



IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 21 OF 2015

BETWEEN

JOSEPH MWAURA NJOROGE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret,

(Mshila, J.) dated 13th day of March, 2013 in HCCRA NO. 5 OF 2012)

JUDGMENT OF THE COURT

1. The appellant was charged with the offence of defilement contrary to **section 8 (1)** as read with **section 8 (3)** of the **Sexual Offences Act**. The particulars of the offence were that on the 23rd day of January, 2011, at [Particulars Withheld] Estate in Koibatek District, within Baringo County, he committed an act which caused penetration of his penis into the vagina of **M W C**, a child aged 13 years. The appellant also faced an alternative charge of indecent act with the same child contrary to **Section 11 (1)** of **Sexual Offences Act**.

2. After a full trial before the Senior Resident Magistrate's Court at Eldama-Ravine, the appellant was convicted on the main charge and sentenced to 20 years' imprisonment. The appellant's first appeal to the High Court was partially successful in that the court held that he was guilty of committing an indecent act with the child and imposed a sentence of 15 years' imprisonment.

3. Being aggrieved by that finding, the appellant preferred a further appeal to this Court. In his self drawn memorandum of appeal, the appellant stated that there was violation of his fundamental rights under **section 198 (1)** of the **Criminal Procedure Code**; that some crucial prosecution witnesses were not called; that the prosecution witnesses were not credible; and that his conviction was based on contradictory evidence.

4. When the appeal came up for hearing, the appellant sought to rely on written submissions that he presented to the Court. He submitted, *inter alia*, that **section 198 (1)** of the **Criminal Procedure Code** requires that whenever any evidence is given in a language not understood by the accused, and he is present in court, there has to be interpretation in a language which he understands. He stated that the

record of appeal does not show that there was interpretation from English to Kikuyu language.

5. The appellant further submitted that the age of the complainant was not proved; that one Mr. N, an uncle of the complainant, who ought to have been a crucial prosecution witness was not called to testify; that the doctor who examined him was not also called as a witness; and that the conviction was based on incredible evidence.

6. Mr. Mulati, Senior Principal Prosecution Counsel, opposed the appeal. He submitted that the age of the complainant was proved to have been 13 years; that **section 198 (1) of the Criminal Procedure Code** was complied with because the proceedings were interpreted to Kiswahili language which the appellant understood; that the prosecution witnesses were credible; the evidence of the complainant was corroborated by at least two other witnesses; and that the conviction was therefore safe.

7. Lastly, Mr. Mulati submitted that no reason was advanced by the High Court for finding that only the offence of commission of an indecent act with the child had been proved. In his view, the prosecution had proved commission of the offence of defilement against the appellant.

8. This being a second appeal that is confined to questions of law, an appellate court has loyalty to adopt the findings of the lower courts on facts, unless it is apparent that on the evidence no reasonable court or tribunal could have arrived at the impugned conclusion. See **M’riungu v Republic [1983] KLR 455**.

9. It is necessary that we set out, albeit briefly, the facts of the case before we proceed to determine the grounds of the appeal.

10. On the material day that is 23rd January, 2011 at about 7.00p.m., the complainant and her two sisters, PW 2 and PW 3, were walking home when they met the appellant, who was known to them. The appellant held the complainant’s hand and led her towards a cattle dip. Meanwhile, PW2 and PW3 ran home and informed their mother, PW4, about the incident.

11. The appellant proceeded to defile the complainant, having covered her mouth to ensure that she did not raise any alarm. After the ordeal, the appellant gave the complainant Kshs.50/= and urged her not to tell anyone what he had done to her.

12. PW 4 together with PW 2 and PW 3 and some other neighbours went to the appellant’s house but they did not find him. As they were proceeding to the scene of crime, they saw the appellant and the complainant, who was crying. The complainant narrated the incident to her mother and the others who had accompanied her. The complainant’s mother and members of public apprehended the appellant and escorted him to a police station.

