REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.59 OF 2013

KEVIN JUMA……...…….……APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(An Appeal arising out of the judgment in Busia CMC.No.1448 of 2012 delivered by C.I Agutu R.M on 3rd July 2013)

J U D G M E N T

1. It was alleged that B N, a girl aged, 13 years was on 22nd July 2012 within Busia County intentionally and unlawfully defiled by one K Juma (**the Appellant**) by causing his penis to penetrate into her vagina. After a full hearing, the accused was convicted of an offence of Defilement contrary to Section 8 (1) (3) of The Sexual Offences Act (Act No 3 of 2006) and sentenced to imprisonment for 20 years.
2. At Trial the Prosecution called six (6) witnesses. B N W (PW1) was born on 6th November 1998 (Certificate of Birth Exhibit 3). On 22nd July 2012, PW1 and her younger sister A visited her Aunt W J M (PW3). At around 3.00pm PW3 saw off the two girls. As they walked back home, a man confronted them and started to hold the waist of PW1. He told her that he wanted to sleep with her. She dismissed him but the man persisted with his advances even offering her ksh.200/=. Sensing danger, PW1 held her sister and started running.
3. The man gave a chase and caught up with them, tripped PW1. He pressed her to the ground and held her by her throat. Although she tried to fight back, he overwhelmed her. It is then that he defiled her. When through, he pulled up his trousers and made away. PW1 was left distressed and as she walked home she met David Wandera (PW2) who she told what had happened. PW2 told Court that the distressed girl described the clothes that the assailant wore being a Brown shirt with boxes, a white Muslim cap with stripes, Black trouser and white shoes. The victim also pointed out the direction that the man had taken. Using a bicycle, PW2 followed and managed to reach a man whose description fitted that given by the girl. The man was trying to flag down a matatu. With the help of some passengers they arrested the man.
4. The girl identified the man as her assailant. PW2 left the man in the hands of the youth who told him that they would hand him over to the Police. It would, however, seem that the youth subjected the suspect to mob justice before the police intervened. Before going to the scene where the youth had beaten up the suspect, PC Faith Zaina (PW5) received two members of the public who brought PW1 to report the incident of defilement. After booking the report she gave PW1 a note to take to hospital. Thereafter she rushed to the scene of mob justice and found the suspect unconscious and badly beaten.
5. On 25th July 2012 the victim visited Sio Port District Hospital for medical examination. She was attended to by Francis Dindi (PW6) a Clinical officer there. The girl had earlier on 22nd July 2012

received treatment at another facility. On examination he found that although the genitalia was normal there was visible spermatozoa on the labias and cervix. The hymen was broken but there was no blood. The Clinical Officer concluded that there had been penetrative sexual assault. The same Clinical Officer also examined the suspect who had been physically assaulted and had cuts caused by sharp objects. He had also been forcefully circumcised.

6. At the close of the Prosecution case, the Trial Court found that the Appellant had a case to answer and invited him to make his Defence. In an unsworn statement, the Appellant denied the offence and stated that on 22nd July 2012 he was playing football when some people came to the field, stopped the game and took him away. After taking him for 1 kilometer the three started beating him accusing him of having defiled a girl. They assaulted him and even forcefully circumcised him.
7. In a Petition of Appeal dated 10th July 2013, the Appellant raised 6 grounds of Appeal which can be conveniently reduced into the following:-

a. That the Prosecution evidence was weak and inadequate,
b. That the medical evidence was contradictory,
c. That the Trial Magistrate did not give proper consideration to his Defence.

