REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 11 OF 2015

(From original conviction and sentence in criminal case number 718 of 2013 of the Principal Magistrate's Court at Kapenguria)

WYCLIFFE SACHER LOKAPE …..…. APPELLANT

VERSUS

REPUBLIC ……..…..…RESPONDENT

JUDGEMENT

WYCLIFFE SACHER LOKAPE, the appellant herein was tried, convicted and sentenced for an offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act number 3 of 2006.

The particulars of the offence are that on the 9th day of July, 2013 at [particulars withheld] area, within West Pokot County, the accused intentionally did cause his penis to penetrate the vagina of P C C , a girl aged 16 years.

The prosecution case is that at the time of the alleged offence, the complainant in this case who gave evidence as PW1 was aged 16 years. She was schooling at [particulars withheld] Primary School in class 5. On 9.7.2013 at about 7pm, PW-2 who is the mother to the complainant was selling groceries at Kamatira. PW-1 went to her and informed her that there was no paraffin. PW-2 gave her money to go and buy paraffin. PW-1 proceeded to the shop of the appellant to buy paraffin. She found the appellant who told her to use the shop's back door. She used it and immediately she entered the shop he locked the said back door before proceeding to lock the front one. He picked a knife and ordered PW-1 not to talk. He gave her a soda to drink.

PW-2 went home at 8pm and was told by her other daughter namely M, that PW-1 was not at home. She went to the appellant's shop to look for her. The shop was closed. She knocked and the appellant respondent. She asked him if he had seen the complainant and he said no. He did not open the shop. The complainant was in the shop at the time and heard the said conversation. PW-2 went back home and slept. The appellant forced the complainant to lie on the floor of the shop. He started by touching her all over the body. He then removed his trousers and pant. He lifted her short skirt and removed her pant. He laid on her and did what she referred to as 'bad manners.' This involved insertion of his private organ into hers. He did it once. It was the complainant's first time to have sex. After that they slept till 3am. The appellant promised to take her to Uganda and marry her as a second wife. He led her to the Centre, gave her 500/- promising to follow her at Makutano Kacheliba Stage. He did not keep that promise.

Another person who was charged together with the appellant met the complainant. Complainant requested him to take her to buy clothes. They did so after which the man requested the complainant to

visit his house. They went and slept there. They had sex. The complainant's mother (PW-2), and her uncle, traced the complainant in this house. They took her to Kapenguria District Hospital and Police Station. She was issued with a P3 form. She disclosed what had happened on both nights, and the suspects were arrested.

PW-3 examined the complainant at Kapenguria District Hospital. Her hymen was open of which he indicated was a sign of penetration. She was not pregnant. She was assessed for age and confirmed to have been 16 years then. Her P-3 from was thus filled and age assessment report made. The suspects were charged with defilement on different dates, counts, but in the same charge sheet.

The appellant in his defence denied the offence. He stated that on the material day he closed his shop and went home to eat. He thereafter returned to the shop to sleep. At 9.30pm a lady knocked on the shop's door and asked for her daughter. He said he had not seen her. Later on PW-2 went to the shop in company of another man. She said she traced her daughter and she had mentioned him. He accompanied them to the chief. When he got to Kapenguria he was placed in cells. Complainant was in cells as well as another man (second accused person). Police demanded for 50,000/-. He did not have it and was charged.

The appellant's witness did not adduce any relevant evidence. The appellant was convicted and sentenced to serve 15 years imprisonment for the offence, on 18.8.2015.

He appealed against the said conviction and sentence on the following grounds:-

1. That the trial magistrate convicted him in absence of the key witnesses.

2. That the medical report was not produced before court.

3. That the complainant was not found with him.

4. That he was not furnished with witnesses statements during the hearing.

5. That hearsay evidence was relied on.

Mr. Nabuyumbu, appearing for the state, opposed the said grounds of appeal and the submissions filed by M/S Risper Arunga, the advocate for the appellant.

On ground one, the state prosecutor argued that the appellant did not state which witnesses ought to have been called and were not, and how relevant their evidence would have been. He argued that they called all the relevant witnesses for the purpose of establishing the charge beyond reasonable doubt. I do agree with the state prosecutor as the law does not demand of the prosecution to call a given number of witnesses. Section 124 of the Evidence Act reads in part, that:-

> ***"……provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

In this case the prosecution called 4 witnesses and the complainant's evidence to a good extent was corroborated by the evidence of her mother and the appellant himself, in that the mother went to the shop looking for her. The ground is therefore dismissed.

On ground 3 it is true that the complainant was not found with the appellant. The law however does not require that for the offence to be established beyond reasonable doubt, the appellant ought be got red-handed, in the act. The girl's evidence well connected him to the offence in count one. Given the weight of the evidence in support of the charge, this ground is insignificant and serves no useful purpose. It is equally dismissed.

It is not disputed that the appellant was not furnished with witnesses statements of which is his constitutional right. It is however noticeable that he did not request for such statement and denied. The appellant has not shown that if he had the benefit of use of such statements, the court's decision would have been different. He did not demonstrate any prejudice occasioned by non use of the said statements. The court can't just assume such prejudice. The ground by itself is not good enough to warrant reversal of a well-founded court decision.

The last ground is that the prosecution relied on hearsay evidence. It is only PW-2 who partly stated what PW-1 told her. Since PW-1 had been called as a witness such reported information is not hearsay. This ground is as well dismissed.

A full and careful evaluation of the entire evidence shows that the prosecution established the offence against the appellant beyond reasonable doubt. The defence case did not challenge it well established truth. 15 years imprisonment was a lawful sentence. I have no cause at all to interfere with the decision and the sentence. The appeal is accordingly dismissed.

Judgement read and signed in open court in the presence of Mr. Mark for the State and Mr. Lowasikou holding brief for Ms. Arunga for the appellant, this

1st day of February, 2017.

S. M. GITHINJI

JUDGE