13. Doctor Vincent Magero, PW 5, who examined the complainant, testified that he established that there had been penetration. He also told the trial court that the complainant’s age was 13 years.

14. In his unsworn statement of defence, the appellant admitted that on the material day and time he met PW1, PW2 and PW3 but denied having done anything to the complainant. He alleged that he merely greeted them and thereafter proceeded to his home.

15. Turning to the grounds of appeal, the record shows that the proceedings were translated into Kiswahili language and there is evidence that the appellant understood Kiswahili because he cross-examined all the prosecution witnesses in Kiswahili language and thereafter tendered his defence. The provisions of **section 198 (1) of the Criminal Procedure Code** were therefore complied with. We find no merit on the first ground of appeal.

16. As regards the age of the complainant, the charge sheet stated her age as 13 years; the complainant said she was 12 years old, but her mother, PW 4 and PW 5 said that she was 13 years old. But whether she was 12 or 13 years, for purposes of this appeal there is no difference. We say so because **section 8 (3) of the Sexual Offences Act** provides that a person who commits an offence of

defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than twenty years. The complainant's age fell within the aforesaid age bracket.

17. We do not agree that the complainant's evidence was not corroborated. Her evidence was well corroborated by PW 2 and PW 3 who were with her when they met the appellant and who saw him holding the complainant and leading her towards the cattle dip. The complainant and her two sisters knew the appellant and they all mentioned the appellant's name (*baba Susana*) to their mother. In any event, under **section 124** of the **Evidence Act**, corroboration of the complainant's evidence would not have been necessary if, for reasons to be recorded in the proceedings, the trial court was satisfied (*as it was*) that the complainant was telling the truth. We dismiss the third ground of appeal.

18. Turning to the last ground of appeal, which alleges that there were crucial potential witnesses who were not called to testify, we note that in her cross-examination, the complainant indicated that on the material day they were with their uncle known as N, who greeted the appellant. However, the complainant said that her uncle left them and went to his home. In the circumstance, we do not think that it was absolutely necessary to call N as a prosecution witness. Failure to avail him as a prosecution witness did not weaken the prosecution case.

19. This Court has severally pronounced itself to the effect that the calling of witnesses is an issue that is at the discretion of the prosecution. In **Julius Kalewa Mutunga V Republic [2005] e KLR**, the Court held that:

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

20. Apart from the complainant's uncle, we do not think that there was any other potential witness who was not called. The investigating officer, PW 6, told the court that the appellant was taken to hospital for treatment because he had been assaulted by members of the public at the time of his arrest. There is no evidence that he was medically examined with a view to ascertaining whether he was the perpetrator of the sexual offence against the complainant. But even in the absence of such medical examination, there was overwhelming evidence that the appellant had defiled the complainant.

21. Having considered all the grounds of appeal, we are satisfied that the appellant's conviction was premised on credible evidence.

22. We agree with Mr. Mulati that the appellant was properly convicted of the offence of defilement contrary to **section 8 (1)** as read with **section 8 (3)** of the **Sexual Offences Act** and there was no basis upon which the learned judge quashed that conviction and its attendant sentence and substituted the same with a conviction for the offence of indecent act with a child contrary to **section 11 A** of the **Sexual Offences Act** and imposed a lesser sentence. The learned judge misdirected herself in so doing.

23. Having come to that finding under **section 361 (2)** of the **Criminal Procedure Code**, this Court is empowered to vary a decision by the first appellate court if it is demonstrated that the decision was wrong on a question of law. Consequently, we hereby vary the High Court's decision of substituting the appellant's conviction and sentence as aforesaid and reinstate the initial finding by the trial court convicting the appellant of the offence of defilement contrary to **section 8 (1)** as read with **section 8 (3)** of the **Sexual Offences Act** and the sentence to 20 years' imprisonment. The appeal therefore fails and is hereby dismissed in its entirety.

DATED and Delivered at Eldoret this 27th day of April, 2017.

D. K. MUSINGA

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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 confirm that this is

a true copy of the original.

DEPUTY REGISTRAR.+