IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KIHARA KARIUKI (PCA), MAKHANDIA & OUKO, JJ.A)

CRIMINAL APPEAL NO. 27 OF 2014

BETWEEN

TITUS DANIEL NZIVO MAWEU…..……..APPELLANT

AND

REPUBLIC…….……..RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (Muya, J.) dated 17th December 2013

in

H. C. Cr. A. No. 37 of 2012)

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JUDGMENT OF THE COURT

1. Titus Daniel Nzivo Maweu, the appellant herein, was charged and convicted of the offence of defilement contrary to **section 8(1)** of the Sexual Offences Act, No. 3 of 2006. The brief particulars of the charge were that on the 21st March 2010, at Vanga location, Msambweni, in Kwale County, the appellant committed an act which caused penetration of his penis into the vagina of JMK, a girl aged sixteen years. After conviction, he was sentenced to serve a term of fifteen years imprisonment.

2. The concurrent findings of fact in the two courts below were that on the material day, the complainant was walking home from church when she met the appellant, who was well known to her. The appellant grabbed the complainant, removed her clothes and defiled her.

3. The appellant is aggrieved with his conviction and sentence, and has preferred this second appeal in which he has asked us to vacate the findings and orders of the trial court. During hearing of this appeal, the appellant submitted first that the trial court erred by not conducting a *voir dire* inquiry on the complainant contrary to the provisions of **section 19** of the Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya. He also faulted the first appellate court for failing to appreciate that the lack of a *voir dire* examination meant that the evidence tendered by the complainant was not credible. The appellant therefore urged that due to this failure, it was not clear whether or not the complainant understood that she was on oath and that she had a duty to tell the truth. In addition, the appellant contended that it was unclear as to whether or not the complainant had sufficient knowledge and

intelligence to justify taking her evidence on oath.

4. The appellant's second submission regards **section 36** of the Sexual Offences Act. He submitted that the learned trial court misdirected itself by accepting the medical evidence of his alleged involvement in the commission of the crime without corroboration of DNA evidence. He claimed that failure to adduce DNA evidence to link him to the crime weakened the prosecution evidence, and thus the prosecution failed to prove that he committed the offence for which he was accused.

5. The appellant's third submission is that the two courts below failed to appreciate that the prosecution did not call key witnesses in support of its case. In particular, he contended that the complainant's mother, V M (PW4), testified that she was informed by her husband that the complainant was pregnant but he was not called to testify, thus contravening the provisions of **section 150** of the Criminal Procedure Code which gives the court power to summon any witnesses.

6. The appellant further claims that his rights under section 200(1) of the Criminal Procedure Code were violated. He alleges that during his trial, when the matter was taken over by Ms. A.O. Aminga, RM, from Mrs. A.M. Obura, SRM, on the 3rd February 2011, the learned magistrate did not inform him of his rights under section 200 of the Criminal Procedure Code thus leading to a miscarriage of justice.

7. The appellant's final submission in support of his appeal was that the prosecution evidence did not dislodge his defence, and that the two courts below erred by failing to consider his defence. For these reasons, the appellant would have us allow the appeal, set aside his conviction and quash the sentence imposed upon him.

8. The appeal was opposed by Mr. Jami Yamina, Principal Prosecution Counsel, on behalf of the state. In urging us to dismiss the appeal, learned counsel for the state urged that the prosecution proved its case beyond a reasonable doubt. He argued that the trial court did not need to conduct a *voir dire* examination on the complainant because she was not a child of tender years.

9. Mr. Yamina further submitted that there was no need for DNA evidence or for the calling of any additional witnesses because the evidence given by the complainant was sufficient to demonstrate the appellant defiled the complainant as a consequence of which she became pregnant.

10. Further, Mr. Yamina contends that the trial court adhered to the provisions of section 200 of the Criminal Procedure Code, and that the appellant's defence was properly considered by the first appellate court, and that even when the appellant was cross-examining the complainant's mother, the issue of a grudge between them never arose. In this regard, counsel further contended that if the appellant believed that the complainant was aged 20 years at the time of commission of the offence, as he claimed during the cross examination of the complainant's mother, then the burden shifted to him, under **section 8(5)** of the Sexual Offences Act, to demonstrate why he thought that the victim was over the age of majority. He further urged that the appellant had in fact conceded that he had had sexual intercourse with the complainant as he stated that the act was consensual.

11. For these reasons, Mr. Yamina argued that the prosecution had proved its case to the standard required by law, and urged us to dismiss this appeal.

12. In a second appeal, such as this one, our mandate is restricted by **section 361** of the Criminal Procedure Code to consider only matters on law. Moreover, we will not interfere with the concurrent findings of the courts below us unless we find such findings to be perverse. This has been stated in a host of decisions of this Court such as in ***Christopher Nyoike Kangethe v Republic*** ***[2010] eKLR (Criminal Appeal No. 306 of 2005)*** where the Court considered the jurisdiction of this Court in a second appeal and rendered itself thus:

> ***"An invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so. And the only compelling reason(s) would be that no***

reasonable tribunal could on the evidence adduced have arrived at such findings, or in other words, the findings were perverse and therefore bad in law."

13. See also ***Obedi Kilonzo Kevevo v Republic [2015] (Criminal Appeal No. 77 of 2015***) where this Court held that:

"The law is that on a second appeal the Court of Appeal is restricted to consider only points of law.... This Court has also stated in many previous decisions that it will not interfere with concurrent findings of fact by the two courts below unless they were based on no evidence or on a misapprehension of the evidence or the trial Judge is shown demonstrably to have acted on wrong principles in reaching the decision."

