REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Criminal Appeal 36 of 2004 (1)

Arising from Webuye SRM Cr. Case no. 155 of 2003

EZEKIEL WAFULA……..APPELLANT

VS

REPUBLIC……..RESPONDENT

J U D G M E N T

Ezekiel Wafula, the appellant, was charged and tried for the offence of rape contrary to Section 140 of the Penal Code. At the end of the trial, the Senior Resident Magistrate sitting at Webuye found the appellant guilty on the aforesaid charge, convicted him and sentenced the appellant to serve six years imprisonment. The appellant being dissatisfied now appeals to this court against both the conviction and the sentence.

The brief facts leading to this appeal are that on the 3rd day of February 2003, the complainant CS, a 15 year old girl, went to grind at a nearby posho mill at Keyaya trading centre and on her way back she encountered the appellant and another boy. The duo were persons well known to her as her neighbours. The two dragged her to a nearby sugarcane plantation and had her blouse, games kit and skirt torn. Her pant was removed and it got torn at the middle in the process. She was made to lie down and the appellant began to have carnal knowledge of the complainant as his accomplice stood to watch.After finishing, the appellant's accomplice took his turn and had carnal knowledge of the complainant too. The complainant attempted to scream but she was held by the throat by her assailants. They released the complainant who then trekked and informed her grandfather about the incident. Her grandfather in company of the complainant immediately headed for the scene and found the assailants at the spot. They fled upon seeing the complainant and her grandfather approaching. A pair of red slippers were recovered from the scene of rape.

The incident was reported to the police the next day and the complainant was examined and treated 3 days after the incident. The P3 form was filled and it revealed that the complainant had tears at her labia minora which shows that there was penetration. The appellant was arrested on 24th February 2003 within Misikhu area.

When placed on his defence the appellant raised the defence of alibi. He said he was at Misikhu at the time of the offence. He denied having raped the complainant whom he knew as his immediate neighbour.

On appeal, the appellant put forward 4 grounds. The first ground raised was that the complainant's evidence were not corroborated being a child of tender age. Mr. Ocharo who argued the appeal on behalf of the appellant averred that the law did not define what is a child of tender age. He was of the view that

the complainant who was aged 15 years was a child of tender age hence he was of the view that the trial court should have satisfied itself first that the complainant possessed sufficient intelligence to justify the reception of her evidence and that she understood the duty of telling the truth.

The learned senior state counsel did not address me on this ground.

The law has imposed a duty on courts of law not to conviction on that the evidence of a child of tender years whose evidence is, through that very fact, likely to be unreliable because its mind has not yet learnt to understand fully the boundaries between fact and imagination and is also more open to the outside suggestions or promptings of adults unless corroborated. Going back to Mr. Ocharo's submissions, I think the learned advocate got the point wrong when he averred that the law did not define what a child of tender age was. The definition is given under section 2 of the children Act of 2001 as follows:

> *"child of tender years" means a child under the age of ten years.*

The complainant herein therefore cannot qualify to be a child of tender years. In view of that fact, her evidence do not need to be corroborated like that of a child of tender years.

The second ground argued was that the appellant was convicted on the evidence of a single identifying witness. In this respect the trial court appreciated the fact that the identification of the appellant was that of a single witness. In sexual offences the law requires that there be corroboration because the evidence of a complainant in a sexual case might likewise be coloured by vindictiveness and is in any case usually difficult to refute. However courts have at times convicted on uncorroborated evidence if it is satisfied that after duly warning itself on the danger of convicting on uncorroborated evidence, of the truth of the complainant's evidence. In this case the trial senior Resident Magistrate warned herself of the dangers of convicting on uncorroborated evidence. I think I cannot fault the trial magistrate in that respect.

The third ground of appeal was that the sentence slapped against the appellant was harsh and excessive. Under the provisions of section 140 of the penal code a convict may be sentenced to serve life imprisonment. It would appear the trial magistrate did not consider the appellant's mitigations. However considering the sentence she tendered I think the same is neither harsh nor excessive. I find no merit on this ground. The failure in this case to take into account the appellant's mitigation did not cause a miscarriage of justice.

The final ground put forward by the appellant is that the charge the accused faced was fatally defective in that it did not contain the word "unlawful". The state conceded this appeal on this ground.

The ingredients of rape are contained in section 139 of the penal code. That section reads:

> *"Any person who has unlawful carnal knowledge of a woman or girl, without her consent or with her consent if the consent is obtained by force or by any means of threats or intimidation of any kind or by fear of bodily harm or by means of false representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony of rape."*

It is apparent that the charge of rape must contain the words 'unlawful' and 'without consent.' The failure to include the two words in the charge or the particulars rendered the whole charge fatally defective hence a conviction could not be sustained through such a charge like the case in this appeal. The charge did not contain the word 'unlawful' hence the same did not disclose any offence.

The court of appeal while dealing with a similar situation in the case of **DANIEL NYARERU ACHOKI VS REPUBLIC CR. APPEAL NO. 6 OF 2000.**

> Held that a charge of rape must allege in its particulars
>
> *(i) that the act of intercourse was unlawful*

(ii) that the act of sexual intercourse was without the consent of the woman or girl.

It was further held that the charge did not disclose an offence known to law hence the appellant was wrongly convicted.

I think the state correctly conceded to this appeal on this ground. However I am a urged to order for a retrial. It should be made clear that where the charge the appellant was convicted for was fatally defective, then an order for a retrial cannot be issued because the result will be the same. The law presumes that the charge which an appellant was convicted for was proper save for a few defects like the case where a trial was rendered null and void for lack of a competent prosecutor or where the evidence on record were not taken into account. In this case it would be unfair and unjust to order for a retrial.

The upshot is that this appeal is allowed with the end result being that the conviction is quashed and the sentence set aside.

The appellant is set free forthwith unless lawfully held.

DATED AND DELIVERED THIS 25th DAY OF February 2005

J.K. SERGON

JUDGE