



IN THE COURT OF APPEAL
AT NAKURU

(CORAM: BOSIRE, ONYANGO OTIENO & NYAMU, J.J.A.)

CRIMINAL APPEAL NO. 624 OF 2010

BETWEEN

SAMMY WANGOMBE WAWERU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nakuru (Koome, J.) dated 14th May, 2009

in

H.C.C.R.A. NO. 81 OF 2008)

JUDGMENT OF THE COURT

In the trial court, the appellant, **Sammy Wangombe Waweru**, was charged with the offence of defilement of a girl under 15 years contrary to section 8 of the **Sexual Offences Act 2006**. The particulars of the offence as per the charge sheet, were that on *10th December, 2006* in the then Nyandarua District within Central Province, the appellant had carnal knowledge of **E.W.K, (PW2,)** a girl under 15 years. In the alternative, the appellant was also charged with the offence of indecent act with a child contrary to **section 11(1)** of the Sexual Offences Act.

The particulars of the alternative charge were that on the same day in the then Nyandarua District within Central province, he unlawfully and indecently assaulted PW2, a child under 15 years by touching her private parts. After the trial, the trial magistrate found the appellant guilty, convicted him and sentenced to **20 years** imprisonment. Aggrieved by the verdict, the appellant appealed to the High Court and by a judgment dated *14th May, 2009*, the High Court (Koome, J.) dismissed the appeal; hence this second appeal to this Court.

At the hearing of the appeal, the appellant appeared in person and the State was represented by Mr. V.O. Nyakundi, State Counsel. In articulating his appeal, the appellant relied on a homemade Memorandum of appeal filed on *20th May, 2009*. The Memorandum raises five grounds of appeal namely:-

“1. That both the learned trial magistrate appellate Judge erred in law when they ignored the verdict of the clinical officer PW4, who ruled out the possibility of defilement having taken place on the day alleged.

2. *That in wholly relying on the single uncorroborated evidence of the complainant, both the learned trial magistrate and appellate Judge erred in law.*
3. *That the learned appellate judge overlooked the possibility that my constitutional right to a fair trial was violated by the learned trial magistrate's failure to indicate the languages used by PW1, PW2 and PW5 in the proceedings.*
4. *That the Honourable trial court further violated my right to a fair trial by failing to provide an interpreter to enable me to fully comprehend the testimony of PW4 as per stipulation of section 77(2) of the Constitution of Kenya.*
5. *That subsequent to my arrest, I was detained in police custody, without any plausible explanation beyond 24 hours in contravention of section 72(3) (b) of the Constitution of Kenya."*

The appellant argued the grounds seriatim but highlighted the alleged failure to understand the language of the court and the alleged failure to have the complainant and himself medically examined at the same time.

Mr. Nyakundi, learned State Counsel, responded by submitting that although the clinical officer did express his doubts on whether the complainant was a virgin, he did not completely rule out a defilement despite the fact that the examination did not reveal the presence of spermatozoa and the injuries to her private parts appeared to have been at least three days old and in addition the complainant, after the incident took a bath and washed herself including the affected parts of her body.

Mr. Nyakundi contended that pursuant to the relevant law, the two courts had principally relied on the complainant's evidence and therefore the shaky medical evidence was not in the circumstances fatal to the prosecution case, the two courts having believed the complainant's evidence and having reached concurrent findings of fact on the same issue.

As regards the second ground, Mr. Nyakundi contended that the complainant's evidence did not in law require any corroboration and therefore the two courts below were entitled to rely on it solely.

Concerning ground three touching on the language used by the court, Mr. Nyakundi submitted that the challenge was an afterthought in that, it was evident that the appellant did fully and effectively cross-examine the complainant (PW2), and the other witnesses a task which could not have been possible if the appellant did not understand the language of the court. To illustrate the point, Mr. Nyakundi submitted that the issue of the language used was never raised in the two courts below and was being raised for the first time in this second appeal. As regards the challenge that no interpretation was provided, Mr. Nyakundi similarly argued that the appellant's cross examination reflected that the appellant fully understood the language used and therefore, interpretation services were provided as required under **section 72(3) (b)** of the retired Constitution.

On the alleged detention in police custody beyond the twenty four hours stipulated in the then applicable Constitution, Mr. Nyakundi submitted that this was never raised in the High Court and therefore this ground should not be upheld by this Court.

Finally, Mr. Nyakundi submitted that, with regard to the defence of alibi, both courts below did consider it and found that it could not displace the credible evidence of the complainants to the effect that the appellant left for the church at 10.00 a.m. after perpetrating the crime.

Taking a broad view of the grounds raised by the appellant, the central ground in our view is the credibility of PW2 and in this regard, we are of the view that there were concurrent findings of fact by the two courts in that they did consistently express the view that they believed the complainants evidence. With this in view, we cannot unravel their findings.

Thus, **Section 124** of the *Evidence Act* stipulates:-

“Provided that wherein a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the child is telling the truth.”

It follows therefore that the two courts below were entitled to rely on the sole evidence of the complainant.

During the hearing of the appeal the appellant placed a lot of weight on the allegation that the complainant was not a virgin as per the *evidence of the clinical officer*. However, it is our view all the same that all the necessary ingredient of the offence of defilement, her alleged loss of virginity notwithstanding, were present because the complainant was fully protected by the ***Sexual Offences Act 2006*** in that it was common ground that she was twelve years when the offence was committed.

Finally, concerning the alleged frame up of the appellant by the parents of the complainant, we are of the view that there was no evidence in support of the ground and on the contrary, the appellant had admitted to have been a debtor of the complainant’s father. For this reason, it would have defied common sense for the complainant’s father to set up a frame up in order to place the appellant behind bars when it would logically have been advantageous for the appellant to be at liberty in order to repay his debt.

The challenge touching on the sentence of 20 years imprisonment imposed on the appellant we note that the sentence is covered by the provisions of section 8 of the ***Sexual Offences Act*** which provides that the minimum sentence for defilement of children up to the age of 12 years is 20 years which was the sentence imposed on the appellant.

In conclusion, although the appellant did demonstrate commendable effort in arguing the appeal in person, nonetheless what commends itself to us is a dismissal of the appeal because all the grounds raised by him are not, in our view, sustainable.

The appeal is accordingly dismissed.

Dated and delivered at NAKURU this 23rd day of February, 2012.

S.E.O. BOSIRE

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR