



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & KANTAL, JJ. A)

CRIMINAL APPEAL NO. 87 OF 2017

BETWEEN

SKK.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (G.W. Ngenye, J.) dated 8th December 2015

in

H.C.CR. A. NO. 205 OF 2013)

JUDGMENT OF THE COURT

1. This is a second appeal by the appellant herein arising from his conviction and sentence by the Magistrates Court sitting in Kiambu (Mrs. C.C. Oluoch, PM), which was upheld by the High Court on first appeal.
2. A brief background of the case is necessary to place this appeal in perspective. The appellant is a cousin to the victim herein who we shall refer to as SN On 4th September, 2012 SN (PW2), a 3½ year old girl was playing with her mates outside the appellant's house when the appellant called her to his house, defiled her and warned her against telling anyone. Her grandmother, JN, (PW1) spotted SN as she entered the compound from the appellant's house and observed that the child had a mucus-like substance on her thighs and upon questioning and examining her, she established that she had been defiled by the appellant. Consequently, she filed a report at Kiambu Police Station where she and S.N recorded their statements and the child was referred to Kiambu District Hospital for medical examination and treatment.
3. It was based on this account that the appellant was arrested on 28th September, 2011 and was subsequently charged before the Magistrates Court with the offence of *defilement* contrary to **section 8(2) of the Sexual Offences Act No. 3 of 2006**. He was also charged with an alternative count of *Indecent Act with a child* contrary to **section 11(1)** of the Sexual Offences Act.
4. He denied both the main and alternative charges and the matter proceeded to full trial with the prosecution calling a total of 4 witnesses in support of its case. On his part, the appellant gave an unsworn statement of defence and called three children aged between 7 years and 12 years as his witnesses. ultimately, upon analysis of the evidence presented before the trial court, the appellant was convicted in the main count and sentenced to life imprisonment.
5. Dissatisfied, the appellant lodged his first appeal before the High Court where upon consideration of the same together with the submissions made in that respect, the Court found that the appeal lacked merit and dismissed it upholding the appellant's conviction and sentence.
6. The appellant now proffers a second appeal before this Court challenging the High Court's dismissal of his appeal. The appeal is premised on 14 grounds which can be condensed as follows: That the learned Judge erred in law by failing to: find that the prosecution failed to: invoke **section 36 (1)** of the Sexual offences Act to subject him to a DNA test; observe that medical evidence did not prove that he had committed the offence; find that the evidence produced by the prosecution was not enough to warrant a conviction; find that the appellant was not accorded a fair trial as he was not provided with legal representation at State expense despite the gravity of the charges against him; find that PW1's evidence was not adequately corroborated; observe that PW2 was a child of tender years whose evidence was subject to a credibility test and corroboration; find that the sentence was too harsh.

