IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, KIAGE & KANTAI JJ.A)

CRIMINAL APPEAL NO. 71 OF 2013

BETWEEN

NATHAN MARINGA RUIBI…….…… APPELLANT

AND

REPUBLIC …….. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kerugoya (Ong'udi, J.)

dated 13th August, 2013

IN

H.C.CR.A No. 149 of 2012)

****

JUDGMENT OF THE COURT

The appellant NATHAN MARINGA RUIBI by this appeal challenges the dismissal by the High Court at Kerugoya (**Ong'udi J**), of his first appeal against conviction and sentence of twenty years imprisonment for the offence of rape contrary to **Section 3(1) (a)** of the **Sexual Offences Act No. 3 of 2006.**

The particulars of the charge laid before the Kerugoya Principal Magistrate's Court were that on 2nd January 2007, in Kerugoya District of the (former) Central Province, he unlawfully had carnal knowledge of **E.C.W. (E)** without her consent.

The prosecution case through six witnesses, was that E was a student of [particulars withheld] Girls' Secondary School entering Form 4 in 2007. She was requested by Mrs. M, her teacher and wife to the appellant, to go stay at the Maringa house within the school's staff quarters and take care of the children aged 9, 14 and 18 years as their mother was to be away marking National Examinations. Their father, the appellant, was a Reverend, based in Embu where he preached the good word and came home only on Sundays and left on Tuesdays. E duly accepted the request and joined the Maringa home. Soon after, the appellant started exhibiting amorous intentions towards E whenever he was on break from his pastoral duties. First, he came to the kitchen on a Monday morning and solicited for a hug from her. She refused

and also declined to join him to a religious youth meeting on the subject of "**dating".** Quoting some verses from the Bible, he told her that sex was sacred and desired to discuss the topic further, or in depth, with her.

On 23rd December 2006, the appellant's wife came for the Chrismas break from the marking duties and released E go join her family for Christmas but requested her to return on 1st January 2007 to wash one of the children's clothes and to cook them "**chapati"** befitting New Year's day. E did and on the following morning, while she was alone at home the children having stepped out, the appellant came to the bedroom she shared with the children, tried cajoling her into bed and failing, pushed her onto the bed and forcefully had sex with her against her will. He warned her not to tell anyone or she would be in trouble. He then shut the door and left.

Later, E discovered that she was pregnant from that incident. She told no one about the incident until the month of March 2007 when a group from Plan International visited her school and talked to the students about drug abuse and sexual violence. They invited the students to share their problems even in writing, which E did. This revelation and the ensuing pressure led to the eventual arrest and prosecution of the appellant.

In due time E gave birth to a baby boy and a DNA test conducted confirmed that the appellant was the father. The appellant in his defence did not deny that he had sex with E that fateful day but maintained that it was consensual. Both courts below found otherwise.

In his appeal before us, the appellant, who is unrepresented, filed some ten self-crafted grounds of appeal in which he says the learned Judge erred in law by;

a. **Upholding a sentence for an offence other than the one charged.**
b. **Violating Article 159(2) of the Constitution that enjoined her to do justice to all irrespective of status.**
c. **Succumbing to pressure by NGOs, Women Groups and her superiors.**
d. **Applying inaccurate facts inconsistent with the complainant's consent implicit in her conduct.**
e. **Upholding the appellant's conviction on the basis of speculation, fanciful theories or attractive reasoning .**
f. **Failing to apply the proper sentencing principles for a first offender.**

The appellant expounded on these grounds, first stating that the learned Judge in dismissing his first appeal breached **Section 134** of the Criminal Procedure Code and **Article 50(2)(b)** of the Constitution by upholding a conviction on an offence the appellant was not charged with. This the learned Judge did, in the appellant's view, by making reference to **Section 8(3)** of the **Sexual Offences Act** which deals with defilement while the charge against him was one of rape.

