



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & MURGOR, J.J.A)

CRIMINAL APPEAL NO. 60 OF 2019

BETWEEN

NAOMI BONARERI ANGASA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kiambu (Majanja, J.) dated 21st February, 2018

in

H.C.Cr.App. No. 95 of 2015)

JUDGMENT OF THE COURT

1. The appellant, Naomi Bonareri Angasa, was convicted by the Magistrate's Court at Thika for the offence of defilement contrary to Section 8(1)(2) of the Sexual Offences Act. She was sentenced to serve life imprisonment. On appeal, the High Court (*Majanja, J.*) quashed that conviction and set aside the sentence of life imprisonment. Instead, the learned Judge found the appellant guilty of the offence of committing an indecent act with a child and sentenced the appellant to 10 years imprisonment.

Dissatisfied, the appellant lodged this second appeal.

2. The appellant had been charged with the offence of defilement contrary to Section 8(1)(2) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between 4th February 2014 and 5th April 2014 within Kiambu County, she intentionally and unlawfully committed an act which caused her vagina to be penetrated by the penis of PCNK, a boy aged 7 years.

3. In the alternative, the appellant faced a charge of indecent act with a child contrary to Section 11(1) as read with sub-section 7 of the Sexual Offences Act the particulars being that on diverse dates between 4th February 2014 and 5th April 2014 within Kiambu County, she intentionally and unlawfully touched the penis of a child, namely PCNK, a boy aged 7 years with her vagina.

4. On a second count, the appellant was also charged with the offence of deliberate transmission of threatening sexually transmitted disease contrary to Section 26(1)(c) of the Sexual Offences Act particular being that on diverse dates between 4th February 2014 and 5th April 2014 within Kiambu County, having actual knowledge that she was infected with life threatening sexual transmitted disease, intentionally knowingly and willfully committed an act which caused her vagina to be penetrated by the penis of PCNK, a boy aged 7 years which she knew or ought to reasonably know will infect the said with sexual transmitted disease, namely, Chlamydia Trachomatis and Neisseria Gonorrhoea.