7. The appeal was canvassed through both oral and written submissions. Mrs. Mwaura, learned counsel appeared for the appellant while O'mirera Moses, Senior Assistant Director of Public Prosecutions (SADPP) appeared for the State.
8. Urging the grounds of appeal, counsel for the appellant condensed the grounds of appeal in two broad grounds i.e. that the learned Judge erred in law in failing to find that: the evidence in support of the charge of defilement did not meet the required threshold and; the custodial sentence of a life sentence imposed on the appellant was too harsh in the circumstances of the case.
9. On the first ground counsel submitted that the oral evidence by PW1 against the appellant was unfounded as no medical reports were produced to buttress the evidence. She contended that the medical examiner who attended to SN and filled the resultant P3 form on the material day was not called to testify to authenticate the document. She maintained that PW3, Dr. Linda Nguu, stated that SN's hymen had been broken but there was no active bleeding or laceration yet she had neither the medical qualifications nor the capacity to prove the same as she was not the one who personally examined the child.
10. Counsel submitted that by virtue of **section 19(1) and (2)** of the Evidence Act the court ought to have ascertained that SN was intelligent enough to justify the reception of her evidence. She contended that her evidence was not reliable as it was evident from her testimony that she lacked such intelligence to the required threshold. Further, citing **section 124** of the Evidence Act, she submitted that PW2's evidence ought to have been corroborated since she was a child of tender years. (See: **JKS v. Republic, Eldoret Criminal Appeal No. 94 of 2012**).
11. Counsel went on to state that despite the appellant stating that he understood Kiswahili, PW3's testimony was not interpreted to him hence he was greatly disadvantaged during cross-examination due to the language barrier. She maintained that this was a critical violation of his right to a fair trial.
12. On the second ground, counsel posited that it is noteworthy that the appellant was barely eighteen years old at the time of the trial and following the gravity of the charges against him the court ought to have ensured that an advocate was assigned to him by the State. She maintained that this violated his constitutional rights.
13. She contended that considering the appellant's age, the sentence that he was condemned to was harsh, excessive, destructive and not correctional.
14. In conclusion she urged the court to quash the conviction or in the alternative to reduce the appellant's sentence to the period already served being a period of 6 years.
15. In response, learned counsel Mr. O'mirera, opposed the appeal. On the first ground he submitted that there was overwhelming evidence on record supporting the prosecution's case. He contended that the child explained what had happened to her on the material day and that the same had happened during day light.
16. Counsel argued that the medical report results indicated that there was no active bleeding or laceration due to the fact that this was not the first time the incident was happening; he maintained that the defilement was a repeat incident. In conclusion he submitted that the issue of age was not contested and further contended that all the aspects of defilement were established to the required threshold.
17. In closing, on the issue of sentencing, counsel submitted that the sentence imposed was merited and urged the Court to uphold the conviction and sentence as held by both courts below.
18. Being a second appeal and by dint of section **361(1)** of the Criminal Procedure Code this Court's mandate is restricted to issues of law only. Where the two courts below have made concurrent findings of fact, this Court ought to show deference to those findings unless it is evident that such conclusions of fact are not supported by the evidence or are based on a misapprehension of the evidence on record.
19. In line with the above principle, this Court in the case of **Karingo -vs- R (1982) KLR 213 at p. 219**; expressed itself 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 Karari C/O Karanja -vs- R (1956) 17 EACA 146).”**
20. Having considered the appellant's grounds of appeal, the record of appeal, submissions by both parties, and the authorities cited, the two issues of law arising can be discerned as:-
- a. Whether the prosecution proved its case beyond reasonable doubt that PW2 was defiled, and that the appellant was properly identified as the perpetrator of the crime.**
- b. Whether this Court ought to interfere with the sentence as was prayed by the Appellant.**
21. On the first issue, it is common ground that SN is a minor, a 3½ year old child. Her grandmother (PW1) produced her immunization card before the trial court as proof of the age. In the Petition of Appeal filed on behalf of the appellant by Kiarie Joshua & Co Advocates, the appellant at paragraph 1 admitted that the child was three and a half years old. Further, the same was not challenged in both courts below as was properly observed by counsel for the state. Therefore, the issue of the child's age does not arise at this stage.
22. In regard to whether the prosecution proved its case as to the defilement of PW2 and that the appellant was the perpetrator, after a

thorough re-evaluation of the evidence presented before the trial court, the High Court held as follows:-

“The medical evidence presented by PW3 indicated that PW2’s hymen was broken. This was ample proof that there was penetration.

The Appellant’s submission that PW2’s evidence was not credible because it was uncorroborated was rebutted by the clear corroboration by the evidence of PW1 and PW3. When PW2 left the Appellant’s house PW1 noticed that there was a whitish substance on her legs which she identified as sperms. She took her to hospital where it was found that her hymen was broken. This was indicated in the P3 form which was presented by PW3. Also, during the medical examination at the hospital, PW2 said that it was not the first time she was sexually assaulted by the Appellant. During cross examination, she was very consistent. She clearly narrated how the act was done. She stated that the Appellant called her from outside where she was playing with N, M and M. He took her inside the house and told her to be quiet. She remembered that the Appellant slept behind her and that there was nobody inside the house. That is when he did bad things to her. The said N, M and M were defence witnesses 2, 3 and 4. Their testimonies were mere statements that did not exonerate the Appellant. DW2 confirmed that on the material day, PW2 was called by PW1 from their house from where they were playing. This vindicated PW2’s testimony that she was called by the Appellant from outside where she was playing with DW2, 3 and 4 into his house. DW3 did not know anything about the allegations. DW4 testified that on the material date, he was doing his Maths with DW2 and 3, which ultimately implied that he could not confirm what transpired inside the Appellant’s house.

Be that as it may, notwithstanding that PW2’s evidence was sufficiently corroborated, under Section 124 of the Evidence Act, a court may convict an accused person if it solely believes in the evidence of a minor. From the account of what transpired as narrated by PW2, there was no doubt to believe that she was telling the truth and that the trial magistrate did not therefore misdirect herself in convicting the Appellant.”