This complaint by the appellant is borne out by the record in that it seems the learned Judge, while analyzing the appellant's appeal on sentence, anchored her reasoning on **Section 8(3)** on defilement as opposed to **Section 8(1) (a)** which deals with rape. This led to a misdirection by which the learned Judge found the 20 year imprisonment imposed by the trial magistrate to be deserved yet the appellant was a first offender.

The appellant also complained that the learned Judge violated his right to equal justice irrespective of status or position as stipulated in **Article 159(2)(a)** of the Constitution by referring to his position as a father and a reverend or clergyman and by also concluding that the pressure brought to bear by Non-Government Organization (NGOs) and Women Groups for his prosecution was not unwarranted which, in the appellant's view, betrayed the learned Judge's partiality.

The appellant next took issue with the learned Judge's analysis of the evidence tendered before the trial court and in particular the failure to find that E's evidence was unworthy of belief having brazenly testified on oath to having been a virgin yet in a letter to PW2 she had stated that she was not. Moreover,

she took an inordinately long time to report the incident to anybody at all which the learned Judge ought to have found to be confirmatory of the appellant's assertions that the sexual intercourse between the appellant and E was consensual. He advanced that argument farther by challenging the learned Judge's application of **Section 44** of the Sexual Offences Act, which he maintained did not apply in that there was no basis for any evidential presumptions about consent as the circumstantial evidence did not show that there was no consent, E having actually consented to the sexual intercourse.

The appellant's further complaint was that the learned Judge erred in departing from the evidence on record and making a foray into the realms of speculation that there was a conspiracy involving the Children's Officer and the Police to cover up the alleged offence. He termed this as improper and that the upholding of his conviction was therefore based on fanciful and attractive reasoning as opposed to evidence as required by law.

Finally the appellant criticized the learned Judge for upholding the sentence which, apart from being of questionable legality for being the maximum for a first offender, proceeded from a non-consideration of the mitigation tendered by the appellant to the effect that the sexual encounter between E and himself was triggered by the former who went to his bedroom.

Mr. Kaigai, the learned Assistant Director of Public Prosecutions (ADPP) stated that the respondent opposes the appeal. He pointed out, correctly in our view, that the crux of this appeal is whether the admitted sexual intercourse between E and the appellant was forced and non-consensual, as found by the courts below, or consensual as the appellant has always maintained.

The ADPP submitted that this was a case of rape where the appellant took advantage of the 18 year old E and raped her in his own house in a bedroom she shared with the appellant's children. He explains her failure to report the incident in timely fashion as occasioned by threats of violence issued to her by the appellant which rendered her vulnerable and she only got emboldened to speak when peer counselors visited her school some three months later. He also made some telling submissions, which we find significant to the central issue herein;

a. ***That attempts were made to settle this matter without taking the criminal angle.***
b. ***That he did not know what to make of the letter in which E disclosed that she had had sex before this incident.***

The ADPP also conceded that the learned Judge "***went a bit overboard***" in her analysis of the case and in particular by applying **Section 44** of the Sexual Offences Act which was inapplicable. He also conceded that imposition of the maximum sentence in the case of the appellant who ought to have received the minimum sentence having been a first offender made the question of sentence a matter of law. Mr. Kaigai concluded his submissions by stating that "***it appears the two courts below were unduly swayed by the appellant's status and the pressure exerted by NGO's".***

The ADPP however fell short of conceding the appeal on conviction maintaining that the appellant's defence that the sexual intercourse was consensual was an afterthought as it had not been put to E in cross-examination. He also denied that there had occurred a breach of the appellant's fair trial rights.

In reply to those submissions, the appellant reiterated that there was between E and him consensual sex and not rape, for had it been the latter, E would have disclosed it to the appellant's 18 year old son who escorted her immediately after the incident.

