REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 75 of 2012

ERIC WANUPI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in criminal case No. 2877 of 2010 by Hon. E. Boke PM, Naivasha dated 19th March, 2012)

JUDGMENT

The appellant was charged that on 18th day of October, 2010 at Naivasha Municipality within Nakuru County, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of LEA a girl aged 14 years contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, No. 3 of 2006. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act, No. 3 of 2006.

The trial court upon consideration of the evidence presented before it found that it proved the main charge and upon convicting the appellant of that offence sentenced him to serve twenty (20) years imprisonment.

Aggrieved by both the conviction and sentence the appellant has filed an appeal to this court on eight (12) grounds that can be summarised as follows:-

1. That the conviction was against the weight of the evidence;

2. That the learned trial magistrate failed to consider his defence.

3. That the learned trial magistrate erred in law by shifting the burden of proof from the prosecution to the appellant.

4. That the sentence passed by the learned trial magistrate was manifestly harsh and excessive.

In arguing the appeal learned counsel for the appellant contended that the evidence of P.W.1 which the trial court relied on to convict the appellant was not credible; that the charge was based on the doctor's finding that the complainant's hymen was broken without indication as to when it was broken and that the trial court dismissed the appellant's defence without giving reasons for doing so. He also contended that the trial magistrate introduced fresh evidence and coined her own theories to explain what might have happened.

Learned counsel for the respondent while conceding the appeal submitted that the complainant did

not initially identify the appellant as the person who defiled her; that the complainant was unable to point out the house in which she was defiled; and that the complainant's evidence was contradictory.

This being a first appeal, it is the duty of this court to consider and re-evaluate the evidence adduced in the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses.

It was the case for the prosecution that on 28th October, 2010 at about 7pm, P.W.1, LEA, who was at the time a girl aged 14 years found the appellant whom she knew standing by the roadside. The appellant held her hand and pulled her to an empty house and defiled her. After he finished he opened the door and pushed her out. He warned her not to tell anybody what he had done to her. After this, she joined her mother who was very angry with her for returning home late. She was initially reluctant to tell her mother what the appellant had done to her and only disclsed it after being beaten. She explained that mama Melvin had seen the appellant pulling her. That night she accompanied her mother to mama Melvin's home who confirmed having seen a man pulling her. On the following day, they reported the incident to the complainant's headteacher who referred them to the police. She was subsequently taken to Naivasha District Hospital for treatment.

P.W.3, Dr. Njoki Ngumi produced the p3 form filled by Dr. Njiri for the complainant. Doctor Njiri, who examined the complainant six days after the alleged defilement found her outer genitalia normal but the hymen was broken. She did not notice any spermatozoa or venereal disease. Since no trauma was noted on the complainant's genitalia she concluded that no force was used.

P.W.4, P.C. Habiba Hussein, investigated the alleged offence and established that both P.W.1 and P.W.2 knew the appellant before the incident and that both the appellant and the complainant were neighbours. Her attempts to trace Mama Wafula, who allegedly saw the appellant pulling the complainant were fruitless. Although she visited the scene of the crime twice she did not gain access thereto as the house was locked. Later on she arrested the appellant, after he was identified by the complainant and charged him .

In his defence the appellant denied having committed the offence. He stated that on the material day he returned home at about 5.00pm and that he heard nothing concerning the alleged defilement until 1st November, 2010 when the principal of the school where he taught told him that police officers were looking for him. Later in the day he contacted one of the police officers and they agreed that he would go to the police station the following day. When he visited the police station the following day, his finger prints were taken. Later on he was placed among (5) police officers in uniform and the complainant was told that her defiler had been arrested and that she should confirm whether he was the one. That after the complainant purportedly identified him he was taken to the cells and on the following day charged in court.

The foregoing constitutes the evidence upon which the trial court found the offence of defilement proved beyond reasonable doubt and convicted the appellant.