23. A close reading of the trial court’s decision shows that its findings of fact were in concurrence with the aforementioned findings of the first appellate Court; both courts below concluded that the child was defiled; that she and the other witnesses were credible witnesses; and that it was the appellant, who was well known to the child and her grandmother, who committed the heinous act.

24. This Court in the case of **Thiaka v. Republic [2006] 2 EA 326** reiterated this principle and expressed itself in the following terms:-

“... [this Court] will not normally interfere with concurrent findings of fact by the two courts below unless such findings 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.”

25. It is old hat that in order for this Court to interfere with the concurrent findings of fact of both courts below, it must be apparent that both courts below misapprehended the evidence on record hence arriving at the wrong conclusions. We do not find any misapprehension of the evidence by the two courts below to justify our intervention. Accordingly, we find no basis to interfere with these concurrent findings of fact by the two courts below.

26. In his defence, the appellant challenged the admissibility of the medical reports stating that they were not produced by the maker, that PW3 who produced the medical report lacked the legal mandate to tender them as evidence in the trial court and that a DNA test was not carried out to determine if indeed he was the perpetrator of the offence he was charged with.

27. The applicable law in the admissibility of documentary evidence by a person other than the maker is **section 33** of the Evidence Act as read together with **section 77** of the same Act which provide as follows:-

Section 33 of the Evidence Act provides:

“Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible”

(Emphasis supplied)

On the other hand, section 77 of the Evidence Act provides:

77.(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

28. A close reading of the proceedings indicates that during the trial, the appellant opposed the production of the medical reports by a person other than the author. Following the numerous adjournments due to the non-appearance of the examining doctor, the trial court allowed the prosecution’s admission of such evidence by virtue of **sections 33** and **77** of the Evidence Act, as the presence of the doctor who examined

the child and completed the medical reports could not be procured in court even after several adjournments. We are satisfied that the P3 form was properly admitted in evidence.

29. On the issue of corroboration of the child's evidence, both courts below found, and correctly so, that under **section 124** of the Evidence Act the child's evidence if found credible can be relied on to support a conviction if the trial court believes the victim is truthful and records the reasons for that belief: (See **Jacob Odhiambo Omumbo v. Republic, Kisumu Criminal Appeal No. 80 of 2008** and **George Kioyi v. Republic, Nyeri Criminal Appeal No. 270 of 2012**). In this case, the child's evidence was also corroborated by PW1's evidence. We find no reason to depart from those findings.

30. On the question as to whether a DNA test should have been carried out on the appellant to establish whether he was the person that defiled the complainant, the applicable law is **Section 36 (1)** of the Sexual Offences Act which stipulates as follows:-

“36. (1). Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the Court may direct that an appropriate sample or samples be taken from the Accused person, at such place and subject to such condition as the court may direct for the purpose of forensic and other testing, including a DNA test, in order to gather evidence and to ascertain whether or not the Accused person committed an offence.”

31. The application of the aforementioned provision was considered in the case of **Robert Mutungi Mumbi v. Republic, Malindi Criminal Appeal No. 52 of 2014** where the Court pronounced itself as follows:-

“Section 36 (1) of the Act empowers the Court to direct a Person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.”

32. It is therefore, settled law that DNA testing on a suspect is not mandatory for a sexual offence to be established. In this case, the appellant was well known to the witnesses. The child said she had been defiled by the appellant and her grandmother who was sitting outside her house, said she had seen the child coming from the appellant's house. Her testimony therefore accorded corroboration to the child's evidence.

We hold, like the two courts below that a DNA test was not necessary in the circumstances of this case. That ground therefore fails.

33. Lastly, we find that the appellant's right to a fair trial were not violated. Although he did not have legal representation at the trial court, he was represented by counsel before the High Court and he cannot therefore complain that he was not accorded legal representation. On the issue of language used by the doctor not being understood by the appellant, from the record and the extensive cross examination of the doctor by the appellant, there is no doubt that he understood the language used well.

We find no violation of the appellant's constitutional right to fair trial.

34. On the sentence, we find that the same was lawful and well deserved in the circumstances of this case. In any event, severity of sentence is a question of fact and outside our domain as a second appellate court.

35. The upshot of all this is that this appeal is totally devoid of merit and is hereby dismissed in entirety.

Dated and delivered at Nairobi this 24th day of April, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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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.

Signed

DEPTY REGISTRAR