8. This Court has narrated the evidence that it must re-evaluate in detail so as to draw its own conclusion. That is what I am obliged to do as a first Appellate Court by keeping in mind that we did not have the advantage of seeing and hearing the witnesses testify first hand and I must therefore take account of that (**Okeno–vs- Okeno[1932]EA 32**). In the written submissions the Appellant addressed various aspects of the Prosecution case in a bid to show the inadequacy of the Prosecution evidence. On the other hand, the State attempted to demonstrate that the evidence was strong and overwhelming. The various aspects raised by both sides will be discussed as the Court evaluates the evidence on record.
9. This Court starts by making an observation of the Prosecution case. Although no particular number of witnesses is required for the proof of any fact (Section 143 of the Evidence Act), the failure of the Prosecution to call a crucial witness, without explanation, can invite a negative inference being made of the Prosecution case. This Court is also minded of the provisions of Section 124 of The Evidence Act which provides:-

> "**124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**
>
> **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."**

10. There are reasons for citing these two provisions. The Trial Court admitted the evidence of PW1 under the provisions of section 19 of the Oaths and Statutory Declarations Act and after carrying out a *voir dire* examination. Presumably, the Trial Court considered the witness aged 13 years to be a child of Tender years. While accepting that the provisio to section 124 allows a Court trying a Sexual Offence to convict only on the evidence of a victim child of Tender years it is not lost on this Court that one other person is said to have witnessed the instant crime. That person is A she is the younger sister to the victim. It was the testimony of the victim that she was present when the assailant defiled her. The Prosecution did not call A as a witness and did not explain why it did not do so. In these circumstances, the evidence of the victim must be so sufficiently corroborated by other evidence so that no negative inference can be made for the prosecution's failure to call Alice. Only then can a safe conviction be returned.
11. The testimony of the victim was that she was with her younger sister A when the Appellant confronted her menacingly demanding to have sex with her. In a bid to evade the advances she

ran and tried to seek refuge at a neighbours home but found no one there. After a chase the Appellant caught up with her, tripped her to the ground, held her by her throat and pressed her on the ground. She then describes what followed:-

> **"He then removed my shirt, biker and underpants with one hand while holding my throat. He then pushed his "thing" into my "thing" and raped me. "alini baka halafu wakati alimaliza akamuka akakimbia."**

12. That the victim and her sister had just visited their Aunt J (PW3) when this incident occurred was corroborated by PW3. She testified,

> **"On 22/7/2012 PW1 came to visit me with her younger sister, A. She was coming from church and passed by to greet me at about 3 p.m. I saw the children off to go back to their home".**

The Appellant did not field any questions to that witness in cross- examination and her account was not challenged. And as to how the ordeal occurred and unfolded, the Appellant did not put much effort in cross-examination to debunk the evidence of the victim. The incident left the girl with soiled clothes. These clothes which included a soiled shirt and underpants were produced as Exhibits (4,5 & 6) by PW5.

13. The victim was left distressed and crying and was found in this state by PW2. The victim described the clothes of the assailant to PW2. The assailant wore a brown shirt with boxes, white Muslim cap with stripes, Black trouser and white shoes. She also pointed out to PW2 the direction in which the Appellant had made away. It was the evidence of PW2, that he saw a man who fitted the description given by the victim trying to flag down a matatu and with the help of some passengers, apprehended the Appellant. It must be observed however that in cross-examination, the witness said that he found the Appellant trying to flag down a motor cycle. The Appellant correctly submitted that this was a discrepancy. Whether it is material enough to make the entire evidence of PW2 unbelievable depends on the quality of the other evidence.
14. It was the evidence of PW2, that prior to the incident, neither the victim nor the suspect were known to him. The evidence of PW2 was that he was in [particulars withheld] when he was approached for help by a girl in distress. When the girl described the man and showed him the direction he had taken, he got on to his bicycle and followed; PW1 had told Court,

> "**I met a man and told him what accused had done. Accused was wearing a black trouser and brown shirt with white blocks. He also wore a Muslim cap with blue strips and white sneakers. The man I met asked me for accused's description and I told. The man had a bicycle. He gave a chase after accused and arrested accused**."

