



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. 2 OF 2018

WALTER NYANGAU OMBATI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement of Hon. H. Ng'ang'a, SRM, delivered on 2/2/2018 in Criminal SOA Case No. 31 of 2017, in the Chief Magistrate's Court at Narok, Republic v Walter Nyangau Ombati)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of fifteen (15) years imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of Sexual Offences Act No 3 of 2006.
2. The state has supported the conviction and sentence.
3. In this court the appellant has raised six (6) grounds in his amended petition of appeal.
4. In ground 1 the appellant has faulted the trial court both in law and fact in convicting him in the absence of proof of the elements of defilement in particular penetration. In this regard, there is the evidence of WAM, the initials of the victim (Pw 1), who testified as an adult. Her evidence was that on 2/5/2017 she went to the house of the appellant, although she had dressed to go to school. She did not want to go to that school. She also had carried her clothes.
5. PW 1 was accompanied to the house of the appellant by FM (Pw 3). The appellant's house is one roomed. The appellant persuaded her and Pw 3 to sleep in his house. At night the appellant persuaded her to go and sleep with him on the sofa set. It is on that sofa set that the appellant had sexual intercourse with her, after persuading her. She felt pain in the process. The victim also testified that the appellant put on a condom before they engaged in sex. She continued to testify that she told the appellant to stop having sex with her; because she felt pain. The appellant resisted and as a result she pushed him off.
6. In re-examination, the victim testified that it was her first time to engage in sex. In the following morning the appellant took Pw 1 and Pw 3 to the matatu stage and went to Kisii.
7. The evidence of Hillary Kiptoo (Pw 4), who is the clinical officer, was that he examined the victim on 5/10/2017. He found as follows. The victim was 14 years old. She had no injuries. The hymen was broken but not freshly. Pregnancy and HIV tests were negative. He examined her three days after she had sexual intercourse with the appellant. Pw 4 then produced the report of the medical examination as exhibit 1. According to exhibit 1, Pw 4 found: *"Torn hymen long standing."* The victim had no physical injuries in her vagina. Pw 4 concluded: *"that the torn hymen indicates that she was defiled."*
8. FM (Pw 3), testified that that she slept in the same room in which the victim and the appellant were. During the night she heard the victim crying. It was also her testimony that they slept in the house of the appellant for two days.
9. Furthermore, there is the evidence of the mother of the victim, MK (Pw 5). Pw 5 testified that the shoes and the bag of her daughter were recovered in the house of the appellant. The evidence of Pw 5 is supported by that of the investigating police officer namely No 92756 PC Juliet Ruto (Pw 6). Pw 6 testified that the shoes and books of the victim were recovered in the house of the appellant. During the recovery the appellant was present.
10. The sworn evidence of the appellant in answer to the prosecution evidence was that he woke up on 10/5/2017 and went to the market to buy fruits. The appellant testified that he was a fruit seller. He then returned home and started to wash the fruits. He parked the fruits on the

wheelbarrow. He heard a knock on his door. It was a mzee, who was knocking. Shortly, two men and women entered and identified themselves as police officers. They arrested him and took him to Narok police station. When he asked them as to why he was being arrested, the police told him that he had hidden a girl.

11. Furthermore, the appellant testified that the investigating officer did not avail the books for the witnesses to identify. He testified all the witnesses who testified were members of the same family. He also testified that they had a grudge against him.

12. The appellant finally testified that he did not know the victim before.

13. This is a first appeal court. As a first appeal court, I have independently re-assessed the entire evidence as required. See *Okeno v. Republic [1972] EA 32*. As a result, I find that the victim (Pw 1) evidence is not truthful. She testified that she felt pain during the sexual intercourse. She told the appellant to stop having sex with her. The appellant resisted and as a result she pushed him off. In re-examination the victim testified that it was her first time to engage in sex.

14. The medical evidence of Hillary Kiptoo (Pw 4), does not support her evidence. The evidence of Pw 4 is that the victim did not have any injuries in her vagina. Pw 4 further testified that the victim had a torn hymen. In this regard, Pw 4 testified that he found: “*Torn hymen long standing.*” He then concluded that the victim was defiled. The examination upon the victim was done three days after the defilement. One would have expected to find injuries (bruises, lacerations or reddening of the vaginal walls) to be found in the vagina of the victim; in view of her assertions that this was her first sex intercourse.

15. Furthermore, I find that the hymen was not freshly torn. It was an old tear of long standing. It follows that this hymen injury was not caused by the appellant. It is crystal clear that the victim was not a virgin. The finding by the trial court that the medical evidence supported that of the victim is not correct.

16. Additionally, the evidence of FM seems to contradict the evidence of the victim. FM testified that during that night, she heard the victim crying as they were having their sexual intercourse. The victim did not testify that she cried. She is totally silent on this point and yet they were in the same room of that one roomed house.

17. Furthermore, the victim did not complain to the police during the following morning that the appellant had sexual intercourse with her. It is during that morning that she had the earliest opportunity to do so. Instead, the victim and her friend FM (Pw 3) proceeded to Kisii from where they returned thereafter to Narok. The lack of prompt reporting to the police by the victim throws doubt as to the truthfulness of her evidence. This clearly so in the light of her own evidence that she proceeded to Kisii, instead of reporting to Narok police station that morning after the defilement. Even the earliest report to the police by the father (Pw 2) of the victim was that his daughter had gone missing. This is clear from the evidence of the investigating officer, No 92756 PC Juliet Ruto (Pw 6).

18. In the light of the foregoing evidence, I find that the victim was not truthful and therefore her evidence cannot form the basis of the conviction in terms of section 124 of the Evidence Act (Cap 80) Laws of Kenya. And the finding of the trial court that the medical evidence supported the evidence of the victim is without evidentiary basis.

19. Furthermore, I find that the evidence of the appellant was not considered by the trial court. I have done so. I have found that the evidence of the appellant was not credible. Although the defence was incredible, the trial court was bound to consider it and make its finding thereon. See generally *Macharia v Republic [1975] EA 193 cited in Procedures in Criminal Law in Kenya, by Momanyi Bwonwong'a, East African Educational Publishers 1994, at pages 248, 249*. Failure of the trial to consider the defence evidence was a misdirection in law.

20. In the light of the foregoing findings, I find that ground 1 of the amended petition of appeal succeeds and I hereby uphold it.

21. In view of the finding in ground 1, which is the major ground, I find that it is unnecessary to consider the remaining grounds. For it is moot or academic to do so. See *The Attorney General v. Ally Kleist Sykes [1957] EA 257*.

22. In the premises, the appellant's appeal succeeds with the result that the conviction and sentence are hereby set aside,

23. The appellant is hereby ordered set free unless held on other lawful warrants.

Judgment signed, dated and delivered at Narok this 22nd day of July, 2020 through video link conference in the presence of Mr. Yenko for the appellant and Mr. Karanja for the Respondent.

J. M. BWONWONG'A.

J U D G E

22/07/2020.