



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Appeal 81 of 2008

SAMMY WANGOMBE WAWERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant Sammy Wangombe Waweru was charged with the offence of defilement of a girl under 15 years contrary to section 8(3) of the Sexual Offences Act, 2006. The particulars of the offence state that on 10th day of December 2006 at S Village in Nyandarua District within Central Province, had carnal knowledge of EWK a girl under 15 years. The appellant was also charged with an alternative charge of indecent Act with a child contrary to section 11(1) of the Sexual Offences Act 2006. The particulars of the offence state that on the 10th day of December 2006 at S Village in Nyandarua District within Central Province, unlawfully and indecently assaulted EWK a child under 15 years by touching her private parts.

The appellant pleaded not guilty to the two charges, after trial he was found guilty and convicted to 20 years imprisonment. Being dissatisfied with the conviction and sentence he has appealed. In his appeal and the supplementary grounds of appeal, he challenged the judgment by the trial court on the grounds that the evidence was insufficient and inconsistent. He also faulted the trial court for relying on the doctor's evidence, which indeed exonerated the appellant as the doctor found there was no evidence of penetration.

On the quality of evidence the appellant in his written submission challenged the evidence by the prosecution especially the evidence by PW2 who testified that Mama Wanjiku coming out of the appellant's house whereas the said Mama did not give evidence saw the complainant. There were several inconsistencies in the evidence by the prosecution's witnesses, which should have been resolved in favour of the appellant.

Mr. Njogu the learned counsel for the State opposed this appeal, he submitted that there was sufficient evidence that supported the charge of defilement by the complainant who gave a very graphic detail of how the appellant accosted her and forcefully carried her to his house where he proceeded to defile her. The complainant testified that there was partial penetration, which in itself supports the charge of defilement. A doctor examined the complainant, however no spermatozoa were found because the complainant had taken a bath immediately after the act. The trial court that heard and saw the witness believed her testimony and according to the provisions of section 124 of the Evidence Act, the evidence of the complainant is sufficient if the trial court was satisfied that she was speaking the truth for the court to convict a perpetrator of a sexual offence.

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 also bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of Njoroge vs. Republic [1987] KLR 19. I now set out albeit briefly the evidence that was before the trial court.

After conducting a *voire dire* examination EW[PW2] a girl aged at the time 12 years testified that on 10th December 2006 at about 8.00 a.m. she was left at home with her three year old brother while her parents went to church. After about one hour the appellant who dragged her to his house accosted PW2. He closed the door to his house he placed her on the bed. He inserted his penis into her vagina but did not penetrate completely when he ejaculated. The appellant told PW2 not to tell anybody and promised to buy for her mandazi.

However PW2 immediately informed Mama Wanjiku and the matter was reported to the complainant's father JKWPW1. PW1 interviewed the complainant and she repeated that the appellant had defiled her. PW1 summoned a neighbour and the accused person and asked him what he had done to his daughter. Her mother and a neighbour who confirmed that the complainant had been defiled examined PW1. They decided to take the complainant to Wanjohi Health Centre but she was not treated because they did not have a P3 form. The following day they went to Kipipiri Police Station where the matter was reported and they were issued with a P3 form. She was treated at Ol Kalou District Hospital on 11th December 2006.

Peter Nguyo PW4 testified that he examined the complainant. He found numerous pus cells after conducting a vaginal swap. No spermatozoa were found; he found the complainant's hymen was broken. According to his evidence penetration was possible since there were injuries in the vagina canal. No spermatozoa were seen because she had taken a bath. The presence of pus cells were indicative that there was an infection in the vagina canal which could have occurred three days before the examination although he conducted the examination after one day.

The complainant who told him that he had been framed on a case of defilement called Paul Njogu Mwaura PW3 a neighbour. PW3 accompanied the appellant to the house of the complainant. After discussions with the complainant's parents no agreement was reached and the following day PW3 accompanied the complainant and her father to Kipipiri Police Station. After making a report the accused person was arrested.

PC Moses Magari effected the arrest of the appellant when the complainant and the accused person presented themselves to the Police Station to complain that the appellant had defiled the complainant. PW4 re-arrested the appellant and issued the complainant with a P3 form. PC David Kones investigated the matter. He interviewed the complainant who narrated how her parents left her at home and the appellant dragged her to his house and defiled her. PW6 arrested the appellant and charged him with the present offence.

Put on his defence the appellant gave unsworn statement. He alluded a defence of alibi. He claimed that from 8.00 a.m. on 10th December 2006 up to 2.00 p.m. he was in church at Kenya Assemblies of God Kiambogo. After church he went to Kiambogo Trading Centre where he stayed until 6.00 p.m. and when he reached his house at 7.00 p.m. he found Jotham Kariuki PW3 who asked him to accompany him to the complainant's house. While at the complainant's house he was asked what he had done to the complainant but said nothing. The complainant was asked to say what had happened. She narrated how she had been defiled. Neighbours who said nothing had happened but PW1 insisted that they should go to the health centre examined the complainant. The complainant was examined at the health centre and the doctor said nothing had happened.

The following day he went to Kipipiri Police Station to make a report and while on the way he saw PW1 and the complainant. They reported that she had been defiled. He was arrested and charged with the present offence. After considering the evidence the trial court found that the prosecution had proved that the complainant was sexually assaulted. The defence by the appellant was found lacking in credibility. The trial court was satisfied that the complainant positively identified the appellant who was well known to her as the neighbour. That of the Clinical Officer who examined her also corroborated the

complainant's evidence.

Upon further evaluation of the evidence before the trial court, it is clear that the learned trial magistrate relied on the evidence of the complainant, PW1 and PW4 who completed the P3 form. The complainant testified that she knew the appellant. He dragged her to his house, where he sexually assaulted her by putting his penis in her vagina. PW2 testified that there was partial penetration followed by ejaculation. However the complainant immediately took a bath and washed her clothes. The matter was reported to her parents on the evening of the same day. The complainant was taken to a health centre but the doctor refused to treat her because there was no P3 form until the following day when she was taken to Ol Kalou District Hospital. After conducting a vaginal swab the clinical officer who testified as PW4 found evidence of infection, which could have occurred three days earlier. This defilement had occurred one day earlier and the issue for determination is whether the prosecution proved its case to the required standard that the appellant committed the offence of defilement on 10th December 2006 as charged. Under the provisions of section 124 of the Evidence Act it is provided as follows:

“Provided that wherein a criminal case involving a sexual offence the only evidence is that a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”

In this case I also find that it is the trial court that heard the evidence from the complainant and the other witnesses. The trial court believed that the complainant was telling the truth. The complainant knew the appellant as a neighbour. The assault took place during the day. The complainant gave graphic details of how she was defiled. There was partial penetration and the complainant took a bath and washed her clothes. The defence by the appellant was dismissed by the trial court although he had no obligation to offer a defence, I also find the defence by the appellant lacking in credibility, it was a mere denial.

I have gone through the evidence and the issues raised in this appeal; I find no merit in this appeal. The conviction and sentence was based on clear and cogent evidence by the complainant. The defence did not shake the evidence by the complainant. I find no justification for interfering with the trial court's judgment. The decision by the trial court is hereby upheld and this appeal is dismissed.

Judgment read and signed on 14th day of May 2009

M. KOOME

JUDGE