



**IN THE COURT OF APPEAL**

**AT NYERI**

**CORAM: WAKI, NAMBUYE & OKWENGU, JJA)**

**CRIMINAL APPEAL NO. 11 OF 2014**

**BETWEEN**

**CHARLES WAWERU MAINA..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An Appeal from the Judgment of the High Court of Kenya at*

*Keroguya (Oloa, J.) dated 3<sup>rd</sup> December, 2013).*

*in*

**(H. C. CR. A. No. 1 of 2012)**

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**JUDGMENT OF THE COURT**

1. On the 26<sup>th</sup> March 2012, at about 6.00 pm, 13 year old **M.K** arrived home from school in Kirinyaga, and found her mother PW2. PW2 left to fetch water from the river leaving **M.K** washing utensils. As she did so, the appellant, who was known to **M.K** by his nickname in the neighborhood as “Salle” arrived and asked her where her mother was. **M.K** told him she went to the river, and continued washing utensils. Then the appellant grabbed **M.K** and pulled her towards their toilet. Behind the toilet, the appellant fell her down, removed her pants and defiled her, penetrating her with his penis. She was unable to scream because her mouth was covered with a cloth. Shortly after, the mother returned home and called out **M.K** as she could not see her. The appellant released her and ran inside the toilet as **M.K** ran towards the mother, panting and crying. She collapsed and fell as she was about to reach where the mother was. **M.K** told her mother that she was defiled by the appellant. The mother went to the toilet and there found the appellant inside. She asked him what he was doing in her toilet and he said he was dressing up. The mother started screaming and other neighbors came to the home, including the appellant’s brother who took him away.
2. The following morning **M.K** was treated at Kerugoya District Hospital and two days later she was examined by a senior clinical officer **John Mwangi (PW3)**; of Kerugoya Hospital who completed a P3 form confirming that the hymen of **M.K**’s genitalia was broken and she had a lacerated wound on the vaginal walls about 5 cms of position 5 o’clock. He concluded that **M.K** had been

- penetrated.
3. The incident was reported immediately to **APC Timothy Ngugi** (PW4) of Karima Administration Police Post who, with other officers, proceeded to the scene and collected a torn pant from behind the toilet, which **M.K** identified as the one she had worn during the incident. They also arrested the appellant and took him to Sagana Police Station on 28<sup>th</sup> March 2012, where he was re-arrested, investigations carried out by **PC Philip Kigen (PW4)**, and the charge of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** was preferred. The appellant denied the offence stating that he was never anywhere near **M.K** on the alleged date of the offence and that he was only informed by his brother about the allegations shortly before he was arrested on 28<sup>th</sup> March 2012.
  4. Those are the concurrent findings of fact made by the Principal Magistrate at Baricho (**E. H. Keago**) before convicting the appellant and sentencing him to serve the minimum sentence of 20 years in prison, and by the High Court (**Olao J.**) before confirming the conviction and sentence. The appellant is now before us on a second and final appeal.
  5. The appellant, who appeared in person, submitted written submissions on five grounds of appeal and asked us to peruse them and decide the appeal in his favour. The grounds and submissions largely challenge the concurrent findings of fact made by the two courts below but we are enjoined at this level to consider only issues of law and give a measure of deference to findings of fact unless they are not based on any evidence or are based on a perverted appreciation of the facts - see **J.A.O v Republic [2011] eKLR** .
  6. The main complaint made by the appellant is that there was no proof, as found by the two courts, that any defilement supported by the crucial element of penetration of the vagina with the penis of the defiler was committed. It is also argued that corroboration of the minor's evidence was lacking. In his view, considering the evidence of the minor that the mother came as the defiler was about to penetrate her and she immediately ran out towards her, no coitus took place. And that this is supported by the further evidence that there was no bleeding noted or any spermatozoa traced. Furthermore, he submitted, the evidence of the clinical officer that the hymen was broken cannot on its own be proof of penetration since the hymen can be broken by other causes like sports. It was necessary, in order to connect the offender with the offence, to examine the male organ and align the tear noted on the vaginal wall with it, but this was not done. Furthermore, the Clinical Officer's report was not scientific and was produced contrary to **Section 77(1)** of the **Evidence Act**, which requires that laboratory reports be produced by the Government Chemist. In sum, the prosecution evidence was insufficient, contradictory and uncorroborated.
  7. Another limb of the submissions complains that the appellant's fair trial rights were breached because the trial was "*hastily carried out in a marathon pace.*" In the process he was not given statements to assist him in the trial and was not taken to hospital for medical examination. Finally the appellant submitted that he raised a defence of *alibi*, which displaced the prosecution evidence, but the defence was not considered.
  8. In response learned **Assistant Director of Public Prosecutions Mr. Kaigai**, submitted that the evidence of the minor that she was defiled was believed by the trial court which had the advantage of seeing her testify and was ably corroborated in material respects by the mother and the clinical officer. There was no doubt that the appellant was known to the minor as a neighbor and his defence that he was elsewhere on the day of the offence was displaced by the prosecution evidence. As for speedy trial, he submitted that the appellant took part in the trial fully and there is nothing on the record to show that he was not supplied with the '*necessary facilities and resources*' to mount his defence as he complains.
  9. We have considered the appeal and the submissions laid before us. As stated earlier, the complaints raised by the appellant are factual and were sufficiently answered by the High Court in its re-evaluation of the evidence as follows:-

