REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 42 OF 2015

MUGO KANG'ARI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Principal

Magistrate's Court ((M. Onkoba) at Gichugu, Sexual Offence

No. 8 of 2014 delivered on 2nd October, 2015)

JUDGEMENT

1. The appellant **Mugo Kang'ari** was charged with defilement contrary to **Section 8 (1)** as read with **Section 8 (4)** of the **Sexual Offences Act** in that on 15th September, 2014 in Kianyaga sub-county intentionally and unlawfully caused his penis to penetrate into the vagina of E.W.C. a child aged 17 years. He was charged in Criminal Case No. 8 of 2014 before Gichugu Principal Magistrate's Court. He denied the charge. After a full trial the Appellant was found guilty, convicted and sentenced to serve twenty (20) years imprisonment.

2. The Appellant was dissatisfied with both the conviction and sentence. He filed this appeal raising the following grounds:

(i) That the learned magistrate erred in law and fact by convicting him based on contradictory and non-corroborative evidence.

(ii) That the learned magistrate erred in law and fact by failing to take him to hospital to ascertain the spermatozoa found on complainant were his.

(iii) That the learned magistrate erred in law and fact by failing to call crucial witnesses.

(iv) That the learned magistrate erred in law and fact by failing to produce the panga and clothes of the complainant as exhibits.

(v) That the learned magistrate erred in law and fact by allowing P.W. 1 to testify before the complainant.

He prays that the appeal be allowed, the conviction be quashed and the sentence be set aside.

3. I have considered the grounds of appeal and the record of the lower Court. This is a first appeal and the Court has a duty to analyse the evidence and come to its own independent finding. That is to say, this Court has a duty to re-look at the evidence and make its own conclusion but bearing in mind that this Court did not have a chance to see the witnesses and leave room for that. In **Okeno -V- R (1972) E.A. 32** it was held that the first appellate Court has a duty to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the decision of the lower Court should be upheld. This has been reiterated by the Court of Appeal in the case of **David Njuguna Wairimu -V- R (2010) eKLR** where it was held:

"The duty of the first appellate Court is to analyse and re-evaluate the evidence which was before the trial Court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial Court. There are instances where the first appellate Court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower Court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the Court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

4. The first step is therefore to analyse the evidence which I embark to do. The complainant in this case E.W.C. who gave evidence as P.W. 2 was said to be an orphan and is epileptic. She lives with her uncle P.W. 1 **J C G** who is a guardian. The complainant is seventeen (17) years old. On 15th September, 2014 she had worked for the appellant in his shamba. At about 6.00 p.m. the Appellant told her to go for her money. The complainant went to the house of the Appellant and met him. The appellant knocked her against the wall then pulled her by force to his bed. The Appellant pinned her on the bed, removed her biker and under pant then had sexual intercourse with her using force. P.W. 2 screamed and children who were playing outside and her uncle (P.W.1) and complainant's brother heard and went to the house. They shouted from outside the house telling the appellant to flee her. The house had holes on the wall and something was thrown at the Appellant and he let go the complainant. The Appellant armed himself with a panga. The complainant fled the house through the rear door. P.W. 1 took her to the Police Station where the matter was reported. She was referred to hospital.

5. A clinical officer **Dennis Serem** (P.W. 4) who examined the complainant found that the complainant had a swollen right eye lid. On vaginal examination the hymen was broken, pus cells were seen and non-motice spermatozoa. There was sexual penetration which caused the injuries. Laboratory examination was done and revealed many epithereal cells plus motice spermatozoa and pus cells. P.W. 4 did an age assessment and found that the complainant was seventeen years old. He filled the P 3 form on 16th September, 2014, lab result exhibit 4 and age assessment report exhibit 1 and X-rays exhibit 5. P.W. 4 concluded that there was penetration due to the broken hymen, the pus cells and presence of spermatozoa.

6. P.W. 5 **Corporal Joseph Ole Kipish** the investigating officer received the report on 15th September, 2014 at 9.30 p.m. and escorted the complainant to hospital. He then visited the scene and arrested the Appellant.

7. The prosecution called P.W. 1 **J C G** who is the complainant's uncle. He testified that on the material day he heard screams from the house of the Appellant. The house had holes. He peeped and saw the appellant in the act of defiling (having sex) with the complainant. He shouted at the Appellant and told him to stop what he was doing. The Appellant would not stop. The P.W. 1 went to the road and called the complainant's brother S K, P.W. 3. The two rushed to the house of Appellant and found the Appellant still engrossed in the sexual activity. The P.W. 3 threw a stick through the gaps on the wall of the house. The Appellant was hit and was forced to rise up. The complainant escaped from the house. The Appellant armed himself with a panga and charged at P.W. 1 and 3. They left and found the complainant hiding in the bush. They went and reported at Kutus Police Patrol base and then took the complainant to hospital.

8. P.W. 3 **S K C** who is the complainant's brother confirmed the testimony of P.W. 1 and 2. The evidence by P.W. 1, 2 and 3 was cogent and consistent. It had no shred of doubt. The Appellant was caught in the act and he had no defence as he opted to keep quiet. The evidence of the complainant was well corroborated by the medical evidence adduced by P.W. 4 who also confirmed that the complainant was seventeen years old at the time the offence was committed.

