



IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 26 OF 2016

BETWEEN

PETER NTHUSI MUSYOKA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (Mutende, J.) dated 29th January, 2015 in H. C. Cr. A. 329 of 2013)

JUDGMENT OF THE COURT

The appellant is serving a life sentence after conviction for the offence of defilement contrary to **section 8 (1)** as read with **section 8 (2)** of the **Sexual Offences Act**, by Kithimani Acting Senior Resident Magistrate, (Hon. M. A. O. Opanga) on 12th September, 2013. His first appeal to the High Court (L. N. Mutende, J.) was dismissed on 29th January, 2015, and he is now before us on his second and final appeal.

The concurrent findings of fact made by the two courts below which led to the conviction are fairly brief. At about 6 p.m on the 16th November, 2012, at [particulars withheld] of Mwala in Machakos County, seven year-old MW, who briefly testified as PW1, was sent by her mother, PW2, to her uncle's home to buy tomatoes. On her way back home PW1 met the appellant who told her he would give her a sweet which was behind a thicket nearby. He led her to the thicket where he defiled her. As he did so, a neighbour, PW5, who was walking home from [particulars withheld], heard a commotion from the thicket and went to check, only to see the appellant whom she knew before, running away leaving behind the stunned PW1. PW1 had only one shoe on, no underpants, and her dress was bloody. She told PW5 that it was the appellant who assaulted her. PW5 then took the child with her and called PW2.

The following day, the matter was reported to Corporal Betty Kigen (PW6) of Yatta Police station where statements were recorded and the blood stained dress retained by the Investigating Officer who gave out a P3 form for completion. On the same day, the child was medically examined at Matuu District Hospital by a clinical officer, PW4, who confirmed that the child's labia minora was reddish, her hymen was freshly torn and pus cells as well as non viable spermatozoa were visible. He confirmed the defilement. Three days later, the appellant was arrested by the Assistant Chief of the area, PW3, and taken to the police where he was rearrested and charged with the offence.

The appellant was a former herdsboy of the uncle of PW2. He denied the offence and simply said in his unsworn statement that he was arrested by some members of community policing on 19th November, 2012 at the chief's office where he had gone to get a letter for his identity card.

After evaluating the evidence on record, the trial court found:

"Having carefully considered all the evidence on record I have no doubt in my mind that PW 1 was defiled by the accused. She was a minor aged seven years as shown in her child health card and baptismal card. PW 5 testified that she saw the accused running away from the scene where PW 1 emerged from a thicket holding her pant in her hand with a torn dress and with only one shoe on her foot. PW 5 thought PW 1 had been assaulted from the way she appeared. Her blood stained dress was produced as exhibit. Medical examination confirmed that indeed PW 1 was defiled. She was able to identify the defiler as the accused who PW 5 saw escape from the scene."

The appellant's defence was disbelieved and rejected as a mere denial.

For its part, the High Court re-evaluated the evidence on record, considered the grounds of appeal laid before it, and concluded thus:

"The evidence of the child that the appellant was with her is supported by that of PW 5. It is argued that the evidence of PW 5 was not corroborated. It is stated in the grounds of appeal that PW5 was an independent witness whose evidence was not corroborated which called upon the court to warn itself prior to basing the conviction on her evidence..... PW5 saw the appellant running away from the thicket where she shortly thereafter found PW1. It was the evidence of PW1 that the appellant did remove her clothes. Evidence was adduced by the Clinical Officer of a high vagina swab that was done. It showed the presence of a form of spermatozoa and torn hymen. This was proof of the act of penetration. The evidence of PW5 was circumstantial in nature..... PW5 found the appellant running away from the scene where PW1 was found. Although in his defence he denied having defiled the complainant he was known by witnesses who testified. There were no circumstances that weakened the fact that he was the person who did the act. Therefore, the evidence of PW5 which connected him to the crime confirmed her evidence did not require any corroboration and the trial court did not have to caution itself of the danger of relying on such evince (*sic*)."

It is against those findings that the appellant comes before us listing three grounds of appeal as follows:-

- "1. That the High Judge made an error in law by failing to re-evaluate the entire evidence on record as was duty bound to and as a result arrived at decision which as unsatisfactory,***
- 2. That the High Court judge failed to observe that the case for the prosecution was not proved beyond reasonable doubt.***
- 3. That the High Court failed to observe that section 169(1) of the C.P.C. was not complied with."***

The appellant appeared before us in person and had obvious difficulty in making oral submissions on those grounds. Perhaps written submissions with the assistance of prison authorities would have helped to focus his submissions but none were filed and there is no compulsion that they be filed. There is no mandatory provision for legal aid either. Nevertheless, he was able to say in brief that both the trial court and the High Court were wrong in convicting him on flimsy evidence. He pointed out that the main witness was the child who did not connect him with the offence, while the other was a purported independent witness who did not even scream despite her testimony that she witnessed the incident and identified the appellant.

By dint of **section 361 (1)** of the Criminal Procedure Code (CPC), such appeal can only lie on matters of

law. It provides as follows:-

“(1) 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.”

Adverting to the grounds of appeal, ground 3 challenges compliance with **section 169 (1)** of the CPC which provides:

“Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.”

No submission was made on this ground but we have examined the impugned judgment of the High Court and we cannot find support for the assertion made in the ground of appeal. The judgment was written, signed, dated and delivered by the presiding Judge; it was in the language of the court; it contains the issues raised on appeal, the decision thereon and reasons for the decision. There is no basis laid for the complaint and we reject it.

Ground 1 of the appeal is on re-evaluation of the evidence on record by the first appellate court. As correctly observed by learned SADPP, **Mr. Peter Mailanyi**, the High Court was aware of its duty as the first appellate court and made reference to the case of ***Okeno vs Republic (1972) EA 32*** which laid out the principles. The court then proceeded to examine and evaluate the evidence on record relating to the elements of the offence including the age of the child which it found proved; the medical evidence which confirmed penetration of the genitals; the brief evidence of the child who identified the appellant as her assailant before she was declared a vulnerable witness; the supportive evidence of PW5 who also saw and identified the appellant at the scene; and the evidence of the appellant which made no answer to the prosecution case. We find no merit in this ground either.

Lastly, ground 2 which in general terms asserts that the case was not proved beyond reasonable doubt. Again, no attempt was made at demonstrating how on the evidence on record, reasonable doubts still exist. On our own evaluation of the evidence, there was consistent and credible evidence to support the charge laid against the appellant and we find no basis to interfere with the conviction.

It follows from those findings that the entire appeal is devoid of merit and we order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 26th day of January, 2018.

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.