REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 17 OF 2017

CORAM: JUSTICE S.M GITHINJI

(From original conviction and sentence in criminal case number 18 of 2017 the Principal Magistrate's Court at Kapenguria)

JOSEPH WANYAMA WAFULA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

JOSEPH WANYAMA WAFULA was charged in the lower court with a main count of ***Defilement, contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act number 3 of 2006.***

The particulars of this offence are that on the 17th day of June, 2017 at [particulars withheld] within West Pokot County, the appellant herein intentionally caused his penis to penetrate into the vagina of S.A.W a child aged 8 years.

In the alternative the appellant was charged with the offence of committing an ***Indecent Act with a Child, contrary to Section 11(1) of the Sexual Offences Act number 3 of 2006.***

The particulars hereof being that on the 17th day of June, 2017 at [particulars withheld], within West Pokot County, the appellant intentionally touched the buttocks, breasts and vagina of S.A.W, a child aged 8 years.

The prosecution case is that the complainant in this case, who offered evidence as PW-1, was born on 23.12.2008. On 17th June, 2017, when the offence allegedly took place, she was 8 years old. That day at about 7.00pm, a woman she referred to as Mama xxx, sent her and xxx to go to the shop to buy tomatoes. On their way there they met one namely Z, whom PW-1 alleged is her elder sister. The said Z asked them to go to the appellant's home. They went. The appellant's home was within a maize farm. They found the appellant in his home with some other persons who were there to drink alcohol. The said Z lied to her that she was going to the latrine and vanished. When the complainant was left alone with the appellant, he removed her pair of shorts and did bad manners to her. He unzipped his pair of long trousers and inserted his genital organ into hers. He did not use any form of protection. He did it once. He then asked her to lie on the sofa of which she did.

Her mother the PW-2 in this case had gone to Makutano on the material day at 6.00pm. When she returned home later that evening, Mama xxx, who is her neighour, took to her PW-1's pair of shoes. PW-

2 asked her where PW-1 was. Mama xxx cautioned her to look for the girl before it was too late for with the grown maize it was risky for a child to stay out late.

PW-2 was staying with her niece namely Z. The said Z was fond of visiting the appellant's house for liquor. The appellant is their distant neighbour. When Z arrived home, PW2 asked her to take her to where the complainant was and she obliged. It was about 7.30pm then. Z led her into a maize plantation and in the middle of it there was a house. Z got into the house leaving PW-2 behind. She too followed inside. She found PW-1 lying on a seat. She picked her up. Beside her there was another child aged about 8 years old, and the appellant. On the way home PW-1 said she was in pain. PW-2 got so angry and wanted to hit her. She had a female visitor who asked PW-1 what was wrong and PW-1 stated that the accused had done bad manners to her. They removed her clothes and examined her. They noticed she had been defiled. There was some unusual dirt in her private part.

She alerted some KPR officers who went and arrested the appellant the same night and took him to the police station. The same night PW-1 was taken to Kapenguria County Referral Hospital. She was examined by PW-3. He noted that her clothes had no blood stains, no tears and were in good general condition. PW-1 however had a swelling around the vaginal wall entrance, which was painful and tender on examination. The hymen was obliterated, torn, breached. No discharge was however noted. A conducted vaginal swab revealed traces of blood and pus cells, also epithelial cells. No spermatozoa were noted.

He concluded that she was penetrated. He also did a wrist X-ray to assess her age. He placed it at about 9 years. He thus filled the P-3 form and age assessment report.

PW-4 investigated the case. He re-arrested the appellant, recorded witness statements and had the appellant charged with the offences in the charge sheet.

At the close of the prosecution case the trial court found that the appellant had a case to answer and accordingly placed him on his defence.

The appellant gave unsworn testimony and called no witness. His brief defence is that on 17.6.2017 at around 7.30pm he had gone to buy oil at a nearby kiosk. On the way back home he was arrested by strangers who did not tell him the cause for the arrest. He was taken to the police station and locked in cells. He was then charged with strange offences of which he denied.

The trial court evaluated the evidence and found the appellant guilty of the offence in the main count. He was convicted and sentenced to serve life imprisonment on 15.9.2017.