5. The prosecution case, in brief, was that the appellant was employed by PCNK's mother, PW2, as a house helper. It was the appellant's duty to look after PCNK. The appellant worked in that position at PW2's home from 4th February 2014 until 6th April 2014. According to PCNK, while his parents were away, the appellant "*did bad things*" to him in her bedroom.
6. On 10th April 2014 PCNK's mother, PW2, and her husband got home in Juja from work and found PCNK having a fever. They took him to Aga Khan Hospital, Nairobi where PCNK reported that he was experiencing pain in his private parts. A medical examination at that hospital revealed that PCNK was suffering from a sexually transmitted disease. On enquiry, PCNK revealed that the appellant had been sexually assaulting him. PCNK was treated and put on medication. By that time, the appellant had already left the home of PW2 and gone to Kisii from where she was recalled to Nairobi, arrested and charged with the offences.
7. PW2 reported the matter at Juja Police Station on 12th April 2014. Police Constable Benard Kiplagat (PW3) of Juja Police Station who investigated the matter issued a P3 form. He produced the birth certificate that established PCNK's date of birth as 15th March 2007. The complainant was referred to Thika Level Five Hospital where he was examined by a Dr. Njenga, whose medical report, which was produced before the trial court by Dr. Mohammed Ahmed, was found to be inadmissible by the first appellate court.
8. In her defence, the appellant denied the offence. She confirmed that she was employed as house help by PW2 during the relevant period and started work on 5th February 2014; that on 4th April 2014, PW2 informed her that she was going on safari and instructed her to go to her rural home and that she would be recalled upon PW2's return from safari whereupon she demanded her salary for two months. It was her testimony that she was away in Kisii when the offence was committed.
9. As already indicated, the conviction by the trial court for the offence of defilement was quashed by the High Court in a judgment delivered on 21st February 2018 which found that the medical evidence on which the trial court relied was inadmissible.
10. Urging the present appeal before us, **Mr. Ebrahim Onyinkwa**, learned counsel for the appellant submitted that the conviction by the High Court was not safe; that evidence of the child, PCNK, is not reliable and required corroboration; that the mother of the child, PW2, was not present when the offence allegedly occurred; that the mother did not take any action when the child allegedly reported the incident to her and she even allowed the appellant to go home to Kisii; that it was not until the child was examined at Aga Khan Hospital where it emerged that he was suffering from a venereal disease, that the mother took action; and that any other person could have been responsible for infecting the child.
11. Counsel submitted that the Judge failed to consider that the appellant's duties included washing the child of which touching him was inevitably an integral part, which in the circumstances cannot be deemed to be an indecent assault.
12. Counsel submitted further that the Judge did not consider the defence of alibi; that the appellant stated that she was away when the offence was allegedly committed; that the mother of PCNK had an ill motive as the appellant was demanding for her salary; and that the appellant was lured to return to work only for a complaint to be levied against her.
13. In her brief submissions in opposition to the appeal, **Ms. Margaret W. Matiru** learned counsel for the respondent submitted that all the ingredients of the offence were proved; that the appellant was well known to the child and the testimony of his mother, PW2, corroborated his evidence; that the minor victim, PCNK, was very clear in his testimony about what happened at home where the appellant called him to the bedroom and asked to him to remove his clothes; and that the evidence demonstrated clearly that there was sexual contact between the appellant and PCNK. Counsel submitted that the appellant's defence, which was a mere denial, was duly considered and properly rejected.
14. We have considered the appeal and submissions by learned counsel. By force of Section 361(1)(a) of the Criminal Procedure Code, our mandate on a second appeal such as this is confined to matters of law. We cannot interfere with the decision of the first appellate court unless it be demonstrated to us that that court failed to discharge its duty as the first appellate court to revisit the evidence that was before it afresh, analyse it and evaluate it as is required of it. The appellant should demonstrate that the learned Judge considered matters he ought not to have considered or that he failed to consider matters he ought to have considered or that looking at the entire decision on such matters that court was plainly wrong.
15. As stated by this Court in ***Karani vs. R [2010] 1 KLR 73***:

“By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first

appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

16. Moreover, as held in *Adan Muraguri Mungara vs. Republic [2010] eKLR*, this Court:

“.....has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.”

17. Bearing those principles in mind the only issue for consideration in this appeal is whether the offence of indecent act for which the appellant was convicted by the first appellate was proved to the required standard.

18. The conviction is primarily hinged on the testimony of the complainant PCNK, who in his testimony explained in graphic detail what transpired. In his words:

“It was during the day. She did bad things to me in her bedroom. My mother had gone to work. We were on Naomi’s bed. There was nobody else in the house. She was wearing a skirt which she removed. She took my penis and inserted in her private parts. I was laying on my back. It was in the morning and in the evening, I told my mother what Naomi had done to me.” [emphasis]

19. That cannot, by any stretched construction of the duties of a child minder be considered to be part of the work of cleaning or washing a child. Under cross examination by the appellant, PCNK’s testimony was not shaken. He maintained that the appellant called him to her bedroom and removed her clothes and that she did it to him three or four times when his mum and dad were not at home. The trial court found, after conducting *voir dire*, that the complainant was intelligent and that he was consistent in his evidence.

20. PCNK’s testimony did not require corroboration as submitted by counsel. Section 124 of the Evidence Act provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where 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. (Emphasis added)

21. In *Mohamed vs. Republic [2006] 2 KLR 138*, the Court captured the effect of the proviso to Section 124 thus:

“It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”

22. Both courts below were satisfied that the complainant was truthful. In agreeing with the trial court, the learned Judge expressed that, “I find and hold that PW1 gave clear evidence of the fact that the appellant molested him.” We do not have any basis for concluding otherwise.

23. There is also no merit in the claim that the appellant’s defence was not considered. In the contrary, both courts considered the appellant’s two-pronged defence of alibi and that she was framed and rejected it with good reasons.

24. The result is that this appeal is devoid of merit. It is accordingly dismissed.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of November, 2020.

P.O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this a true copy of the original.

Signed

DEPUTY REGISTRAR