14. These are the principles that this Court must now bear in mind when determining the appeal before us. The first issue of law that we shall consider is the appellant's complaint that his rights under section 200 of the Criminal Procedure Code were violated. That section relates to ***"conviction on evidence partly recorded by one magistrate and partly by another."*** Section 200(3) provides that:

"(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."

15. We have perused the record of proceedings, and have noted that on the 3rd February 2011, Ms. Aminga, RM took over the trial of the appellant from her predecessor. In the record, the following is the order of proceedings:

"Before A. O. Aminga, RM

Prosecutor Inspector Said

C/C Regina

Accused: Present

Court: My predecessor is [on] transfer.

Substance of section 200 CPC hereby complied with.

Accused: I wish to proceed with case from where it reached.

Court: Case hereby directed to proceed from where it had reached".

16. After placing the foregoing on record, the court proceeded to receive the evidence of Allan Tumwet Cherop (PW4), the clinical officer who treated the complainant. In our view the appellant is being less than candid when he claims that this requirement of the law was not complied with. It is patently clear that the learned magistrate who took over the trial of the appellant indicated to him that he had a right under section 200 of the Criminal Procedure Code to have his trial start afresh and to recall any witnesses, to which the appellant expressly informed the court that he wanted his trial to continue from where it had reached. This ground of appeal therefore fails.

17. We turn now to the appellant's complaint that crucial evidence was not adduced at his trial, thus weakening the evidence of the prosecution as regards his guilt. The law in that behalf is that no particular number of witnesses is required to prove a fact - see **section 143** of the Evidence Act which provides that:

"143. Number of witnesses

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

18. During the trial of the appellant, the evidence of the complainant was cogent and clear that it was the appellant who waylaid her and then defiled her. The fact that the evidence of the medical officer was not corroborated by DNA evidence did not weaken the prosecution evidence. The trial court was right in relying on it as the basis of conviction of the appellant in line with the proviso to section 124 of the Evidence Act which provides 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."

19. From the record, it is clear, that both the trial court and the first appellate court were satisfied with the complainant's evidence that it was the appellant who waylaid and defiled her. We find no fault with the failure to call the complainant's father; his evidence would not have added value to the complainant's evidence, and the fact that he was not called to testify did not weaken the prosecution's case. This ground of appeal accordingly fails.

20. The appellant's complaint that the trial court erred in not conducting a *voir dire* examination on the complainant is also baseless. Section 19 of the Oaths and Statutory Declarations Act provides that before the court can proceed to receive the evidence of a child of tender years, the court must first satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence, and that the child understands the duty of speaking the truth. The Children Act, 2001 provides that a child of tender years is ***"a child under the age of ten years."*** However, in a host of decisions of this Court, for instance in **KIBANGENY ARAP KOLIL v REPUBLIC [1959] EA 92** it was held by that the term tender years meant a child under the age of 14 years.

21. Does the definition of a "child of tender years" by the Children Act, therefore oust the jurisprudence that has been developed in criminal trials? We do not think so. We must appreciate that in passing the Children Act, Parliament was trying to address issues touching on the welfare of children and was not concerned about the rights of accused persons as relates to the testimony of child witnesses. We would therefore be reluctant to accept the proposition that in view of the definition of "a child of tender years" by the Children Act, any child over the age of ten years should now testify on oath without the trial court conducting a *voir dire* examination.

22. In our view, the jurisprudence established over a long period of time is still good jurisprudence despite the definition provided by the Children Act. After all a child's development both physical and intellectual is dependent on the social, cultural and economic environment under which he is brought up. Some children are slow learners while others are fast, it would therefore be prudent to test the intellectual capacity of a child witness before putting the child in the witness box. The complainant was aged sixteen at the time of commission of the offence; this was proved by the evidence of the complainant, her mother's evidence and also by the birth certificate that she introduced into evidence. An examination, as envisioned in section 19 of the Oaths and Statutory Declarations Act, was therefore unnecessary and we find that the lack of such an examination could not have prejudiced the appellant.

23. We now turn to the appellant's final complaint that his alibi defence was not properly considered. In defence, he stated that he had been framed because he had a land dispute with the complainant's parents who had once threatened to put him in a position from which he could not extricate himself. This defence was not an alibi defence, as the appellant never suggested that he was somewhere other than at the scene of the crime. We observe, as did learned counsel for the state, that when the complainant's mother testified, the appellant did not raise an issue regarding a land dispute between them. We are satisfied that the trial court and the first appellate court rightly considered this defence and finding no merit in it, accordingly dismissed it. Moreover, we note that when the appellant cross-examined V (PW2), he seemed to suggest that the complainant was aged 20 years at the time of commission of the offence. We agree

with learned counsel for the state that if the appellant truly believed that the complainant was over 18 years of age, he was required to demonstrate to the court the basis for his belief, and the steps that he took to ascertain that the complainant was indeed an adult. The appellant offered no explanation and he cannot therefore claim to have believed the complainant to have been an adult.

24. In the circumstances, we find that there is no reason to warrant our interference with the concurrent findings of both the lower courts. The conviction of the appellant was proper and the sentence meted out was lawful. Consequently, this appeal is devoid of merit, and we accordingly order that it be and is hereby dismissed.

Dated and delivered at Mombasa this 29th day of April , 2016.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL