



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 136 OF 2016

WYCLIFFE INJEVELI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Principal Magistrate Honourable H.O. Barasa in Eldoret Criminal Case No. 2917 of 2015 dated 25th November, 2016)

JUDGMENT

WYCLIFFE INJEVELI the appellant herein was charged in the lower court with the offence of defilement of a child, contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this charge are that on the 19th day of June, 2015 at [particulars withheld] village, Moi's Bridge sub location in Likuyani Sub-County, within Kakamega County, the appellant intentionally and unlawfully caused penetration of his genital organ (penis) into the genital organ (vagina) of *C A S*, a child aged 7 years.

In the alternative he faced a charge of indecent act with a child, contrary to *Section 11(1)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars hereof being that on the 19th day of June 2015 at [particulars withheld] village, Moi's Bridge Sub location in Likuyani Sub-County within Kakamega County, the appellant indecently and unlawfully caused his genital organ (penis) to come in contact with the genital organ (Vagina) of *C A S*, a child aged 7 (seven) years.

The prosecution case is that the complainant in this case, who gave evidence as PW-1 was aged 7 years on 19th June, 2016. She was a pupil at [particulars withheld] primary school. She was living in [particulars withheld] with her parents. 19th June, 2015 was on a Friday. She left school at lunch hour and went home. Her mother, the PW-2 in this case, was feeling unwell and was resting in bed in the bedroom. She told the complainant to get food from the kitchen. The complainant did so. After she finished eating she took a tennis ball and started playing with it outside the house. She was bouncing the ball. She even went round the house bouncing the ball. While there she heard footsteps. The mother also heard the said footsteps. PW-1 saw a man she knew as *Wiki*. He greeted her and she positively responded. He asked her where her mum was. She told him she went to grandmother's place. PW-2 was hearing all these conversations. The appellant then asked her where the Dad was and she

told him that he had gone to work. He said he wanted to borrow some grass. He commenced cutting grass right in front of the house door. He then proceeded to where the complainant was. He told her that she did not know how to make the ball bounce. He offered to show her how. He bounced it three times and held her hand. He led her near the maize plantation. She was in her P.E Kit. He unzipped his trouser. He removed her clothes and inserted his penis into her vagina. The complainant said she'll tell her mum. The mother heard it and her heart skipped a beat. She peeped outside through the rear door which had a glass. She saw *Wiki* carrying the complainant up to his abdomen with her legs apart. She got out of the house. *Wiki* left the complainant, picked his pile of grass and vanished. PW-2 went to where PW-1 was. PW-1 told her what the appellant had done and that some mucus like substance was left on her PE Kit. The mother witnessed the mucus like substance and pursued the appellant. She got him and led him back to the scene. He knelt down and begged her for forgiveness. PW-2 called neighbours to the scene. They decided to take the appellant to Kona Mbaya AP's camp. On the way the appellant's mother appeared and confronted PW-2. They however reported the matter and were referred to the hospital and to Matunda police station.

The complainant was examined on 21st June, 2015 by PW-3 at Matunda Sub-County Hospital. The clinical officer noted that her vagina had injuries. She had pain on the vagina. Her hymen had been broken. There was discharge on her vagina. HIV test was negative. There was pus cells in her urine. No spermatozoa were noted. Urinalysis revealed the presence of pus cells and blood cells. She had no syphilis. The degree of injury was grievous harm. The P-3 was thus filled.

PW-4 arrested the appellant who is a neighbor to the complainant. He produced the child Health Card which shows she was born on 22nd

January, 2008. After investigations were over he charged the appellant with the offences.

The appellant gave unsworn evidence in his defence. He said his name is *Wycliffe Njeveli* and was living in Mutoni area, Matunda. He was a casual labourer. On 21st June, 2015 he was going about his usual business when a certain woman appeared and invited him into her house. When he entered she accused him of defiling her daughter. She framed him up because her husband and the appellant's sister had an affair. She accused him of having connected the sister to her (PW-2's) husband. Neighbours got to the scene and examined the complainant. They found her okay and turned their anger against PW-2. PW-2 had mixed some substance which she placed on the complainant's clothes. PW-2 insisted the matter be reported to the police. Neighbours were inclined to beating her and the appellant restrained them. He was advised to go back to work. PW-2 later reported to the police. On 21st June, 2015 he was arrested and taken to the police station. He was later charged with an offence he did not commit. He claimed that he was innocent; he did not defile the complainant.

