REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Criminal Appeal 92 of 2007

DAVIS WANYAMA ……..……. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

J U D G M E N T

The appellant was charged in Eldoret Chief Magistrate's Criminal Case No. 5545/2005 with the offence of defilement of a girl contrary to section 145(1) of the Penal Code. The particulars are that on the 6th day of August 2005 at Lugari District within Western province he had carnal knowledge of E A a girl under the age of sixteen years. He faced an alternative charge of Indecent assault on a female contrary to section 144(1) of the Penal Code the particulars of which were that on the 6th day of August, 2005 at Lugari District within Western province he unlawfully and indecently assaulted E A by touching her private parts namely breasts. He was acquitted on the first charge but was convicted on the alternative charge and sentenced to serve a term of imprisonment of seven years. Being aggrieved by the said sentence he has preferred this appeal and his counsel has brought five grounds of appeal.

These grounds are that the learned trial magistrate erred in law and in fact in failing to appreciate the fact that no evidence had been tendered in support of the alternative count. Two – the magistrate erred in law and fact in failing to appreciate the fact that the prosecution had not proved its case beyond reasonable doubt. Three – the magistrate erred in law and in fact in failing to appreciate that the evidence of the complainant was uncorroborated. Four – the learned trial magistrate erred in law and fact in failing to appreciate that the basic ingredients required to sustain a conviction on indecent assault had not been proved and fifthly that the honourable magistrate erred in law and fact in finding the accused guilty on the alternative charge.

The prosecution called seven witnesses PW1 E A is the complainant and was aged 15 years and in primary class 4 at M Primary School at the time of giving evidence on 5.10.2005. She said that she was harvesting Sorghum when the appellant came to where she was, held her by the right hand and took her to his house. She screamed but he covered her mouth. The appellant undressed the complainant by removing her underpants and then he also undressed. He raped her on his bed. It was the first time the complainant had sex and she felt pain. She said the defilement took some time. complainant's sister came and told the appellant that they would tell their mother and the complainant ran away and went to his sister's house. She said the appellant was her neighbour and that he forced her to have sexual intercourse with him. Later her mother came and reported the matter to Matunda Police Station and the complainant was taken to Matunda Health Centre. Two months later the complainant discovered that she was pregnant. PW2 N A was the complainant's mother. On 6.08.05 she had gone on a safari and on coming back she was told that the appellant had defiled the complainant. She said her daughter though 15

years old was in class 4 because she was sickly and had missed school on account of sickness. The witness took the complainant to the hospital and reported the matter to the police. At the hospital the complainant was examined and a P3 form filed. Her further evidence was that the complainant explained to the witness that as she harvested Sorghum appellant came and pulled her into his house and defiled her. The complainant then went home and took a shower. She said the accused was her neighbour and they had not difered on anything. The appellant did not cross examine this witness but had cross examined the complainant who said that when she tried to scream he covered her mouth. PW3 E K aged 13 years at the time is the sister to the complainant. On the 6/8/2005 both of them were harvesting Sorghum. The witness took home what she had harvested and on coming back did not find her sister. She enquired from children playing nearby and was told that the complainant had been called by Wanyama the appellant. The witness went to the appellant's house where she found the complainant crying. The complainant then went home and took a shower and later told her mother what had happened. PW4 was James Okusi Lutta a community counsellor on AIDS. His evidence was that on 9/08/05 at 8.00 a.m. a man, a woman, and a young girl who needed advice on what to do with a mentally disturbed child who had been defiled came to him. He advised them to see a doctor before 72 hours had lapsed to avoid infection of HIV. He took them to the hospital PW5 Peter Amadi was stood down when it was realized that he was not the first doctor to examine the complainant. He saw the complaint eight days after the incident. PW6 Police constable Richard Nyakoe was the investigating officer. He said the appellant was brought to him at the police station by an Administration police corporal by the name Patrick Odege. He interrogated him and the complainant and together with PC Dorcas Sosi took both the appellant and the complainant to Kongoni Health Centre where they were both examined. He then charged the appellant with the offences.

PW7 was Bob Andambi of Kongoni Health Centre. He testified that on 12/08/2005 he examined the complainant who said she had been raped by someone known to her on 6/8/05. He stated that an examination after 3 days could not allow for spamatozoa to be seen. He saw done. The complainant did not have any injuries on her genitals and that urine sample showed a few pus cells. He filled the P3 form and produced it in evidence.

The appellant chose to say nothing in his defence and opted to keep quiet. He did not even mitigate and told the court to do its work.

At the hearing of the Appeal grounds 1, 2 and 4 were argued together. Counsel argued that there was no evidence tendered to prove the alternative charge on which the appellant was convicted and hence that conviction and sentence were wrong. On ground 3 counsel submitted that there was no corroboration which counsel submitted was necessary before conviction on the type of offence appellant was charged with. On ground 5 counsel submitted that there was no evidence that the alternative charge was read to the appellant or that he pleaded to it and therefore the conviction on the alternative charge and sentence were said to be wrongful. Learned Senior Principal State Counsel Mr. Omutelema opposed the entire appeal and urged the court to find that the main charge had been proved. Once the trial court believed the complainant that she had been defiled then there should have been conviction. Counsel submitted that the trial magistrate proceeded under the mistaken view that corroboration was needed. Counsel conceded that there should not have been conviction on the alternative charge.

