REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO.45 OF 2015

REMJUS NAMBOLO WAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(***Appeal arising out of the conviction and sentence of Hon. D. O. Ogollah, CM***

delivered on 30th September, 2015 in Busia CM Criminal Case No. 2048 of 2013)

JUDGMENT

1. On 12th March, 2014 the Appellant, Ramjus Nambolo Wambo pleaded not guilty to the substituted charge of attempted incest contrary to Section 20(2) of the Sexual Offences Act, 2006. The particulars of the offence disclosed that on the 30th November, 2013 at about 7.00 a.m. in Busia County he attempted to cause his penis to penetrate the vagina of M. N. O. who was to his knowledge his niece.

2. In the alternative the Appellant was charged with the offence of indecent act contrary to Section 11(A) of the Sexual Offences Act, 2006. The particulars of the offence being that on the 30th November, 2013 at about 7.00 a. m. in Busia County the Appellant intentionally and unlawfully committed an indecent act by rubbing his penis on the vagina of M. N. O., a child aged 11 years.

3. At the conclusion of the trial the Appellant was convicted for the offence of attempted defilement contrary to Section 9(1)(2) of the Sexual Offences Act, 2006. The Appellant being dissatisfied with both the conviction and sentence has appealed to this Court.

4. Vide a Memorandum of Appeal dated 12th October, 2015, the Appellant raised the following grounds:

> **"1. THAT the trial Magistrate erred in law and in fact in convicting and sentencing the Appellant when the facts and evidence adduced in court was in favour of the Appellant.**
>
> **2. THAT the trial Magistrate erred in law and in fact in convicting the Appellant when the evidence adduced by the complainant and her witnesses did not meet the standards required.**
>
> **3. THAT the learned trial Magistrate erred in law and in fact in convicting the Appellant without taking into consideration his defence and mitigation.**
>
> **4. THAT in any event, the sentence is manifestly excessive."**

5. In his oral submission to the Court, the Appellant started off by stating that he had previously had sexual relations with the mother of the complainant. On 29th November, 2013 they had been in the farm together where they agreed to meet later on in the evening. When he arrived at her house in the evening, she requested him to sleep over but he excused himself saying that he was going to the shops and would call her later. He later called her and told her that he was not going to make it and that they should meet at Imelda's place.

6. It is the Appellant's case that the complainant's mother was annoyed and switched off her phone. He nevertheless proceeded to Imelda's place but she never turned up.

7. The next morning he went to the farm with his dogs which alerted him to the presence of somebody in the farm. It was then that he saw the complainant who was in the process of stealing maize. He beat her up and told her to go and call her mother but they never came.

8. He continued working in the farm until he went home late in the day. Police officers came and arrested him and took him to the Police Station where the complainant's mother told him he would be charged with defilement. He was taken to a doctor who examined him by removing all his clothes and he was later charged. It is his case that the report that was prepared for him was not produced in Court and neither did the doctor see any presence of sperm on the complainant.

9. Mr. Owiti appeared for the State. In opposition to the appeal, he commenced by stating that it was not in dispute that the Appellant pleaded not guilty to the offence. Further, that the substituted charge was read over to the Appellant who responded to the same afresh as is required by law. He pointed out that the law allows the prosecution to amend the charges any time before the close of the prosecution's case and in this case the amendments were done before the close of the prosecution's case.

10. On the Appellant's claim that the trial Court relied on contradictory evidence to convict him, Mr. Owiti submitted that there was no contradiction in the evidence of the prosecution witnesses and if there was any contradiction the same was immaterial and could not have caused any prejudice to the Appellant. He submitted that the evidence of PW1, PW2, PW3 and PW4 was corroborative of each other. The State's case is that PW4, the medical officer who examined the complainant established that her hymen was torn, an indication that she had been defiled.

11. Counsel for the State continued his oral submission by stating that the Appellant was an uncle to the victim and therefore the question as to the identity of the Appellant could not arise. Further, that the Appellant admitted that he knew both the victim and her mother.

12. It was the Respondent's case that failure to produce the complainant's underpants did not undermine its case as there was sufficient evidence to sustain a conviction.

13. On the contention that the Appellant's defence was disregarded by the trial Court, the State was of the view that the trial Court considered the defence but found it to be an afterthought. Further, that the Appellant's claim that the complainant's mother wanted a sexual engagement with him was unbelievable as he never posed any questions to the witness by way of cross-examination in order to establish the existence of such state of affairs. It was the State's position therefore that the trial Court was right in concluding that the defence was an ambush.

14. The Appellant asserted in his written submissions that his constitutional rights had been violated owing to failure to supply him with the statements of the prosecution witnesses. On this issue, Mr. Owiti submitted that the Appellant was represented by counsel who cross-examined the witnesses and was aware of the charges facing his client. Further, that even if the constitutional rights of the Appellant were violated, his remedy lies in a claim for compensation and not a nullification of the criminal trial.

