



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 1 OF 2012

CHARLES WAWERU MAINA 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. 294 OF 2012 DELIVERED

ON 27TH SEPTEMBER, 2012)

JUDGMENT

CHARLES WAWERU MAINA (the appellant herein) was on 27th September, 2012 convicted by the Principal Magistrate Baricho Court (E.H. KEAGO) for the offence of defilement contrary to **Section 8 (1) and read with Section 8 (3) of the Sexual Offences Act** and sentenced to serve twenty (20) years imprisonment. It was the prosecution case that on 26th March 2012 at **[Particulars Withheld]** village in Kirinyaga West District Kirinyaga County he defiled M W K a girl aged 13 years.

Being aggrieved by that conviction and sentence, he has filed this appeal raising seven (7) grounds why that conviction and sentence should be set aside. He did also file written submissions at the hearing of his appeal which the State Counsel Mr. Omayo opposed arguing, inter alia, that his conviction was well merited and the sentence was proper.

Being a first appellate Court, I must re-consider the evidence and draw my own conclusions on whether or not to support the trial magistrate's findings bearing in mind that unlike the trial Court, I did not have the benefit of observing or hearing the witnesses.

The case against the appellant in the subordinate Court was that on the day in question, the complainant (PW1) was at her home washing utensils when the appellant whom she knew by the nickname of "**Salle**" went where she was, grabbed and pulled her to a nearby toilet and proceeded to defile her. Her mother F W K (PW2) came looking for her at about the same time, found the appellant in the toilet and she screamed for help whereupon members of the public including the appellant's brother arrested him and he was later re-arrested by A.P. Timothy Ngugi (PW4) who handed him over to P.C. Phillip Kigen (PW5) of Sagana Police Station together with complainant's pants (Exhibit 4) and he was subsequently charged with this offence. JOHN MWANGI (PW3), a Senior Clinical officer at Kerugoya District Hospital examined the complainant and confirmed that her hymen was broken and she has a lacerated wound on the

vagina walls about 5 a.m. of position 5 o'clock. He concluded that the complainant had been penetrated and filled the P3 Form (Exhibit 3).

In his un-sworn statement in defence, the appellant said that on the material day, he left work at 6.30 p.m. and went home then his brother told him that it had been reported that he (appellant) had defiled complainant. He was then arrested and placed in custody for two (2) days before being charged with this offence which he denied.

In his first ground of appeal, he says the trial magistrate erred in law and in fact by not considering that the charge against him was framed by the prosecution. There is nothing from the record to suggest that the prosecution had any reason to frame charges against the appellant. During cross-examination of the prosecution witnesses, there was nothing to suggest that any of the five (5) witnesses who testified against the appellant had reason to give false testimony against him. Indeed, even in his defence, he never suggested that any of the witnesses had any reason to give false testimony against him. That ground of appeal fails.

The second ground is that the trial magistrate erred in law and in fact by not considering that there were two similar exhibits i.e. pants which were brought to Court bringing to question if the complainant wore two pants. The evidence of the complainant's mother (PW2) was that when the Administration Police (A.P) visited the scene, they recovered two pants (Exhibit 4). A.P. Ngugi (PW4) said when he visited the scene, he recovered one pant. Whether one or two pants were produced at the trial is not really an issue on which this appeal can turn. What is important is that in her testimony, the complainant told the Court that the appellant removed her pants before defiling her and she identified in Court a cream and brown pant which she was wearing. That ground fails.

The appellant has also raised the issue that there was no independent witness and that the trial Court relied on the evidence of a single witness i.e. complainant. The complainant was aged 13 years at the time of the incident. Her birth certificate was produced (Exhibit 1 (b) showing that she was born on 27th March 1998. Therefore, she was not a child of tender years when she testified on 2nd July 2012 since a child of tender years is defined under the **Children's Act** as one who is aged under ten (10) years. In the circumstances, the trial Court was entitled to base a conviction on her evidence if satisfied that she was speaking the truth. In his judgment, the trial magistrate was satisfied about honesty of the prosecution witnesses whose evidence he described as "***direct and consistent***". Even if there was need of corroborative evidence, there was sufficient corroborative evidence from the complainant's mother who found the appellant hiding in her toilet moments after the complainant had been defiled. Corroborative evidence need not necessarily be direct evidence. Evidence that an accused was arrested at a scene of crime in circumstances that show he had the opportunity to commit the crime can, taken together with other evidence, be sufficiently treated as corroborative evidence – **MALONZA VS REPUBLIC 1986 K.L.R 476**. In this case now before me, there is evidence from JOHN MWANGI (PW3) who is the Clinical officer that when he examined the complainant, he found her hymen broken and her vagina walls were lacerated. He concluded that the complainant had been penetrated. This evidence taken together with the evidence of PW2 that she found the appellant in her toilet moments after the complainant identified him as the one who defiled her could only lead to one inescapable conclusion. And that conclusion was that the appellant was the one who had defiled the complainant. The appellant was well known to the complainant who identified by his nickname of "***Salle***". Therefore, taking all that into account, the ground of appeal that he was convicted on the evidence of a single witness can only be for dismissal since he was recognized by both the complainant and PW2 who knew him previously and therefore this was not a case of mere identification of a stranger but rather, a case of recognition by persons well known to him and such evidence is more satisfactory, more reliable and more assuring – **ANJONONI & OTHERS VS REPUBLIC 1980 K.L.R 59**.

The appellant also takes issue with the fact that no spermatozoa or blood stains were found on the complainant. It must be appreciated that the Clinical officer examined the

complainant on 28th March 2012 which was some two days after the incident. He was nonetheless emphatic that the complainant had been “**penetrated**”. That was evidence of a doctor which the Court was entitled to receive and act on. That ground similarly fails.

The appellant also raises the issue that his Constitutional rights were violated because he was kept in Police custody for more than 24 hours having been arrested on 26th March 2012 and taken to Court on 29th March 2012. From the record, I am satisfied that indeed the appellant was arrested on 26th March 2012 by A.P. Ngugi (PW4) who then handed him over to P.C. Kigen (PW5) on 28th March 2012 and he was taken to Court for plea on 29th March 2012. Clearly therefore, he was kept in custody beyond the 24 hours required under the Constitution. However, the Court of Appeal has held in **JULIUS KAMAU MBUGUA VS REPUBLIC C.A CRIMINAL APPEAL NO. 50 of 2008** that such violation of Constitution right does not necessarily vitiate a Criminal trial and that an accused who is so held in custody can seek redress in a Civil Court for damages. That ground of appeal similarly fails.

Finally, the appellant complains that neither his defence nor mitigation were considered. The record shows that both were considered. In his defence, he merely explained how he was arrested adding that he did not commit the offence as he was not with the complainant. However, the trial magistrate rejected that line of defence stating that the appellant was identified by the complainant when he pulled her into the toilet and defiled her and where he was found by PW2. The trial magistrate was therefore satisfied from that evidence that the appellant’s guilt was not in doubt and that his alibi (for that was really his defence) had not displaced the “**direct and consistent**” evidence by the prosecution. Having re-examined the evidence afresh, I am of the same opinion that the case against the appellant was established as required in law. The trial magistrate similarly considered the appellant’s mitigation and said as much as per the proceedings of 27th September 2012 when sentence was passed. That ground also fails. The result is that the appeal against sentence is accordingly dismissed.

On sentence, **Section 8 (3) of the Sexual Offences Act** provides that a person who commits the offence of defilement with a child between the age of twelve and fifteen years “**--- is liable upon conviction to imprisonment for a term of not less than twenty years**”. That means that the minimum sentence for such offence is twenty (20) years and the trial Court had no discretion in the matter. The sentence being legal, it is up-held.

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

B.N. OLAO

JUDGE

3RD DECEMBER, 2013

3/12/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Omayo State Counsel – present

Language – English/Kiswahili

COURT: Judgment delivered in open Court this 3rd day of December 2013.

Appellant present

Mr. Omayo State Counsel present

Mr. Muriithi Court clerk present

Right of appeal explained.

B.N. OLAO

JUDGE

3RD DECEMBER, 2013