** (herein after referred to as the Appellant) against his conviction and sentence on a charge of defilement by the Learned Senior Resident Magistrate sitting at Kwale Law Courts. The Appellant was on 3/05/2007 arraigned before the lower court and charged with **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8 (1) (3) OF THE SEXUAL OFFENCES ACT OF 2006**. The particulars of the charge were that

“ On the 21st day of January 2007 at about 8.00 a.m. within Kinango District of the coast province unlawfully had carnal knowledge of M.J.L a girl aged 12 years”

The prosecution led by **INSPECTOR SIBUDA** called a total of five (5) witnesses in support of their case. The brief facts were that on 21/01/2007 at about 8.00 a.m., the complainant was on her way from the shops. She met the Appellant who told her that he was looking for his goat. He then grabbed hold of the complainant and pulled her into a nearby bush and threw her to the ground. He removed her underpants before removing his own trouser and under-wear. The Appellant then proceeded to defile the complainant. When he completed the act he released her. The complainant immediately reported the matter to her family. She went back to the scene with relatives but failed to find the Appellant. He was later arrested and charged.

The Complainant was taken to hospital where she was examined. Her P3 form which was filled and signed by the doctor was produced as an exhibit –**PEXH.1**

At the close of the prosecution case the trial magistrate ruled that the Appellant had a case to answer and he was placed on his defence. The Appellant gave an unsworn statement by which he denied the charges. On 7/12/07, the learned trial magistrate delivered his judgment in which he convicted the Appellant and after listening to his mitigation sentenced him to serve fifteen (15) years imprisonment. Being dissatisfied with both the conviction and sentence the Appellant filed this appeal.

This being a court of first appeal I will, in coming to a decision in this matter be guided by the decision of the court of Appeal in the case of **OKENO VS.REPUBLIC (1972) EALR 32**

“ It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld”

The Appellant who appears in person relied entirely upon his written submissions.

MR. ONSERIO, learned state counsel made oral submissions on behalf of the respondent state in opposition to this appeal

I have perused the written submissions filed by the Appellant in which he raises two main grounds of appeal as follows:-

- (1) Identification.
- (2) Insufficiency of evidence

The charge alleges that the complainant was defiled. The complainant a 12 year old girl was examined by the trial magistrate who satisfied himself that she understood the nature of the oath and directed that she give sworn evidence. In her evidence the complainant tells

the court that on the material day she was accosted by a man as she walked home from the shops. At page 3 line 7 she states

“ He removed my underpants. He also removed his short trouser and underwear. He then raped me and when I screamed he ordered me to keep quiet”

This evidence is confirmed by the medical evidence. **PW4 CORNELLIUS MOCHAGE**, the clinical officer at Kinango District Hospital produces the complainant's P3 form. The doctor found the complainant to have tenderness around the neck. This confirms her evidence that her assailant held her by the neck. The presence of lacerations on her genitalia are evidence of forcible entry. The lab examination revealed the presence of spermatozoa in the complainant's vagina, which is evidence that penetration and sexual intercourse took place. This P3 from provides medical corroboration of the complainant allegation that there was defilement. This evidence was also considered and analyzed by the trial magistrate. On his judgment at page 13 line 12 he states

“There is no doubt in my mind that complainant was raped. The P3 form produced herein (Exh. 1) proved that indeed that she had been subjected to sexual intercourse as even spermatozoa were detected in her genitalia”

I do agree with the trial magistrate that the evidence on record provides sufficient proof of the complainant's claim that she had been defiled on the material date.

The next issue is that of identification. The complainant identified the Appellant as the man who defiled her. The indecent occurred at 8.00 A.M in broad day light. The Appellant conversed briefly with the complainant before he pulled her into the bushes. At page 3 line 4 she states

“ I remember on 21/01/2007 at about 8.00 a.m.,I was from the shop on the way after buying sugar. I saw a man.He is the accused. He came out of the bush and told me he was looking for a goat. I told him I did not see any goat. He followed me and held my left hand and fell me down in the bush.....”

