



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 92 OF 2013

STEPHEN MAINA MWANGI APPELLANT

VERSUS

REPUBLICRESPONDENT

**(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT
AT BARICHO (E.H. KEAGO – P.M) IN CRIMINAL CASE NO. 856 OF 2012 DELIVERED ON
22ND APRIL 2013)**

JUDGMENT

STEPHEN MAINA MWANGI the appellant herein was convicted by the Principal Magistrate E.H. KEAGO at Baricho Court for the offence of defilement contrary to **Section 8 (1) (2) of the Sexual Offences Act** and was sentenced to life imprisonment.

He has filed an appeal against both the conviction and sentence and raised the following grounds:-

1. *That he pleaded not guilty*
2. *That the trial magistrate erred in law and in fact by failing to consider that PW1 the complainant was not able to positively identify him and that it was PW3 who led to arrest of appellant and that there was a long standing dispute between them*
3. *That the trial magistrate erred in law and in fact for failing to note that the whole prosecution case relied on PW1 and all the other witnesses gave hearsay evidence*
4. *That the trial magistrate erred in law and in fact by failing to consider that the evidence given by the Medical examiner showed there was no spermatozoa seen nor blood stains on the pants*
5. *That the trial magistrate erred in law by failing to consider appellant's defence that he was nowhere near the complainant on the material day*
6. *That the trial magistrate erred in law and in fact by failing to consider that the appellant was arrested by members of the public and handed over to the Investigating officer who did not investigate*
7. *That the trial magistrate failed to consider that the appellant is only 19 years and a first offender whose mitigation was not considered.*

The complainant GW was aged 8 years at the time of the trial and gave sworn evidence following a voire dire examination. She told the Court that on 27th July 2012 at 9 p.m. as she was walking to her grandmother's home, she met the appellant standing by his door steps and the appellant took her to his house, removed her pants and proceeded to penetrate her vagina using his penis having covered her using bedsheets so she could not scream. When the appellant heard complainant's mother calling her, he opened the door and the complainant told her mother what had happened. She was then taken to the

Police Station where a report was made and also to hospital for examination. She confirmed that the appellant whom she knew by name is a worker at her grandmother's house. She identified her pants (Exhibit 1).

Her mother JW (PW2) testified that on the material night, the complainant requested to go to her grandmother's house so she let her go but asked her not to over-stay. Moments later, the grandfather came calling for her but PW2 told him she had gone to the grandmother's but he told her she was not there. So PW2 started calling for her and saw her come out from appellant's house. She checked her and found her genitalia wet and she told her that appellant had defiled her. She reported the incident to Baricho Police Station and took complainant to hospital where she was examined. Meanwhile, the appellant had disappeared. She produced the complainant's birth certificate showing she was born on 18th February 2004.

PW3 (DK) is complainant's grandfather and testified that on 28th July 2012 at about 9 p.m. he went to look for her so she could give him his medicine but was told by the mother that she was not at home. As PW3 was walking back to his house, he saw complainant walking out of the appellant's house and when he asked her what she was doing in appellant's house, she told him that the appellant had pulled her into the house, tied her mouth and proceeded to defile her. He told the Court that appellant was his employee and he also said he saw a used condom in the house. The appellant disappeared but was later arrested.

JOSEPH NJENGA (PW4) is a Clinical officer at Kerugoya District Hospital and testified that he examined the complainant on 29th July 2012 who presented a history of sexual assault on the previous day. On examining her, there were no tears but there was redness on the opening of the vagina with areas of tenderness and the hymen was not intact. No spermatozoa or cells were seen. HIV test was negative though she was put on anti-biotics. He produced the P3 Form (Exhibit 2) and the medical notes.

CPL CATHERINE MIGWI (PW5) testified that she received this complaint on 29th July 2012 and escorted complainant to Baricho Health Center and later charged the appellant.