15. The duty of this Court in this appeal is to submit the evidence adduced in the trial to fresh analysis in order to reach its own independent conclusion. In doing so, the Court must bear in mind, that unlike the trial Court, it has not had an opportunity of seeing and hearing the witnesses testify-see **Okeno v R. [1972] E.A. 32**.

16. The complainant who testified as PW1 gave unsworn testimony after the trial Court conducted *voir dire* examination and found that although she was a competent witness, she did not understand the meaning of an oath. This witness narrated how on 30th November, 2013 she went to the Appellant's home to collect maize after the Appellant had asked her to do so the previous day. It was her testimony that when she arrived, the Appellant gave her three green maize cobs and urged her to move into the maize plantation. Thinking that the Appellant wanted to give her more maize she complied only for the Appellant to ask her to remove her underpants. She refused to comply and it was then that the Appellant removed her underpants and fell her down. She lay on her stomach. The Appellant did bad things to her on her vagina and thighs using his penis. He then wiped her thighs using his hands. She wiped her vagina using her underpants. She started crying and the Appellant let go of her.

17. On reaching home with the three maize cobs her mother asked her what the matter was and she told her to ask the Appellant. She accompanied her mother back to the farm. When her mother asked the Appellant what he had done to her he kept quiet. Her mother then took her to Port Victoria Police Station before taking her to Port Victoria Hospital where she was treated. On cross-examination the witness testified that the green maize and her underpants were taken by the police.

18. R A O, the mother of the complainant testified as PW2 and told the Court that on 29th November, 2013 the Appellant who is the brother of her husband went to her home and greeted her and left. The complainant later informed her that the Appellant had told her to go to his farm the next day to collect green maize. The following morning she left the complainant still asleep. When she returned home the complainant was not in the house. At about 7.00 a.m. the complainant came back home crying. On asking her what was wrong she told her to go and ask the Appellant. The complainant's underpants were wet. She proceeded to the Appellant's farm and he denied doing anything to the complainant. She went and reported the matter to the police who sent them to the hospital where her daughter was treated.

19. PW3 Newby Abuya a worker with Afya Western Plus, a non-governmental organization dealing with matters touching on vulnerable children testified that on the material day he received a call from a colleague concerning the defilement of a child they had been taking care of. He escorted the child and the mother to the Police Station and thereafter to the Hospital. Upon cross-examination he told the Court that the complainant did not give him the name of the defiler.

20. PW4 Wanjala Tom, a clinical officer from Port Victoria Hospital testified on behalf of her colleague Dr. Godo Edwin who was said to be away for a seminar. It was his testimony that according to the doctor's notes, the girl's hymen was torn and her vaginal linings were swollen. She also had a discharge on the entry of the labia minora and labia majora. Analysis of the specimen obtained upon a high vaginal swab did not reveal any spermatozoa. There was also no infection. PW4 also produced a P3 form for the Appellant showing that nothing of substance was noted on him upon medical examination.

21. Police Constable Wanjohi from Port Victoria Police Station who testified as PW5 told the Court that when the complaint was reported to

him on 30th November, 2013 at about noon he recorded the statements of the witnesses and proceeded to the scene of crime. At the scene the complainant identified the maize farm and he noted that the maize plantation was disturbed. He collected the three maize cobs as exhibits and arrested the accused person. He took him to the Police Station from where he escorted him and the complainant to Port Victoria Hospital where they were both examined and P3 forms filled for them.

22. In his defence the Appellant told the Court that he was framed by the mother of the victim. It was his evidence that on 29th November, 2013 they had agreed to meet as she had indicated that she had something to discuss with him. He went to her house and requested her that they should go and meet in the house of one Imelda Chore but the meeting did not materialize. The next day in the morning he found the complainant stealing his maize and decided to discipline her. She then told her to come with her mother but they never came. In the evening he found the complainant and her mother in the company of police officers who arrested him and charged him with attempted defilement.

23. Looking at the evidence adduced in the trial, it emerges that there was contact between the Appellant and the complainant on the morning of 30th November, 2013. There is however divergence on what took place during that contact. The complainant's case is that the Appellant defiled her but the Appellant's position is that he found the complainant stealing his maize. For the matter to be unraveled, the Court has to look elsewhere.

24. Let me first get out of the way the Appellant's claim that he was not supplied with the statements of the prosecution witnesses. Although the Court did not capture in the record that the prosecution had supplied copies of witness statements to the Appellant, a review of the proceedings clearly shows that the Appellant had access to the statements of the prosecution witnesses. On 12th March, 2013 when PW2 testified, the defence counsel referred her to the statement she had recorded with the police. The defence therefore had access to the statements of the prosecution witnesses. That explains why the Appellant's appeal which was filed by an advocate did not raise this issue. The Appellant's claim that he was denied access to witness statements is unfounded and his appeal on this ground therefore fails.