It is this court's duty as a first appeal court to evaluate and assess the evidence adduced at the trial court and reach its own decision and may then interfere with the conviction and sentence or either of them or uphold the subordinate court's finding. In this case I will start at the Alternative charge – of indecent assault. Plea was taken on 15.08.05 what is recorded is;

"*Court; charge read over and explained to the accused person in English/Kiswahili the language he/she understands and replies;*

Accused; "That is not true"

From the foregoing it is not possible to know which charge was read to the accused. However, it is reasonable to assume that it was the main charge that was read to him. If it was the alternative charge

then it should have been quite easy and simple to say or write that it was the alternative charge. It appears quite clearly that the alternative charge was not read to the accused and so he did not plead to it. If it was both charges that were read to the appellant then again it should have been easy and simple for the magistrate to state that the charges were read to the appellant. Even then that would not have been the right thing to do as each charge should be read to the accused person separately and he be required to plead to each count separately and his plea be taken down in writing. The magistrate acted in error. Again no evidence whatsoever was tendered by any of the seven prosecution witnesses on the alternative charge of indecent assault. The magistrate therefore totally misdirected herself when she convicted the accused in the absence of his plea and evidence by prosecution witnesses on that charge.

On the main charge the complainant's evidence was that she was defiled. According to her it was the first time to have sexual intercourse and she said it was very painful. The trial magistrate said she believed the complainant on this point, that she was defiled or else "how come she was pregnant;" wondered the magistrate. The magistrate said that the presence of the complainant in the accused house where she was found by PW3 crying, when she was meant to be harvesting Sorghum was further evidence that she was defiled. The magistrate then proceeded to say that she could not convict in the absence of medical evidence. I think this is where the misdirected herself. The magistrate appears to have proceeded on the misconception that the medical evidence was a mandatory piece of evidence without which the court cannot convict in sexual offences. She proceeded thus;-

"*In my view the Doctor ought to have checked on the hymen and explain whether it was intact or not. In view of the failure to explain to me all these and in view of the fact that prosecution never referred the complainant for a 2nd medical opinion, accused person is given a benefit of doubt and acquitted on the main count."*

That was the main error, in my view. Medical evidence is additional corroborative evidence more like any other corroborative evidence. One may accord it more weight than other corroborative evidence but that in my view does not change its nature of being corroboration. And I have not found anywhere in our laws or in authorities where it is stated to be mandatory corroborative evidence without which there cannot be conviction in sexual offences. On the contrary, where the magistrate believes the complainant and records the reasons why the complainant is believed and warns himself/herself of the danger of convicting on that sole complainant evidence, then the magistrate may proceed to convict. See the authority of NYANAMBA .V. R – Criminal Appeal No. 121 of 1983 – [1983] KLR 599

Again our own Court of Appeal has taken this matter of corroboration in sexual offences further and held that it is unconstitutional to require adult women and girls to bring corroborative evidence in sexual offences. I am bound by their Lordship's decision in MUKUNGU .V. R – Criminal Appeal No. 227/02[2002]2 EA482 where it was stated "…….. *we think that the requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls."* I associate myself fully with those sentiments. Such requirement offends S. 82(3) of the Kenyan Constitution.

Additionally, Section 124 of the Evidence Act supported the magistrate to convict the accused on the main charge once she believed and recorded that the complainant was telling the truth. The relevant part of the said section reads;-

"Provided that where in a criminal case involving a sexual Offence the only evidence is that of the alleged victim of the offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the *truth."*

If the magistrate felt that it was unsafe to rely on the additional evidence of PW3 (the 13 year old sister of the complainant) then all she needed was the above section of the Evidence Act to convict the accused. In my view the magistrate ought to have gone further and inquired into the alleged pregnancy of the victim, resulting from the defilement and what became of it. That would have filled any gaps and doubts left after the adduced evidence. That the above were not done resulted in the unjustifiable acquittal of the

accused. I could use section 358 of the Criminal Procedure Code Cap 75 of the Laws of Kenya and order that the matter reverts to the magistrate for the purpose of taking additional evidence. However, I fear that this is not a proper case in which to so order. To do that would be to fill in gaps in evidence to the likely disadvantage of the accused – See Murimi V. R (EA) 1967 – Criminal Appeal No. 50 of 1967.

The Prosecution did not on their part make this case any better. It was not enough to call upon the court at the hearing to use non existent jurisdiction under S. 354 of the Criminal Procedure code to convict. The state should have cross-appealed in respect of the main count. That would definitely have brought a different result. This case was poorly conducted by both the prosecution and the trial court. Enough of this. The upshot is that this appeal succeeds and the appellant shall be set at liberty forthwith unless otherwise lawfully held.

I so order.

DATED AND DELIVERED AT ELDORET THIS 4TH DAY OF JUNE, 2009.

P.M. MWILU

JUDGE

In the presence of;

Paul Ekitela - Court Clerk

Present - Accused

Mr. Kamau holding brief for Ngosi Advocate for the Appellant

Mr. Chirchir holding brief for Omutelema Counsel for the State