



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJA.)

CRIMINAL APPEAL NO. 5 OF 2012

BETWEEN

DANIEL MWAURA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

Appeal from the Judgment of the High Court of Kenya at Eldoret

(Azangalala, J.) dated 4th August, 2011

in

HCCRA NO. 171 OF 2009)

JUDGMENT OF THE COURT

1. Daniel Mwaura, the appellant, was convicted of defilement of **EWK**, a child aged 11 years. The trial court sentenced him to 15 years' imprisonment. Being dissatisfied with the said conviction and sentence, the appellant preferred an appeal to the High Court. The High Court dismissed the appeal against conviction. The first appellate court found that the sentence imposed by the trial court was illegal as it was contrary to **section 8 (2)** of the **Sexual Offences Act No. 3 of 2006**. It set aside the sentence and substituted it with life imprisonment.

2. The appellant moved to this Court on a second appeal. In such appeal, we are under a legal duty to pay homage to the concurrent findings of fact by the two courts below, and we can only interfere if we are satisfied that there was no evidence at all upon which the findings were based, or if the evidence which gave rise to the findings was of such a nature that no reasonable tribunal could be expected to base any decision upon it. See **BONIFACE KAMANDE & 2 OTHERS V REPUBLIC [2010] eKLR**.

3. The appellant's memorandum of appeal, through his advocates, **Limo R. K. & Company**, raised three grounds: that the appellate judge erred in law and fact by upholding conviction against the weight of evidence, that he misdirected himself on the inconsistency of the doctor's evidence and other witnesses, and by failing to appreciate that the learned trial magistrate misdirected himself on the defence of the appellant.

4. The evidence that was adduced by the prosecution was that on diverse dates between 1st November, 2008 and 7th March, 2009 at [particulars withheld] Estate within Eldoret, the appellant defiled the complainant by causing his penis to penetrate her vagina. The complainant testified that she was 11 years old then, which fact was corroborated by her mother, **A. W. (PW 3)** and **Dr. Joseph Embenzi, PW 1**.

5. The appellant was well known to the complainant, being a photographer operating within [particulars withheld] Estate. On 1st November, 2008 at about 3.00p.m. the appellant offered to buy the young unsuspecting girl a soda. He gave her Kshs.20/= and a samosa. He then led her to his house where he defiled her. On 1st March, 2009 the appellant called the complainant to his house, defiled her again and gave her Kshs.200/=. The appellant repeated the heinous acts on 3rd and 7th March, 2009. On that last occasion he gave her a packet of condoms and she went with it to school. Some pupils saw the packet of condoms and informed their teacher, who in turn summoned the complainant's mother to school. Apart from the packet of condoms, the young girl was also found in possession of biscuits, cakes, ribena and Kshs.200/=. The said items had been given to her by the appellant, the young girl stated. She added that the appellant had warned her against disclosing anything to anyone.

6. A report was made to the police and thereafter the complainant was referred to Moi Teaching and Referral Hospital. PW 1 testified that upon examination of the complainant he found that her hymen was torn and healed. He further stated that she was sexually experienced, which was evidence of chronic sexual abuse.

7. In his brief defence, the appellant admitted that he was a photographer at [particulars withheld] Estate, Eldoret, but denied having defiled the complainant.

8. **Mr. Kibii**, learned counsel for the appellant, submitted that the complainant was not a reliable witness because she had not disclosed to her mother about the defilement until she was found in possession of the packet of condoms, biscuits, ribena and Kshs.200/=. Counsel further submitted that the said items were not produced and neither was the complainant's teacher who summoned her mother called as a witness.

9. Regarding inconsistency touching on the medical evidence, Mr. Kibii submitted that **P. C. Doris Shapata, PW 5** testified that she received the report about the complainant's defilement on 16th March, 2009 then issued a P 3 Form. However, the P 3 form shows that it was issued on 7th March, 2009 and was completed on 13th March, 2009.

10. On his part, **Mr. Omwenga**, Assistant Deputy Public Prosecutor, submitted that there was overwhelming evidence that it was the appellant who had repeatedly defiled the complainant. The complainant knew the appellant as a photographer at [particulars withheld] estate, which description the appellant admitted.

11. Regarding failure to call the complainant's teacher and produce the items that the complainant was found in possession of, Mr. Omwenga submitted that no prejudice was occasioned to the appellant by such omission. As to the inconsistency relating to the evidence of PW 5, counsel submitted that it was of no consequence, in light of the totality of the incriminating evidence against the appellant.

12. We have carefully considered all the evidence on record and weighed it against the submissions made by counsel. The evidence is clear that the complainant was repeatedly defiled by the appellant, who was well known to her.

13. The young girl had been intimidated into silence by the appellant and we cannot fault her for having failed to report to her mother the ordeal she had been subjected to, until the mother was summoned to her daughter's school by the complainant's teacher. We do not entertain any doubt that the packet of condoms and the other items that were in the complainant's possession and which led to the revelation of the appellant's misdeeds had been given to the complainant by the appellant. The complainant had no reason to frame up the appellant

14. We agree with Mr. Omwenga that the failure to call the complainant's teacher as a witness and to produce the things that the complainant was found in possession of did not occasion any miscarriage of justice or prejudice the appellant's case in any way.

The same applies also to the inconsistency relating to the date of reporting the incidences to the police. PW 5 may have made a genuine mistake in stating that she received the report on 16th March, 2009. We realize that the witness was neither cross examined nor re-examined on the issue of the date.

15. All in all, we find no merit in this appeal. Accordingly, we dismiss it in its entirety.

DATED and delivered at Eldoret this 5TH day of FEBRUARY 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR