



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: OKWENGU, SICHALE & KANTAL, JJ]

CRIMINAL APPEAL NO. 156 OF 2015

BETWEEN

DO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal against the judgment of the High Court of Kenya at Homa Bay (Majanja, J) dated 28<sup>th</sup> April, 2015)*

IN

HOMA BAY H.C.CRA. NO. 124 OF 2014

\*\*\*\*\*

JUDGMENT OF THE COURT

This is a second appeal before us. Our mandate in a second appeal is as stipulated in Section 361(I) (a) of the Criminal Procedure Code. It provides:

***“ 361 (I) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:***

***(a) on a matter of fact, and severity of sentence is a matter of fact; or***

***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”***

In so far as case law is concerned, the decision of **David Njoroge Macharia vs. Republic [2011] eKLR** sums up the said mandate. In the said decision, it was stated:

***“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (see also Chemagong vs. Republic [1984] KLR 213.)”***

Similarly, in **Kaingo versus Republic [1982] KLR 213** it was held as follows:

***“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karoti S/O Karanja versus Republic [1956 17 EALA 146].)”***

The appellant herein was initially charged with the offence of rape Contrary to Section 3 (1) (a) (b) of the Sexual Offences Act. Six (6) witnesses testified before the prosecution applied to have the charge sheet amended so as to substitute the charge of rape with that of defilement Contrary to Section 8(1) (4) of the Sexual Offences Act No. 3 of 2006. This was because the victim CA (name withheld) was said

to be seventeen (17) years & 10 months old. The appellant opposed the said application. However, in a ruling dated **4<sup>th</sup> August 2011**, **Omwansa**, the then Resident Magistrate, Ndhiwa Law Courts allowed the substitution of the charge and directed that the trial commence *de novo*.

The trial court was told that on **4<sup>th</sup> June, 2011** at about 12.00 pm, P.W.1 (**CA**), (who produced her birth certificate showing that she was below 18 years of age) had gone to collect firewood from a forest. She was waylaid by the appellant who took her to a house and had carnal knowledge of her. P.W.1 reported her ordeal to **MAO**, (P.W.2), (an employee of a Community Based Organization), who took her to hospital in company of P.C. Woman **Edna Kimaru** (P.W.5) where she was seen by **Stephen Karario** (P.W.4), a Clinical Officer at Ndhiwa District Hospital. P.W.4 filled a P.3 form which indicated that penetration had taken place. On **5<sup>th</sup> June, 2011**, P.C woman **Emy Chebet** (P.W.6) together with **PC Edwin Wambugu** in company of **CA** and her father, **MOO** (P.W.3) and **CA's** mother went to the house of the appellant and arrested him from therein.

In his sworn statement of defence, the appellant denied the commission of the offence. He stated that he was away from his home from **3<sup>rd</sup> June, 2011** upto **5<sup>th</sup> June, 2011** when, whilst at his house he was arrested.

In a judgment delivered on **13<sup>th</sup> October, 2011**, the trial magistrate found the appellant guilty of defilement Contrary to Section 8(1) (4) of the said Act and sentenced him to fifteen (15) years imprisonment. Aggrieved by the outcome of the trial, the appellant filed an appeal at the High Court. This appeal was dismissed on **28<sup>th</sup> April, 2015** by **Majanja, J.** In dismissing the appeal, the judge rendered himself as follows:

*“the last issue I will deal with is the contention that the appellant’s rights were violated as the amendment of the charges was done after the close of the prosecution case. I have considered the record and I find that the application for amendment was made before the close of the prosecution case. The same was allowed and the hearing commenced afresh. This was done in accordance with the provisions of Section 214 of the Criminal Procedure Code and the new amended charge was properly read over to the appellant as provided for by the law and the trial commenced afresh. I find that the appellant did not suffer any prejudice and the trial was fair.*

*I find and hold that the prosecution proved all the elements of the offence and I accordingly affirm the conviction. As regard the sentence, it was the minimum provided for under Section 8 (4) of the Sexual Offences Act. I affirm the sentence. The appeal is dismissed.”*

Undeterred, the appellant filed this second appeal before us based on four (4) grounds. These are:

**“(i) That the prosecution and the trial court failed in law to observe my rights under Section 211 of the CPC.**

**(ii) That the prosecution and trial court relied on the medical findings that were not in force under Section 26, 33 and 36 of the S.O.A No. 3 of 2006.**

**(iii) That the judgment of trial court did not meet the Rules of Sections 169 of the C.P.C Cap 75.**

**(iv) That the appellate court failed in law to uphold (sic) the conviction and sentence hence fishing out the evidence against me”.**

On **31<sup>st</sup> July, 2019**, when the appeal came before us for hearing, the appellant relied on his Memorandum of Appeal and his written submissions both filed on **2<sup>nd</sup> July, 2019** in which the appellant contended that he was not informed of his rights under Section 211 of the Criminal Procedure Code; that the medical evidence was insufficient as whereas he is HIV positive, the complainant was found to be HIV negative; that the trial Court’s judgment did not specify whether the offence under consideration therein was rape or defilement. In conclusion, the appellant seemed to say that the charge against him was not proved beyond reasonable doubt.

**Mr. Sirtuy**, the learned Principal Prosecution Counsel (PPC) opposed the appeal. He contended that the sentence meted out was in accordance with the law. As regards P.W.1’s age, it was counsel’s position that this was proved by her birth certificate. He urged us to dismiss the appeal.

We have considered the record, the appellant’s Memorandum of Appeal and his written submissions as well as the oral highlights thereof together with the State’s opposition to the appeal, in light of our mandate as a second appellate Court.

The concurrent findings of the two courts below were that P.W.1 did not know the appellant before but once she was waylaid in the forest where she was collecting firewood, the appellant led her to his house which was right inside the forest. It is this same house where the appellant was arrested from on **5<sup>th</sup> June, 2011**. The 1<sup>st</sup> appellate court considered the issue of identification and found that:

*“The substantial issue for determination is whether the appellant is the person who committed the offence. P.W.1 testified that she did not know the person prior to the assault. However, she was able to identify him in the presence of her father P.W.3, P.W. 6 and another officer when they went to his home which she pointed out. The incident took place at about midday and she could recall the house where it took place. The appellant did not deny that the place he was found was his house. I therefore find that the circumstances were such that there was no possibility of mistaken identity”.*

We too, are of the same view. The appellant was arrested from the house in the forest where he led P.W.1 to in order to commit the act of defilement.

As regards the appellant's contention that because he is HIV positive and P.W.1 was found to be HIV negative, he could not have raped her, P.W.4 explained that the incubation period for HIV aids is three (3) months, and hence the fact that P.W.1 was found not to be HIV positive did not rule out penetration. The 1<sup>st</sup> appellate court considered the aspect of penetration and rendered itself thus:

***“The testimony of P.W.1 was clear and consistent as to what happened. Her case was supported by P.W.2 to whom she immediately reported and who saw her distressed state. They both immediately reported the incident to the police as confirmed by P.W.5. The sexual assault was corroborated by the medical evidence of P.W.4 notwithstanding the fact that P.W.1's evidence did not require to be corroborated by reason of the proviso to section 124 of the Evidence Act (chapter 80 of the laws of Kenya). I therefore find and hold that the prosecution established the element of penetration”.***

We too are of the view that penetration was established. As regards P.W.1's age, this was proved by the production of her birth certificate. The 1<sup>st</sup> appellate court considered this aspect and stated:

***“The last element of the offence is that of the age of the complainant. Proof of age of a child is a question of fact and as regards the offence of defilement it is necessary on two grounds. First, to establish the offence of defilement which is committed if the victim is below the age of 18 years and second, to establish the penalty applicable. The P.3 form produced by P.W.4 stated P.W.1 was 18 years old. In his evidence, he stated that P.W.1 was 15 years old. On the other hand, the birth certificate produced in evidence stated P.W. 1 was born on 16<sup>th</sup> August, 1993.***

***In resolving the issue of age, I find the evidence of the birth certificate credible. P.W. 4 did not conduct an age assessment nor provide a basis for the concluding that P.W.1 was 18 years. He also did not establish any basis for stating that P.W.1 was 15 years. I therefore reject P.W.4's testimony and finding on the issue of age. I therefore find, as per the birth certificate, that the complainant was 17 years as the time the offence was committed. She was a child within the meaning of section 2 of the Children Act”***

In our view, the birth certificate produced by P.W.1 was conclusive proof of her age. No other evidence, be it the opinion of an expert, was required to prove P.W.1's age. We are satisfied that at the time of the commission of the offence, P.W.1 was below 18 years.

As regards the appellant's contention that he was not informed of his rights under Sec. 211 of the CPC, we find that nothing much turns on this. The record shows that the appellant made a sworn statement and although the record does not state that the appellant was informed of the 3 options in defending himself, he clearly opted to make a sworn statement of defence.

In our view, the appellant was positively identified, penetration was established and the age of P.W.1 was also proved. We find no merit on the appellant's appeal against conviction.

Further, the sentence of fifteen (15) years imprisonment that was meted out was in accordance with the law. The 1<sup>st</sup> appellate court cannot be faulted for confirming the sentence of fifteen (15) years. The upshot of the above is that we find no merit in this appeal. It is hereby dismissed in its entirety.

**Dated and Delivered at Kisumu this 31st Day of January, 2020.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**