The only direct evidence against the appellant was given by the complainant. The complainant described the events leading to the incident as follows:-

“I was carrying the maize home. I delivered the maize and was coming for other goods when I found accused standing besides the road. He is Erick Wanupi. I had known him just by seeing him in the area. As I was passing him he held my right hand and started pulling me. I started crying but he threatened me that he would kill me if I screamed. He pulled me to his house which was in a corner where no one could see us. It is a single room not far from the place he pulled me from. Other houses are scattered. When we reached the house it had nothing. He ordered me to lie down. He then ordered me to remove my clothes. He pulled my petticoat and my pant. By then I was lying on the floor. He removed his trouser and from his pocket he drew a condom which he tore and wore on his penis. He then told me that if I screamed he would kill me. He showed me a knife from the floor. He then lay on me and started having sex with me. I felt a lot of pain and started crying.

That is when he showed me a knife. He then opened the door for me and warned me that I should not tell anyone and if I did tell anyone I should make sure I didn't meet him again..... the incident took about three (3) minutes".

The appellant having raised an alibi defence the sole question in this appeal and indeed before the trial court is whether the evidence presented by the prosecution witnesses proved that the appellant indeed committed this offence. After being beaten by the mother, the complainant stated that the person who had defiled her was a teacher from DN Handa Secondary School who lured her to his house in order to teach her maths.

But on cross examination, the complainant told the court that the appellant was not a neighbour and that she did not know him before the incident. She also said that the appellant did not talk to her before he started pulling her.

That evidence contradicted her own testimony during examination-in-chief and also the findings of P.W. 4 (the investigating officer) to the effect that the appellant was a neighbour to the complainant and that the complainant knew him before. Whereas the complainant said the appellant's house was far away, the house to which the appellant allegedly pulled her into was not far from the complainant's home. According to the evidence of the complainant's mother her home was about 250 metres from her business premises. This means if indeed the house in which the complainant was taken belonged to the appellant, the complainant lied by stating that the appellant's house was far away.

Of importance is the complainant's description of the events leading to the occurrence of the offence. The said occurrence depicts the appellant as a person who was prepared to commit the offence. For instance, the appellant had a condom in his pocket. There was also a knife on the floor of the house which the appellant allegedly used to threaten the complainant. When the incident happened darkness had already set in. There was a black out and the complainant does not talk of the complainant having lit any form of light in the house. It is incredible that the complainant could see the knife and the condom without light. Although the complainant alleged that the incident took three minutes, the evidence showed that she was away for about two hours. Interestingly too, the doctor who examined her found her hymen broken but could not tell whether it was broken on the alleged occasion or before. There was nothing in the examination that could conclusively prove that she was actually penetrated on the material day.

The investigation officer failed to call witnesses who were said to have seen the appellant with the complainant. It is not clear whether it was mama Melvin or mama Wafula who saw the appellant pulling the complainant or whether this mama Melvin is the same person as mama Wafula. Whatever it is, they were not called as witnesses.

The alleged offence occurred at about 7.00pm.There was a power blackout shortly before the offence occurred. From the evidence it is not clear whether the complainant knew the appellant well before the incident. It was therefore important for the trial court to ascertain that the circumstances obtaining at the time of the alleged offence were conducive to enable positive identification of the appellant as the offender. I am of the view that the circumstances were not good enough to enable the complainant to positively identify the appellant.

The alleged identification at the police station was of no value as no parade was conducted. I also note that the evidence of the doctor was not conclusive on whether or not the complainant's hymen was broken on the material day or was old.

Owing to the inconsistencies in the complainant's evidence; the inconclusive determination of the doctor on whether the complainant's hymen was broken on or before the alleged defilement and given that the complainant was beaten before she reported to her mother about the alleged defilement, I entertain doubt whether the offence was indeed committed and if it was committed, whether it was the appellant who committed it. The benefit of doubt must be given to the appellant.

For the foregoing reasons, I allow the appeal, quash the conviction and set aside the sentence and

order the appellant to be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Nakuru this 5th day of October, 2012.

W. OUKO
JUDGE