The trial court evaluated the evidence, found the main charge proved against the appellant beyond reasonable doubt. He was convicted of the offence and sentenced to serve life imprisonment.

The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that: -

- (1) He pleaded not guilty at the trial.
- (2) Prosecution case was full of lies.
- (3) PW-2 framed him all the way upto conviction.
- (4) The sentence was harsh and excessive.

In his submissions, the appellant claimed that he was not supplied with witnesses' statements. He had requested for them and the court ordered they be supplied. However, they were not. He as well submitted that the evidence by prosecution witnesses was incredible. He relied on various court decisions to support his allegation.

Madam Kagali who appeared for the state in the matter opposed the appeal. She averred that the evidence by prosecution witness is credible, consistent, reliable and well corroborated. All ingredients for the offence were established beyond reasonable doubt. The age was confirmed by the complainant's Health card. The appellant was well known to PW-1 and PW-2 as *Wiki*, a neighbor. He used to frequent their home to cut grass for cows. On penetration the evidence of PW-1 was well corroborated by that of PW-2. The clinical officer further corroborated the evidence when he stated of the injuries on the vagina. The hymen was broken and there was a discharge. I was urged to dismiss the appeal.

I have considered the evidence on record, the judgment passed and the sentence. I have also weighed the grounds of appeal and submissions by both sides. Having done so I can admit that the evidence by PW-1 and PW-2 contains impressive details and is very consistent. It is the kind of evidence which truth cannot be doubted. The rest of the evidence, that is of clinical officer and the arresting as well as the investigating officer is consistent and credible. The appellant's defence must have been an afterthought. He never questioned PW-1 and PW-2 on the issues he raised. Were it then not for this one ground which the appellant raised in his submissions that he was not supplied with witness statements, and was ill prepared during the hearing, this appeal was headed for dismissal. The issue was not addressed by the state prosecutor. The record shows clearly that on 17th August, 2015 the prosecution had 2 witnesses in court. The appellant said he had not been supplied with witness statements and it was his constitutional right. On 27th August, 2015 the appellant again requested for the said statements. The court said nothing about it then. Mention date was given for 3rd September, 2015. On that day the appellant again prayed for witness statements. The court ordered they be supplied. The issue resurfaced again on 12th November, 2015 when appellant said he did not have witness statements. The court ordered witness statements and charge sheet be issued to him.

On 2nd February, 2016 the prosecution had two witnesses and said were ready to proceed. The appellant also said he was ready to proceed. The case proceeded. There is nothing showing the appellant was ever issued with witness statements and a copy of the charge sheet. Various order had been made by the court that he be supplied and had not been complied with. When the appellant said he was ready to proceed on 2nd February, 2016 it cannot be adequately argued that he must have been supplied with the statements and a copy of the charge sheet as he could have as well given up on the spirited request, having done so several times in the past leading to the court making orders in this favour of which were never met. In such circumstance a lay person could easily give up and to save on time decide to proceed, more so as he was in custody. Where an accused person claims that he was not supplied with a statutorily required documents by the prosecution, the prosecution have a duty to establish otherwise. They did not do so in this case and the court is obliged to find that the appellant was not supplied with the witness statements.

Article 50 (2) of the Constitution of Kenya 2010 reads:

“Every accused person has the right to a fair trial, which included the right:

(b) to be informed of the charge, with sufficient detail to answer it.

(c) to have adequate, time and facilities to prepare a defence.

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

The appellant herein was denied a copy of charge sheet and witness statements despite of him having made various requests and the court having made orders in his favour. His constitutional right as envisaged in Article 50 was infringed, denying him a fair trial. The conducted trial therefore is a nullity. I consequently on the ground allow the appeal and order a retrial.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 11th day of October, 2018

In the presence of:-

Appellant

Ms Mokuu for the state

Mr. Mwelem – Court Assistant