9. I am of the view that based on the evidence on record, the conviction of the Appellant was proper.

10. The Appellant raised the issue that the evidence was contradictory and non-corroborative. In his submission the Appellant states that P.W. 4 stated that the complainant had a swollen right eye which herself did not mention. That P.W. 5 stated that the appellant had waylaid the complainant. I am of the view that these contradictions were minor and do not shake the overwhelming evidence adduced by the prosecution witnesses. They are not on material particulars. The contradictions have not changed the evidence on the offence which was committed. They are minor contradictions which have not changed the strong prosecution case and have not prejudiced the Appellant in any way. The Court of Appeal has in binding decisions held that such contradictions do not affect the fact of the commission of the offence. In **Erick Onyango Ondeng -V- Republic (2014)eKLR C.A.** it was held:

> ***"Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial court, after hearing all the evidence accepted that the offence was committed at "about 7 pm" in accordance with the evidence of PW.2. As noted by the Uganda Court of Appeal in TWEHANGANE ALFRED VS UGANDA, Crim. App. No. 139 of 2001, [2003] UGCA 6 it is not very contradiction that warrants rejection of evidence. As the Court put it:***
>
> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The Court will ignore minor contradictions unless the Court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

The Court heard the evidence of the complainant and accepted it as to how the offence was committed. The evidence which contradicts that is of no consequence. The Court believed the complainant as to why she had gone to the house of the Appellant. The Court ignored what P.W. 5 said that P.W. 2 was waylaid. Evidence abound that the offence was committed in the house of the Appellant. The contradiction does not warrant rejection of the evidence.

The evidence of the complainant was well corroborated by eye witnesses to the offence. The Appellant was busted while in the act due to screams by the complainant. It is not true that there was no corroboration. This ground must fail.

11. The second issue is on medical evidence. The Appellant claims that he was not taken to hospital to ascertain whether the spermatozoa found on the complainant was his. I find that medical evidence which I have analysed above has well corroborated the evidence of the complainant. The key ingredients which require proof in a sexual offence are, the complainant, the age of the complainant, penetration, the medical report and the perpetrator. Once the prosecution has proved to the satisfaction of the Court that the complainant is a child as defined under **Section 2** of **Children's' Act** – That is to say, ***"any human being under the age of eighteen years"*** – that the perpetrator with his genital organs penetrated the genital organs of the child, and the fact of penetration is corroborated with medical evidence, they have discharged the burden of proof of the charge of defilement. Failure to examine the source of the sperm found in the complainant does not in any way affect the prosecution case. It would if the perpetrator was not known and the D.N.A. of the sperm would assist the investigators to know the perpetrator. In this case the perpetrator was known and so failure to determine whether the sperm was form the Appellant was

immaterial and does not change the fact that P.W. 2 was defiled by a person known to her and her witnesses. This submission is baseless as there is no allegation that another person was involved. This ground must fail.

12. The Appellant faults the prosecution for failing to call crucial witnesses. This is a case where the prosecution could rely on the evidence of P.W. 2 to prove their case. This is because under **Section 124** of the **Evidence Act** the proviso thereto states that the Court can rely on the evidence of the complainant alone to convict if the Court, for reasons to be recorded believes the complainant. It is provided:

> ***"Provided that 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."***

13. The prosecution evidence in this case is a notch higher as it called two witnesses (P.W. 1 and 3) to prove the fact of defilement. Failure to call the children who were said to have seen the Appellant defiling the complainant is not fatal. The **Evidence Act** provides that no particular number of witnesses is sufficient to prove a fact. It is provided under **Section 143** as follows:

> ***"No particular number of witnesses shall, in the absence of any provision of the law to the contrary be required for the proof of any fact."***

14. The Court of Appeal in the case of **Erick Onyango Ondeng -V- Republic (supra)** held:-

> ***"In BUKENYA & OTHERS VS UGANDA (supra) the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the Court itself had the duty to call any person whose evidence appears essential to the just decision of the case;…….***
>
> ***While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso to section 124 of the Evidence Act and the medical evidence must be borne in mind as well as Section 143 of the Evidence Act (Cap 80) which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact."***

I am of the view that the prosecution called sufficient witnesses to prove the fact of defilement. This ground must fail.

15. The prosecution had a burden to prove the charge against the Appellant beyond any reasonable doubt. I find that the prosecution properly discharged this burden. In a binding decision by the Court of Appeal in the case of **Stephene Nguli Muli -V- Republic (2014) eKLR** it was stated:-

> ***"On the issue of whether the prosecution discharged its burden of proof, it is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case……..***
>
> ***In reference to this Lord Denning in MILLER V MINISTRY OF PENSIONS, [1947] 2 LL ER 372 stated:***
>
> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

Having considered the evidence in its entirety, I find that the prosecution did discharge its burden and proved the case beyond any reasonable doubts. There is no doubt that it is the Appellant who on the material day defiled the complainant, a fact which is confirmed by medical evidence. The trial magistrate properly directed himself after considering the evidence and the law to convict the Appellant. There is no reason to interfere with the conviction. I find that the appeal is without merits. I dismiss it.

Dated and delivered at Kerugoya this 13th day of April 2018.

L. W. GITARI

JUDGE

Read out in open court appellant present, D. Sitati P/C, C/A Kinyua

L. W. GITARI

JUDGE