In his un-sworn statement in defence, the appellant told the Court that he does boda boda (motor cycle taxi) business and that on 27th July 2012 he was doing that work at Kagio when his aunt called him to prepare a tent for prayers. He remained there till 29th July 2012 guarding the tent and machines and on 30th July 2012 he continued with his boda boda business. On 1st August 2012, two people hired him to take them to Mukinduri but on the way, they requested him to take them to the Police Station where he was arrested and charged with this offence which he says he knows nothing about.

I have considered the grounds of appeal as well as the oral and written submissions of the appellant. The State through Ms Kambanga State Counsel supports both the conviction and sentence.

Being a first appellate Court, I have considered the evidence afresh to see whether the trial magistrate's findings can be supported.

It is not in doubt that the appellant was well known to the complainant. He was an employee of the complainant's grandfather (PW3) and was living in the same homestead. The complainant even knew him by name and so his identity was not really an issue. Although the appellant has raised in his appeal the issue that he was not identified, this was really a case of recognition by persons who knew him well. The complainant's mother (PW2) and grandfather (PW3) both testified that they spotted the complainant coming out of appellant's house on the material night and she narrated to them how the appellant had pulled her into his house, tied her mouth and defiled her. In his appeal, the appellant talks of a long standing dispute between him the witnesses. However, there is nothing in the record to show that the appellant raised any questions with regard to that long standing dispute during the trial. Indeed the record is clear that he did not put any such questions to either the complainant PW1, or her mother (PW2) and with regard to the cross-examination of the complainant's grandfather (PW3) no questions were put to him to suggest that his evidence was motivated by malice or was fabricated due to a long standing dispute. Even in his own defence, the appellant never raised any issue of a grudge with the

witnesses. This can therefore only be an afterthought.

The appellant has taken issue that apart from the complainant, the other evidence was hearsay. Of course the complainant was the only witness to testify as to the actual defilement. The trial Court did conduct a *voire dire* examination before allowing her to testify on oath and that means the trial magistrate must have been satisfied that the complainant understood the nature of giving sworn evidence. The evidence of her mother and grandfather that they saw the complainant coming out of appellant's house moments after the incident was not hearsay evidence. It was direct evidence of what they saw and it was sufficiently corroborative as it was evidence that put the complainant and appellant in the same house and since there is no evidence to suggest that a third party was in that house, it is evidence which showed that the appellant had the opportunity to commit the offence. Corroborative evidence need not be direct. Even circumstantial evidence can be sufficiently corroborative depending on the particular circumstances of each case. In this case, the fact that complainant emerged from appellant's house and complained of having been defiled and the disappearance of the appellant from the house where he was an employee was sufficient evidence upon which a finding of guilt could be made. There is medical evidence that her hymen was not intact (torn) and there was redness on the opening of the vagina and tenderness of the genitalia when the Clinical officer (PW4) examined her on 29th July 2012 which was a day after the incident. That was sufficient evidence that she was defiled and the fact that no spermatozoa was seen was not fatal to the prosecution case. It must also be remembered that the complainant's grandfather said he saw a condom that appeared to have been used.

The appellant also raises the issue lack of investigations by the arresting officer and that he was arrested by members of the public. There is nothing wrong with members of the public arresting any suspects and the depth of investigations will depend on the particular circumstances of each case. In this case, CPL Migwi (PW5) received the complaint and recorded the witnesses evidence who also handed her the exhibits and the appellant, by his own admission, was taken to the Police Station by members of the public. There was nothing else for this officer to investigate as all the evidence was taken to her at the Station. The fact that appellant was arrested by members of the public does not in any way vitiate his trial in the subordinate Court.

After evaluating all the evidence before the trial Court, I am satisfied that his conviction was on sound evidence and I dismiss the appeal against conviction.