25. I proceed to analyze the evidence adduced during the trial. The complainant's evidence that the Appellant had on 29th November, 2013 invited her for a treat the next day was confirmed by the evidence of her mother. On 30th November, 2013 the complainant went to pick the maize. She later went home crying. When her mother enquired from her what the problem was, she told her what the Appellant had done to her. They proceeded together to the Appellant's farm. The Appellant could not give an answer when asked what he had done to the Appellant. Although there was no witness as to what took place between the Appellant and the complainant, the evidence of PW2 corroborates that of the complainant. It confirms the fact that the Appellant met with the complainant a day before the incident. It also confirms that the complainant reported the incident to her immediately after its ocurrence.

26. There was more evidence that was adduced in support of the prosecution case. The investigating officer told the trial Court that he visited the scene and noted that it was disturbed. He also collected the green maize that had been given to the complainant by the Appellant. The complainant and her mother told the Court that the police collected the undergarment that the complainant wore on that day. Unfortunately these exhibits were not produced

27. Failure to produce exhibits can only point to lack of seriousness on the part of the prosecution. The prosecutor having noted through the testimony of PW1 and PW2 that some exhibits had been recovered ought to have ensured that the same had been brought to Court for identification by these witnesses before they concluded their testimony. He also ought to have ensured that the same were produced by PW5. If the exhibits could not be traced then a satisfactory explanation ought to have been placed on the Court record by the investigating officer. Having said so, I do not find the failure to produce the exhibits to have prejudiced the Appellant in any way. He indeed admitted that there were some maize cobs in the equation.

28. Further corroboration of the prosecution's case came through the evidence of the medical officer who told the Court that the complainant's vaginal lining was swollen. The evidence confirmed sexual activity. The finding by the medical officer that the hymen was torn is neither here nor there as the Court was not told whether the tear was old or fresh. In fact the medical report stated that no tears were seen.

29. In his defence the Appellant blamed the complainant's mother for his predicament. The Appellant's claim that PW2 wanted him to spend the night of 29th November, 2013 with her was correctly dismissed by the trial Court as an afterthought. He never raised this issue when cross-examining PW2. It is noted that from the cross-examination of PW5 by the defence counsel, the Appellant had told the police that he had found the complainant stealing his maize. This line of defence is unbelievable. It does not explain why the Appellant let the complainant to go away with the stolen maize. It also does not explain why he released the complainant instead of escorting her to PW2. Like the trial Court I find the Appellant's defence implausible in its entirety.

30. Before reaching my conclusion I need to point out some errors on the part of the trial Court. In its judgment the Court found that the medical examination revealed spermatozoa in the complainant's body. That was not correct as the evidence of PW5 and the contents of the P3 form filled for the complainant were clear that no spermatozoa were seen. Despite this erroneous statement, the evidence on record still points to the commitment of a sexual offence by the Appellant.

31. A greater error on the part of the trial Court was the conviction of the Appellant for the offence of attempted defilement. When the Appellant was first brought to Court on 2nd December, 2013 he was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act, 2006. The charge was substituted on 21st January, 2014 with that of attempted defilement contrary to Section 9(1)(2) of the same Act which was in turn substituted on 12th March, 2014 with that of attempted incest contrary to Section 20(2) of the same Sexual Offences Act, 2006. The offence for which the Appellant was being prosecuted was therefore in respect to the charge read to him on 12th March, 2014. He was thus convicted for an offence which had already been substituted.

32. It is clear from the proceedings that the Appellant was aware of the charge that was facing him. PW1 stated that the Appellant was the brother of her father. PW2 told the Court that the Appellant was the brother of her husband. When the Investigating Officer (PW5) was cross-examined he stated that PW2 told him that the Appellant was the step-brother of her husband. He, however, admitted that he did not

know the names of the husband of PW2. With such kind of evidence one cannot confidently say that the complainant was a niece of the Appellant. It would have indeed been risky to find the Appellant guilty of attempted incest.

33. The alternative charge to the main count in the charge sheet of 12th March, 2014 is that of committing an indecent act contrary to Section 11A of the Sexual Offences Act, 2006. That is an offence that can only be committed against an adult. The evidence shows that the complainant is a child. PW5 testified that the medical officer estimated the complainant's age to be twelve years. She is thus not an adult.

34. The proper Section under which the Appellant ought to have been charged is Section 11(1) of the Sexual Offences Act, 2006 which criminalizes an indecent act with a child. In Section 2 of the Act an indecent act is defined to include any unlawful intentional act which causes any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration. The evidence adduced in this case shows that the Appellant committed an indecent act with the complainant who was a child at the time of the commission of the offence. I therefore quash the Appellant's conviction for attempted defilement and substitute therewith a conviction for an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, 2006. The sentence of ten years imprisonment is also set aside and substituted with ten years imprisonment provided for the offence for which I have just convicted him. For avoidance of doubt the sentence shall run from 30th September, 2015 being the date of his incarceration by the trial Court.

35. Apart from what is stated hereinabove, the Appellant's appeal stands dismissed.

Dated, signed and delivered at Busia this 8thday of December,2016.

W. KORIR,

JUDGE OF THE HIGH COURT