This being a first appeal, our jurisdiction is statutorily confined to a consideration of matters of law only. See **Section 361** of the Criminal Procedure Code. As such, we accord a degree of deference to the concurrent findings of fact by the two courts below, seldom interfering. As was stated in **DAVID NJOROGE MACHARIA –VS- REPUBLIC** [2011] eKLR;

> ***"Only matters of law fall for consideration and the Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on a***

misapprehension of the evidence, or the two courts below are shown demonstrably to have acted on wrong principle in making the findings".

Much as we are slow to interfere with concurrent findings of fact by the two courts below, it is not the case that there has to be hesitation about doing so in a deserving case. Indeed, interference is called upon where it becomes plain from a consideration of the record that the concurrence may be the function of a failure on the part of the first appellate court to faithfully discharge its duty of subjecting the whole of the evidence to a fresh and exhaustive scrutiny before drawing its own inferences of fact and making independent conclusions. This is a statutory duty that creates a legitimate expectation on the part of the appellant and has been expressed in many decisions of this Court and its predecessor including, more notoriously in **PANDYA –VS- REPUBLIC** [1957] EA and **OKENO –VS- REPUBLIC** [1972] EA 32.

As we have pointed out already this appeal turns on the question whether the uncontested sexual intercourse between E and the appellant was an unlawful criminal act of rape or an act consented to by E as contended by the appellant in his unsworn statement of defence before the trial court and in submissions in both the High Court and before us.

From the record, both the trial court and the first appellate courts were, with the greatest respect, dismissive of the appellant's defence that he had consensual sex with E in his bedroom in a rather peremptory, if charged and naïve manner. The trial court dealt with the issue as follows;

> ***"I have carefully analyzed the evidence of the complainant and the accused as to how the incident occurred. I will outright reject the statement of the accused for how could he have the complainant sleep in his bedroom whilst his children were in the same house. Secondly it was almost impossible for the complainant to spend in the accused bedroom because the complainant used to sleep in the same bed with the accused daughter called M and in the same room with the accused son who was of almost the same age with the complainant. Obviously her absence would have been noticed by the accused children. The house was only two bed roomed house. Nothing odd could have happened in the accused bedroom without his children noticing. I therefore dismiss the accused statement that they had sexual intercourse with the complainant in his bedroom".***

It proceeded to totally rule out the possibility that E could at all have consented to the act by reasoning thus;

> ***"The complainant went to the accused house by the invitation of the accused wife who is her teacher. So it is unfathomable to imagine that the complainant would have dreamed to have sexual intercourse with her teacher's husband on her teacher's bed".***

We think it is enough to state that no place, no circumstance and no relationship has ever existed that of itself rules out the possibility of sexual intercourse taking place between any two people who are minded to engage in it.

The High Court for its part also quoted and adopted that reasoning by the trial court but not before expressing its own charged incredulity as follows;

> ***"PW1 slept with the appellant's three (3) children then aged eighteen (18) years, fourteen (14) years and nine (9) years respectively in one bedroom. The appellant would want this court to believe that he could indulge in such an activity in the presence of his children, whose ages are as stated above! Quite unbelievable! He had authority over this girl and if indeed she came to their bedroom he should have thrown her out and even disciplined her".***

It seems quite plain from the record that the two courts below were in full sympathy with the version of events given by E which they accepted upfront as truthful so that the appellant's defence that the sex was consensual was an unacceptable dissonance. Tales of sexual abuse are obviously traumatic and easily

sympathy-inducing, which is human enough. However, it is the duty of courts to decide cases purely on the basis of evidence and the credibility of all witnesses in a criminal trial, must be carefully assessed and established. Complainants in sexual offences are not exempted from that scrutiny because all criminal offences must still be proved beyond reasonable doubt.

The case before us is evocative of the case of **ABASI KIBAZO –VS- UGANDA** [1965] EA 587 decided half a century ago by the predecessor of this Court on an appeal from a conviction of rape returned by Sir Udo Udoma, the Chief Justice of Uganda. That conviction was mainly on the evidence of the complainant.