The quotation is lifted from the handwritten notes of the Magistrate which differs slightly from the typed proceedings. One quickly notices that the description of the clothes by the two witnesses is substantially and materially similar. Secondly the evidence of how PW1 sought help from PW2 and how PW2 gave a chase using a bicycle is consistent. The evidence supports the position taken by the Prosecution that PW1 who was crying and distressed sought help from a stranger, PW2. The account is as consistent as it is believable and the discrepancy as to whether the accused was trying to flag down a matatu or boda boda when arrested is diminished.

15. It is true as submitted by the Appellant that PW2 did not accompany the victim when she made a report to the police. This Court is asked to find that PW2 was therefore insincere in his testimony. PW2 gave reason why he left the Appellant in the hands of the youth. He stated;

> "**I handed you over to the youths who came to the scene as I was going for another errand**."

That may also explain why the witness did not accompany the victim to the Police Station but chose to

record his statement later. That he had other errands to attend to does not seem to be an unreasonable explanation for the witness not going to the police station immediately after arresting the suspect.

16. It is of course true that the youth in whose hands PW2 left the Appellant were not called as witnesses. In his arguments to Court, the Appellant makes much of this failure and submitted,

> **"If they are the people who handed the Appellant to the Police then it was of paramount importance that they be availed to testify and give credibility to the Prosecution."**

The evidence of PW5 that she rushed to the scene on receiving a report that irate members of the public were subjecting the Appellant to mob justice. There she found the suspect unconscious and badly beaten. This account was not challenged at all in cross-examination by the Appellant. The Appellant himself in his defence talks of people assaulting him and cutting "his manhood." PW6 who examined the Appellant on 25th July 2012 found that the Appellant had been assaulted physically and cut with sharp objects and that he had been forcefully circumcised. There is no doubt whatsoever that some people inflicted fairly serious injuries on the suspect after his arrest. The evidence of PW5 and the medical evidence of PW6 confirm this. On the other hand the evidence by the defence does not displace this. This Court is unable to find much contention in the manner in which the suspect was arrested and beaten up. It does not therefore find that the youth meted out the mob justice upon the suspect were crucial witnesses.

17. This Court has found that PW3 gave evidence on to how she had just seen off PW1 and her sister A before the Sexual assault took place. That evidence was consistent. The Court has also found that the victim gave a detail account of how she was chased by the Appellant, tripped and defiled. That account was not shaken in cross-examination. Then there is consistent evidence of PW1 and PW2 on how PW1 sought help from PW2 and how PW2 arrested the suspect. There is strong evidence to support the account of the victim.
18. Further corroborative evidence came from the Clinical Officer (PW 6) who examined the victim and found the presence of visible spermatozoa on her labia and cervix. The medical notes of 22nd July 2012 made at Holy Family Mission Hospital Nangina where the victim had first been treated were of similar finding. The Clinical officer returned an opinion that the victim had suffered a penetrative sexual assault. This medical evidence bolsters the circumstantial evidence of PW2 and PW4 and the direct evidence of victim herself. This Court finds, just like the Trial Court, that the circumstantial evidence against the accused was so overwhelming. It was so overwhelming that it could not be weakened by the failure of the Prosecutor to call A, the other eye witness. The strength of that Prosecution case also swept away the mere denial offered by the Appellant in Defence.
19. Turning to the sentence, the victim was born on 6th November 1998. That would make her between the age of 13 and 14 at the date of the sexual assault. Under Section 8(3) of The Sexual Offences Act the minimum punishment for a person who defiles a child between the age of 12 and 15 years is 20 years imprisonment. The Court imposed this minimum sentence. The Law does not allow a lesser sentence. This Court cannot possibly interfere with that sentence.
20. The upshot. The Appeal is dismissed in its entirety.

F. TUIYOTT

JUDGE

DATED, DELIVERED AND SIGNED AT BUSIA THIS 3RD DAY OF DECEMBER, 2014.

IN THE PRESENCE OF;

KADENYI……..COURT CLERK

OBIRI…….……FOR STATE

APPELLANT PRESENT IN PERSON