Discontented with the said conviction and sentence he appealed to this court on the following grounds:-

1. **That he pleaded not guilty during trial.**

2. **That prosecution did not prove the case beyond reasonable doubt.**

3. **That the case was not investigated at all.**

4. **That vital prosecution witnesses did not offer evidence.**

5. **That the prosecution case was contradictory.**

6. **That his defence was rejected without cogent reason.**

7. **That the burden of prove was shifted to him.**

The appellant in his written submissions alleged his was a case of mistaken identity as the victim could have been defiled by drunkards.

The state opposed the appeal on the grounds that all the ingredients for an offence of defilement were established beyond reasonable doubt.

I have thoroughly re-looked into the recorded evidence. The first issue I take is that the evidence of PW-1, the minor victim, was not properly taken. The trial court conducted a ***voir dire*** and found that she was possessed of sufficient intelligence as to be able to appreciate the truth from falsehood, but did not seem to appreciate the nature and solemnity of an oath. She ruled that the minor will give unsworn evidence. However, the court went against its own ruling by swearing the minor who ended up giving sworn evidence. I don't understand how that happened.

The second issue is about some relevant witnesses who were not called by the prosecution. Z is the one who called the complainant and another child called V and led them to the appellant's home. Why was she not called as a witness to state why she took them there and the person she left them with? She is also the one who led PW-2 to where the girl was found, having allegedly been defiled. No doubt she was a crucial witness for the prosecution. The other is V. The evidence of PW-1 suggests they went together to the appellant's house. What happened to her? Where did she part way with the complainant and why was she not called as a witness? There is also the guest female who questioned the complainant, making her reveal that she was defiled. She together with PW-2 examined the complainant and noted unusual dirt on her genitalia. Why was her identity hidden by PW-2 and why wasn't she called as a witness? KPR men who were reported the case to by PW-2 and arrested the appellant the same night were also not called as witnesses. Failure to call them creates some lacunas in the prosecution case, and invites the court, in absence of an explanation for the failure, to infer that if called their evidence would have been unfavourable to the prosecution position in the case or would have been adverse to their case.

I'll move to the issue of identification of the appellant as the culprit. PW-1 and V were sent at about 7.00pm. That was at night as it was past 6.30pm. The evidence does not reveal how she was able to see and identify her assailant. The mother (PW-2) allegedly got her in the appellant's house at about 7.30pm. It was also at night. She does not tell us the source of light that enabled her see the appellant and the other child.

PW-1's evidence shows that she was led to the appellant's house where there were people who were taking beer. In her evidence she does not describe the appellant in any other way, save for referring to him as the accused. Before he was arraigned in court he was not an accused. We do not know how PW-1 referred to him then, of which would withdraw any doubt that actually it was him who defiled her and not any other drunkard in the same homestead. She had not known the appellant before then and it was at night. No description was given to the mother (PW-2) or the police,by PW1, which fits the appellant.

Chances that she made a mistake of the appellant or that the appellant was arrested as he was simply eventually found with her in his house after she had been defiled cannot be ruled out. The onus in law is not upon the suspect, to exonerate himself; it is on the prosecution to prove the offence beyond reasonable doubt.

The trial magistrate was wrong in her finding that, "**the appellant being the only adult who was in the house with the victim, leads to irresistible inference that he must have been the one who defiled her."**It is wrong because the appellant was not the only person who was with her from the time she got into that home till he was allegedly found with her. We don't know at what point she was actually defiled between 7.00pm and 7.30pm; We don't also know when the revelers left the appellant's house. We even have no tangible evidence that it is the appellant who was found with the complainant given that it was at night and the source of light that enabled the witness see and identify or recognize him was not disclosed. It could have been someone else but since it was in appellant's house, it was just assumed he was the one. There is no any other evidence which connects him to the offence. As he claims there is a possibility it was a case of mistaken identity. The trial magistrate having observed as earlier on quoted, showing she relied on circumstantial evidence, points to the fact that she was not certain of the fact of identification of the assailant. However, the held circumstance is wrong and unreliable.

On the ground the appeal succeeds. The conviction and sentence are hereby quashed. The appellant,

consequently, is set free unless otherwise lawfully held.

Judgment is read and signed in the open court in presence of the appellant and Ms. Kiptoo, the state prosecutor, this 6th day of March, 2018.

S. M. GITHINJI

JUDGE

6.3.2018