There were contradictions in her evidence and the statement she made to the police and in some respects her evidence was false. Allowing the appeal, the Court stated in part;

> **"With the greatest respect to the learned Chief Justice we think he placed a far greater reliance on the evidence of the complainant than was desirable in view of the contradictions, and in some respects, some false evidence she gave before the court. There was her evidence that before the alleged assault she was a virgin, that she bled from her vagina as a result of the rape upon her thereby implying that her hymen had been ruptured and that her dress was stained with blood. All this was proved to be false and we would hesitate to describe any person who gives such evidence as being honest and impressive. We would also hesitate to describe the admissions extracted from her under cross-examination as mistake. It does not appear that the learned Chief Justice considered the apparently false evidence and contradictions in his judgment although he did state that he had warned himself and had carefully considered the evidence before arriving at his conclusion".**

In the present appeal, it is clear that E's evidence had a number of falsehoods, inconsistences and contradictions that the two courts below either did not notice or paid scant attention to. To mention but a few;

a. ***She testified in chief to have turned 18 years old 25th January 2007 yet in her letter to the Director of Vine International dated 16th March 2007, she had said she was 20 years old.***
b. ***Still on age, whereas she reported her age as 18 years to the police officers who filled the P3 Form on 25th June 2007, the General Outpatient Record at Karatina District Hospital filled out on 7th may 2007 contains obvious alterations which however show that her age was indicated first as 21 and cancelled, 20 and cancelled, and finally 18 years.***
c. ***She testified that she was a virgin on the day of the incident but in her said letter she confided that she had had sex before.***
d. ***She said she bled during the incident and stained a dress that was lying on the bed but no such dress appears to have been stained or even existed.***

Where, as here, the guilt of an accused person on a charge of rape depends entirely on whether or not there was consent, it is imperative that the lack of consent alleged be proved by the prosecution beyond reasonable doubt. It is not for the accused person to prove that the sexual intercourse was consensual. It follows that the issue of consent is one that must be very carefully and seriously scrutinized and considered by the trial court and the first appellate court. The issue calls for specificity and deliberation in analyzing the evidence so as to establish that indeed there was no consent. This has to be so because, as was held by this Court in **REPUBLIC –VS- OYIER** [1985] KLR 353;

> ***"1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.***
>
> ***2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to consent or resist".***

We are not satisfied that this important and significant element to the crime of rape received the attention it deserved from the two courts below. It is worth restating what was said in **KIBAZO –VS- UGANDA** (Supra) as reflecting the failures that attended the handling, or more accurately, the insufficient handling, of the issue of consent by the two courts;

> ***"The issue of consent or no consent is an important one and deserves very serious consideration. Thus in the case of Republic vs. Bradley (3) it was held by the Court of Criminal Appeal, quashing a conviction for rape, that there was not sufficient evidence before the jury to justify them in bringing a verdict that the prosecutrix did not consent. One of the matters which influenced the Court of Appeal was an inconsistency in the girl's evidence at the Police Court and at the trial. The decision in this case was regarded as justifying the conclusion that in cases of offences against women the Court of Appeal will not necessarily treat the verdict of a jury upon conflicting evidence as final.***
>
> ***In the case of Republic vs. Harling (4), it was held that in every charge of rape the fact of non-consent must be proved to the satisfaction of the jury. This implies that a jury should be satisfied without reasonable doubt on the issue of consent or no consent. Nowhere in the judgment of the learned Chief Justice does he appear to have addressed his mind to the question of reasonable doubt on the issue of consent".***

On our part, we are not persuaded that the learned Judge made any conscious effort to navigate and explore the line between consent obtained by firm and persistent persuasion and the riding rough shod over a fast, determined and unambiguous refusal or non-consent which makes the ensuing sex the criminal act of rape. Reasonable doubt as to non-consent was not explored and excluded and for that reason, it cannot be said that it was proved beyond reasonable doubt.

