REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.131 OF 2017

(From SPM's Court at Kimilili SOA 16 of 2017 by: Hon. D.O. Onyango (SPM)

WYCLIFFE SAMITA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

Wycliffe Samita was convicted of the offence of defilement Contrary to Section 8(1) as read with Section (8)(2) of the Sexual Offences Act. The particulars of the charge are that on 27/1/2017 at [particulars withheld] Village in Bungoma North, intentionally caused his penis to penetrate the vagina of NWJ a child aged 6 years.

In the second charge, he faced a charge of committing an indecent act with a child contrary to Section 11(1) of Sexual Offences Act in that he touched the vagina of NMJ on 27/1/2017. He was acquitted of the 2nd charge. He was sentenced to serve life imprisonment.

Being aggrieved by both the conviction and sentence, the appellant filed this appeal on 21/12/2017 based on the following grounds:

(1) ***That he was not given the witnesses statements and therefore did not know the charge he faced;***

(2) ***That the medical evidence did not connect the appellant to the offence;***

(3) ***That the court failed to consider that the charges were a fabrication;***

(4) ***That the prosecution evidence was contradictory;***

(5) ***That the court failed to consider the appellant's defence;***

(6) ***That the charge was not proved to the required standard.***

The appellant therefore prays that the court do quash the conviction and set aside the sentence.

This is the first appellate court and it is required of it to re-evaluate all the evidence that was adduced before the trial court afresh, analyze it and arrive at its own conclusions. The court has to bear in mind that it neither saw or heard the witnesses testify. See ***Kiilu v Republic (2005) KLR 174***.

The prosecution called a total of six witnesses. **PW1 JN** is the mother of the complainant N.M.J. PW1 re-called that she had employed the appellant to be dropping and picking her children from school on her motor cycle.

On 27/1/2017, PW1 arrived home when B (PW3), her younger sister aged about 17 years, informed her that the complainant was bleeding from her private parts. PW1 observed the complainant's genitalia and found it to be swollen. The complainant informed her that on the way from school, Samita the appellant, removed her clothes and defiled her. PW1 rushed the child to Naitiri Hospital and reported to the police.

PW2, the complainant, after a *voire dire* examination, gave unsworn evidence as the court was satisfied that she was too young to understand the meaning of the oath. PW2 recalled that on the way from school, the appellant took her to a shrub, inserted his *chero* (thing for urinating) into her private parts.

PW3 BN an aunt to PW2 who lived with PW1 and 2, recalled that after PW2 arrived from school on 27/1/2017 at 6.00 p.m., she found PW2

sleeping in the kitchen and when she called PW2 to bath, she refused. PW3 removed PW2's clothes and noticed that she was bleeding from her vagina and when asked who had removed her clothes, PW2 said it was Samita, the appellant who removed them on the way from school.

Edwin Wafula Masika (PW4) is the Clinical Officer who examined the complainant on 28/1/2017 having been treated at the same facility on 27/1/2017. PW4 found blood in PW2's urine, bruises on the labia minora, cut wound on the clitoris, vaginal walls were inflamed and hymen was intact but bruised. PW4 opined that there was partial penetration. PW4 also examined the appellant on the same day.

PW5 PC Peter Musinya arrested the appellant when he went to the police station with PW1 and 2.

When called upon to defend himself, the appellant denied the offence and stated that he was arrested for no apparent reason and denied knowing the complainant or why they picked on him.

In his oral submissions, on appeal, the appellant complained that when PW2 & 3 testified, he did not have the witness statements and is not aware of the charge; that there was another suspect by name Alex who was not arrested; that the person he took to the police station did not testify; he denied being Samita but Soita.

Ms. Njeru learned counsel for the State opposed the appeal and submitted that the appellant was recognized as the assailant as he had been employed by PW1 to drop and pick PW2 from school; that it is PW3 who found out that PW2 was bleeding from her genitalia and brought to the attention of PW1; that PW1, 3 and 4's evidence corroborated PW1's evidence; that the medical evidence also corroborated the witnesses' evidence.

The appellant faced a charge of defilement contrary to Section 8(1) of the Sexual Offences Act. To prove the said charge, the prosecution has to prove:

(1) That the victim was a child;

(2) That there was penetration;

(3) Positive identification of the perpetrator.

The court saw the complainant, PW2 in court and was of the view that she was a child of tender age and did not understand the meaning of the oath. Further, PW2's Birth Certificate was produced in evidence as (P.Exh.2) and she was born on 27/10/2011. By 27/1/2017, when the offence was allegedly committed, she had just turned 5 years. She was not yet even 6 years. The doctor also estimated PW2's age at 6 years but no age assessment was done. There is no doubt that the complainant (PW2) was a child of tender age – about 5 - 6 years old.

Penetration is defined in Section 2 of the Sexual Offences Act as ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

In this case, PW2 clearly narrated that when coming back from school, the appellant took her to the shrubs, removed her pant and put his 'chero' his organ for urinating into hers. PW3 was the first to notice that PW2 was bleeding from her genitalia. PW1 also confirmed it. Their evidence was corroborated by PW4 who examined PW2 a day later. There were bruises to PW2's genitalia, the hymen was bruised though not torn and there was blood in her urine. PW4 was of the opinion that there was partial penetration.

PW1, 2 & 3's evidence was consistent, credible and supported by the medical evidence.

This incident took place during the day. PW1's evidence was corroborated by PW3 that she had employed the appellant to be dropping and picking PW2 from school. PW2 said they were from school that day when she was defiled. PW2 mentioned the appellant as the perpetrator when first asked who caused her to bleed. Her testimony in court was not shaken. The appellant was a neighbor and well known to PW1, 2 and 3 and the incident occurred in broad daylight. Though the appellant generally denied having known the prosecution witnesses, in his defence, his submissions are contradictory.

He admits having taken the child to school. The trial court properly observed that from the questions put to the witnesses by the appellant, it was clear that he was not a stranger to the witnesses, PW1, 2 and 3 and the defence was a mere sham.

I find that the court did consider the defence.

Whether the case is a fabrication, PW2 is a child aged about 6 years. Her evidence was unshaken even in cross examination. It is very unlikely that she was coached.

PW1, 2 & 3's evidence was cogent and consistent and therefore believable.

The appellant also alleged that he did not know the charge he faced because he was never given the witness statements. Article 50(2) (j) of the Constitution guarantees an accused's person's right to fair hearing and requires that an accused be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. When the case came up for hearing, the prosecutor said that he had 3 witnesses and the appellant said he was ready to proceed and the hearing kicked off.

I have perused the proceedings and at no stage did the appellant ever raise the complaint that he was never issued with witness statements and this court cannot deduce from the record whether or not he was given the witness statements. However, having been ready to proceed

with the hearing, this court will presume that the appellant had seen the witness statements and was aware of the charge he faced.

There is no requirement in law that the medical evidence should connect an accused with the offence. A charge of defilement or rape can be proved by other evidence as was in this case see ***Kassim Ali v Republic CRA.84/2008*** where the court held:

> ***"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence."***

In the end, I find that the trial court properly directed itself and found that the prosecution had adduced sufficient evidence in support of the charge and the consequent conviction.

Under Section 8(2) of the Sexual Offences Act, upon conviction of an accused, where the victim is below 11 years, one is liable to imprisonment for life.

The sentence is therefore lawful.

Consequently, I affirm the conviction and sentence. The appeal is dismissed.

Signed and Dated at *NYAHURURU* this *9th* day of *April, 2019*.

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R.P.V. Wendoh

JUDGE

Delivered by *S. Riechi (J)* at BUNGOMA this *20th* day of May, *2019*.

PRESENT:

Ms. Nyakibia - Prosecution Counsel

Wilkister - Court Assistant

Appellant - present