***"The complainant was aged 13 years at the time of the incident. Her birth certificate was produced (Exhibit 1 (b)) showing that she was born on 27<sup>th</sup> March, 1998. Therefore, she was not a child of tender years when she testified on 2<sup>nd</sup> July 2012 since a child of tender years is defined under the Children's Act as one who is aged under ten (10) years. In the circumstances, the trial court was entitled to base a conviction on her evidence if satisfied that she was speaking the truth. In his judgment, the trial magistrate was satisfied about honesty of the prosecution***

witnesses whose evidence he described as “direct and consistent.” Even if there was need of corroborative evidence, there was sufficient corroborative evidence from the complainant's mother who found the appellant hiding in her toilet moments after the complainant had been defiled. Corroborative evidence need not necessarily be direct evidence. Evidence that an accused was arrested at a scene of crime can, taken together with other evidence, be sufficiently treated as corroborative evidence – MALONZA VS REPUBLIC 1986 K.L.R 476. In this case now before me, there is evidence from JOHN MWANGI (PW3) who is the Clinical Officer that when he examined the complainant, he found her hymen broken and her vaginal walls were lacerated. He concluded that the complainant had been penetrated. This evidence taken together with the evidence of PW2 that she found the appellant in her toilet moments after the complainant identified him as the one who defiled her could only lead to one inescapable conclusion. And that conclusion was that the appellant was the one who had defiled the complainant. The appellant was well known to the complainant who identified him by his nickname of “Salle”. Therefore, taking all that into account, the ground of appeal that he was convicted on the evidence of a single witness can only be for dismissal since he was recognized by both the complainant and PW2 who knew him previously and therefore this was not a case of mere identification of a stranger but rather, a case of recognition by persons well known to him and such evidence is more satisfactory, more reliable and more assuring – ANJONONI & OTHERS VS. REPUBLIC 1980 K.L.R. 59.”

No firm basis has been laid to disturb those findings and we uphold them. The submission that **Section 77(1)** of the **Evidence Act** applies to the Government Chemist only is of course, erroneous since the section refers to documents made in the hand of the “*Government analyst, medical practitioner or....*”. There is no argument that PW3 was a medical practitioner.

10. As for the complaint that there was a breach of fair trial rights because the trial was conducted speedily, we fail to reconcile the maxim “*justice delayed is justice denied*” with such complaint. Expedition in the disposal of cases is a virtue the judiciary and consumers of justice aspire to. This case appears to have been a straight forward one whose investigations were completed expeditiously, the appellant taken to court one day after his arrest, and the hearing completed between March and September 2012, in 6 months. As correctly observed by **Mr. Kaigai**, there is nothing on record to show that the appellant was hindered in cross examining the witnesses or generally making his defence and his complaint made before us about statements appears to be self serving. We find no merit in the complaint on breach of fair trial rights and we reject it.
11. Finally, the defence of the appellant was considered and rejected. His short unsworn statement merely talked about the date of arrest and his denial that he was with the minor at all on any date. He had no duty to prove anything, including an *alibi*, and the prosecution discharged its duty in proving beyond doubt by believable evidence, that he was indeed at the scene of the crime with the minor and inside a toilet, which was not in his compound.
12. For the reasons above, we find no merit in this appeal and we order that it be and is hereby dismissed .

*Dated and delivered at Nyeri this 3<sup>rd</sup> day of February, 2016*

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**H. OKWENGU**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original*

**DEPUTY REGISTRAR**