On sentence, the appellant said his mitigation was not considered. However, the Court did make the following remarks before sentencing him:-

“ The accused appears not remorseful. The offence is prevalent in this region and many young lives have been affected by such reckless behaviour”

It cannot therefore be true that the trial Court did not consider his mitigation. It did and also took into account the prevalence of the offence in that area. A Court is entitled to take into account the prevalence of any offence within its jurisdiction while passing sentence. Having said that, the sentence under ***Section 8 (2) of the Sexual Offences Act*** is a mandatory one and left no discretion to the magistrate in view of the fact that the complainant was aged under 11 years at the time of the offence. The sentence of life imprisonment was lawful.

The up-shot of the above is that the appeal against the sentence and conviction is dismissed.

B.N. OLAO

JUDGE

26TH NOVEMBER, 2013

26/11/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Omayo State Counsel – present

COURT: Judgment delivered this 26th day of November 2013 in open Court.

Appellant present

Mr. Omayo State Counsel – present

Mr.Muriithi Court clerk – present

B.N. OLAO

JUDGE

26TH NOVEMBER, 2013

APPELLANT: I am 18 years old.

COURT: Appellant says he is 18 years old but appears not be sure when he was born. This issue was not brought up at trial or while arguing his appeal. However, it is an important issue with regard to sentence and I cannot shut my eyes and ears to that plea. His sister is in Court and says she has his birth certificate at home. I may need to see it.

MR: OMAYO: That is correct. We can mention tomorrow.

COURT: Let the birth certificate be availed tomorrow at 2.30 p.m. for further orders.

B.N. OLAO

JUDGE

26TH NOVEMBER, 2013

APPELLANT: I am 18 years old.

COURT: Appellant says he is 18 years old but appears not to sure when he was born. This issue was not brought up at trial or while arguing his appeal. However, it is an important issue with regard to sentence and I cannot shut my eyes and ears to that plea. His sister is in Court and says she has his birth certificate at home. I may need to see it.

MR. OMAYO: That is correct. We can mention tomorrow.

COURT: Let the birth certificate be availed tomorrow at 2.30 p.m. for further orders.

B.N. OLAO

JUDGE

26TH NOVEMBER, 2013

27/11/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Sitati State Counsel – present

Language – Kiswahili/English

COURT: The appellant's birth certificate No. [particulars withheld] issued at Kirinyaga District Hospital on 26th October 1995 has now been availed. It shows that the appellant was born on 10th September 1995. The offence was committed on 28th July 2012 which mean that appellant was aged 16 years and then (10) months at time of the offence. He was therefore a young person as per the Children's Act. He ought not to have been sentenced to a life imprisonment. The issue of his age was brought but only after he addressed me after his appeal. I have asked him whether he brought the issue of his age during the trial and he says he did not. He looks big for his age but in view of the evidence as to his age, he should not havr been sentenced to lifeimprisonment.

I quash that sentence and order that he be produced out on 9th December at 9 a.m. for further orders.

B.N. OLAO

JUDGE

27TH NOVEMBER, 2013

9/12/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – absent

Mr. Sitati State Counsel

Language – English/Kiswahili

COURT: Judgment/Order on 11th December 2013. Production Order to issue.

B.N. OLAO

JUDGE

9TH DECEMBER, 2013

11/12/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant present

Mr. Sitati State counsel present

Language – English/Kiswahili

COURT: Appellant having been born on 10th September 1995 was therefore below 18 years of age when he was sentenced to serve life imprisonment on 22nd April 2012. He was a child as defined in the **Children's Act** although his physique seems to suggest otherwise. Perhaps that is why the trial magistrate did not bother to ascertain his age. Under **Section 190 (1) of the Children's Act**, no child can be ordered to imprisonment.

The life sentence imposed upon the appellant is set aside and substituted with one that he serves three (3) years in a Borstal Institution from the date of his conviction i.e. 22nd April 2012. The appeal succeeds only to that extent.

B.N. OLAO

JUDGE

11TH DECEMBER, 2013