The complainant is very clear and concise in her evidence. Under cross examination by the accused she states clearly

“ I know it is you because I saw you”

PW2 J.L the complainant's father confirms that the complainant did immediately report the defilement to him. She stated that she would be able to identify her assailant and as it happened the complainant did later see that Appellant and alerted the authorities who came and arrested him

From the evidence on record, it is clear that the conditions were favourable for a positive identification. It was day time the Appellant spoke to the complainant that she had ample opportunity to see him well. I have no doubt that the identification was clear, positive and free from error.

The age of the complainant which is a crucial factor in this type of offence must be sufficiently proven. In her testimony the complainant herself states that she is 12 years and states that she is class 3 at K Primary school. The court takes judicial notice of the facts that a child who is in class 3 in primary school would be aged between 10-12 years old. **PW2** the complainant's father does not state her age but the P3 form filled out by a medical doctor gives the complainant's age as 12 years old. The trial magistrate variously describes the complainant in his judgment as a child. I am satisfied that indeed the complainant was a child aged 12 years.

The Appellant takes issue with his conviction on the basis of the evidence of a single identifying witness. It is quite true that the only witness who identified the Appellant was the complainant herself. This is because rape and defilements are offences that tend to be committed in secret – there is rarely an eye witness present. The fact that there was only one eye witness does not mean a court cannot convict an accused person. All it means is that such a court will have to take certain precautions in such circumstances.

In the case of **NAITANYI VERSUS REPUBLIC (1986)KLR 198**, the court of Appeal held as follows:-

“The court must warn itself on the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made .”

Did the learned trial magistrate comply with this requirement? At page 13 line 18 of his judgment he states:-

“it is however noted that the only direct evidence herein against the accused is that of the complainant herself.The court has taken cognizance of the dangers of conviction on the basis of uncorroborated evidence of a single witness.

In view of the evidence on record, I am convinced that complainant was indeed raped and that she identified the attacker as the accused whom she knew except for his name”

It is clear that the trial magistrate did warn himself of the danger of relying on the evidence of a single witness. I also note further that

the trial magistrate took the precaution of so warning himself **BEFORE** coming to a decision on the matter.

The trial magistrate did give consideration to the defence raised by the Appellant. On page 13 line 23 he states.

“I have otherwise considered the evidence of the defence in which accused alleges that the charges herein are fake and only arose out of a land dispute between their two families. With respect, I do not believe this defence. It is noted that the accused did not raise this defence (issue) with the prosecution witnesses at all and the same were merely an afterthought.”

With that the learned trial magistrate dismissed the accused defence. My own evaluation of the evidence on record is that the complainant though a child gave evidence in a clear and consistent manner. The medical evidence corroborated her claim that she had been raped. She stood firm under intense cross examination by the Appellant. I do agree with the finding of the trial magistrate that the complainant was indeed a **“credible witness”**. Notwithstanding the evidence of a single identifying witness the prosecution mounted a formidable case. The case was water-tight and I am satisfied that this conviction was based on sound and reliable evidence. I have no hesitation in upholding the same and I do hereby confirm the said conviction.

After listening to the Appellants mitigation the trial court sentenced him to serve fifteen (15) years imprisonment. Section 8(11) (3) of the Sexual Offences Act provides

“(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen is liable upon conviction to imprisonment for a term not less than twenty years.”

The complainant was a 12 year old child. As such the sentence which was imposed was not lawful as the minimum sentence prescribed by law for the offence upon which the appellant was convicted was twenty years. As such I do enhance the Appellant sentence to twenty (20) years imprisonment to conform with the minimum sentence as provided for by the law.

Finally this appeal fails in its entirety and the same is dismissed.

Dated and Delivered in Mombasa this 16th day of June 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Onserio for State

Appellant in person

M. ODERO

JUDGE

16/06/2010

