



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO 77 OF 2017**

**PROTUS WAFULA NYONGESA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgement (conviction and sentence) of Hon. D.O. Onyango, SPM, delivered on 28<sup>th</sup> June 2017 in the principal Magistrate's Court at Kimilili in Criminal Case No. 63 of 2014, R v. Protus Wafula Nyongesa)*

**JUDGEMENT**

***[Pursuant to section 201 (2) as read with section 200(1) (a) CPC]***

1. The appellant has appealed against his conviction and sentence of twenty years' imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 3 of the Sexual Offences Act No. 3 of 2006.
2. Ms. Nyakibia, counsel for the respondent has supported both the conviction and sentence.
3. In this court the appellant has raised three grounds in his petition of appeal.
4. In ground 1, the appellant has faulted the trial court for failing to ensure that the proceedings were conducted in a language that the appellant understood namely Lubukusu. In his submissions the appellant has submitted that the court allowed the usage of Kiswahili, which he did not understand well. In this regard, the record of the proceedings indicates that during plea, the language used was Kiswahili. The record further shows that all the witnesses testified in Kiswahili. Even the appellant testified in Kiswahili. At no time did the appellant complain that he did not understand Kiswahili. He is raising it as an issue for the first time in this appeal. The constitution in article 50 (2) (M) guarantees to an accused the right to interpretation of the language he understands. I find that in the instant appeal there was in place an interpreter in the English into the Kiswahili used throughout the proceedings. In the circumstances, I find that the appellant was provided with the necessary interpretation in Kiswahili language. I therefore find that the raising of this issue at this stage is an afterthought. I find no merit in this ground and I therefore dismiss it.
5. In ground 2 the appellant has faulted the trial court in failing to find that the case against him was fabricated and the evidence of the prosecution lacked credibility. In his written submissions the appellant has not elaborated the nature of the fabricated evidence of the prosecution witnesses. I have perused the record of the proceedings; this issue was not raised during trial. It is being raised for the first time in this appeal. I find the prosecution evidence to be credible and cogent. I therefore reject this complaint as an afterthought and is hereby dismissed for lacking in merit.
6. In ground 3 the appellant has faulted the trial court for convicting and sentencing him when his rights were violated. In his oral submissions in this court the appellant submitted that only the second trial magistrate issued him with witness statements. The first magistrate did not do so. The record of the proceedings shows that on 9/9/2015, the appellant applied for copies of witness statements. The hearing of 9/9/2015 was adjourned to enable the appellant to be supplied with witness statements and it is on that date the appellant told the trial court that the proceedings were to be commence from where they had reached. He did not then ask the court to have the witnesses recalled for further examination. I therefore find no merit in this complaint, which I hereby dismiss.
7. Additionally, the appellant has complained that he was kept in custody for three days, which he says violated his rights. In this regard, the charge sheet indicates that he was arrested and placed in custody on 26/09/2014 and was taken to court on 29/09/2014 for plea. These alleged violations are matters to be raised in a civil court for redress. I therefore dismiss this ground for lacking in merit.
8. According to her birth notification (exhibit 3) the complainant was born on 16/07/2001, which translates to her being 13 years' when the offence was committed.
9. The evidence of Michael Okumarut (Pw 4) is that he examined the complainant on 25/09/2014 and his findings were as follows. She was

aged approximately 13 years. There was no injury to the labia majora. Labia minora was inflamed. The hymen was broken. There was blood in the labia minora. She was having her monthly periods. Pregnancy test was negative. HIV test was negative. She did not have STIs. Pw 4 then produced the P3 as exhibit 2 and the treatment notes as exhibit 4. While under cross examination, Pw 4 testified that the injury to the labia minora was an indication that she was defiled.

10. The defence of the appellant in his unsworn statement was that he was framed by the mother of the complainant. The mother of the complainant was owed KShs 400/= by the appellant. The appellant had bought sheep from the mother of the complainant. She threatened to teach him a lesson. He also stated that the complainant wanted to have an illicit affair with him, but he refused.

11. I have independently re-assessed the entire evidence as a first appeal court. After doing so, I find that the appellant was convicted on sound evidence. His appeal against conviction is hereby confirmed.

12. The mitigation of the appellant was that he was a first offender. Additionally, the appellant is the sole breadwinner of his family of three children and that his wife ran away. He now has been in custody for over two and a half years.

13. The aggravating factors include the fact the appellant defiled a 13-year-old victim. He used violence in the process of doing so.

14. After considering all the foregoing factors, I hereby reduce the sentence imposed to twelve years' imprisonment which will begin to run from the date of this judgment.

**Judgement signed and dated at Narok this 19<sup>th</sup> day of December, 2019**

**J. M. Bwonwong'a**

**Judge**

**And**

**Judgement signed, dated and delivered in open court at Bungoma this 12<sup>th</sup> day of February, 2020.**

**S. N. Riechi**

**Judge**

**12/2/2020**