Given the stark conflict between E's and the appellant's narratives as to what happened, it was crucial for the two courts below to interrogate all of the surrounding circumstances so as to determine whether the prosecution case stood proved. In this regard, it is a matter of concern that both the learned Judge and the trial court did not give sufficient consideration to the length of time E took to disclose or confide to anyone what had transpired on the material day. There is no dispute that it was not until 16th March 2007, which was two and a half months after the event, that E wrote to the NGO indicating that the appellant had raped her. This was after the said NGO had spoken to students at her school about drug abuse and sexual violence. There is an inescapable impression that it is this intervention that led E to the conclusion, obvious upon reflection, that what had happened to her was rape.

E had opportunity to immediately confide in the appellant's 18 year old son who was her friend as he escorted her but she did not. Nor did she inform her own mother, when she got home. She did not mention it to the appellant's wife who was her teacher and with whom she must have been close enough to be invited to go to the appellant's home to take care of the children. We are of course aware that the fact of a complaint being made by a victim shortly after the alleged offence is merely evidence of consistency and no more, as was recognized in **REPUBLIC –VS- OYIER** relying on Archbold's Criminal Pleading, Evidence and Practice, 46th Edn P.1413 para 2884 and **REPUBLIC VS CULTHREAD** 24 CR.APP. R 44. Unlike **REPUBLIC VS OYIER** where the disclosure was made after 2 days and the delay was held not to be unreasonable, here it came after several weeks and we do think that it further weakens the consistency of the appellant's conduct. We therefore do not accept that the trial and first appellate court's quick and gratuitous explanation of that delay as owing to the appellants threats, the wife's being E's teacher and relative, E's being a member of the Christian Union and the Appellant's being ***"a Pastor/Reverend/a servant of God"*** and she feared to expose him. Rather, the learned Judge ought to have tested that delay on the basis of reasonableness and consistency. She did not do so and therefore erred.

We also must address as going to the question of consent the fact that E wrote some letters to the appellant and there were discussions arrived at having him take responsibility for the pregnancy. She also appears to have spoken at some length to some other clergymen referred to simply as "***Rev. J.B."*** and also to a Bishop for the Anglican Church of Kenya. The letters to the appellant were not produced

in court but the prosecution did produce as exhibit No. 2 a document titled "Letter of Undertaking" signed by the appellant on 21st June 2007 in which he stated at clause 5 that;

"I was tempted and had carnal knowledge with E.W on 2nd January 2007"

He then proceeded to commit himself to take care of the pregnancy, medical expenses, PW1"s education and to "***maintain the child up to the age of 18 years as per Children's (sic) Act 2001".***

That undertaking was witnessed by one P.K.W as a family representative; P. M.W, the complainant's mother; E.C.W the complainant, and P.G.G "***on behalf of the elders".***

All of these people signed the letter witnessing the appellant's undertaking.

We find it curious and a serious non-direction that the two courts below did not address this letter of undertaking. It would seem from the face of it that all parties were agreeing that there was carnal knowledge but there is no indication that the complainant or any member of her family was suggesting that it was anything but consensual. It is ironical that instead of the matter ending with the letter of undertaking, the appellant was arrested three days later and arraigned in court.

This case calls for our interference with the appellant's conviction. The two courts below misdirected and non-directed themselves in the manner we have already adverted to. True it may be that the appellant used his position improperly to solicit and insist on sex with E, but that conduct, while morally reprehensible, did not amount to rape. There was no proof beyond reasonable doubt that the sexual intercourse was not consensual.

The conviction of the appellant was not safe and we therefore quash it. Having done so, we need not go into the question of the sentence which, as was admitted by the ADPP, was of questionable legality being the maximum sentence yet the appellant was a first offender. In any event nothing turns on it as the sentence, whatever its legality, is set aside the conviction having been quashed.

The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 6th day of April, 2016

P. N. WAKI

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

S. O. KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR