



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 79 OF 2014

BETWEEN

CHARLES ENOSE MAKOKHA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kisumu, (H. K. Chemitei, J.) dated 20th January, 2014

in

HCCRA. NO. 84 OF 2012)

JUDGMENT OF THE COURT

1. On 28th June 2012, the Magistrate's Court at Homa Bay convicted the appellant, Charles Enose Makokha, for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act. He was subsequently sentenced to imprisonment for a term of 15 years. That court acquitted him on the offences of indecent act and of attempted rape with which he had also been charged.
2. He challenged the conviction before the High Court at Kisumu. That court delivered its judgment on 20th January 2014, and dismissed that appeal, having been satisfied that the charge for the offence of defilement had been proved.
3. The appellant remains dissatisfied and has lodged this second appeal.
4. During the hearing of the appeal before us, the appellant, who was un-represented, argued that the trial court and the High Court failed to appreciate that the offence was not proved; that the necessary ingredients of that offence, namely penetration, and the age of the victim were not established; and that he was not positively identified as the perpetrator of the offence.
5. Learned prosecution counsel, Mr. E. Ketoo, on his part submitted that the offence was established to the required standard of proof; that all elements of the offence were established; and that it is clear from the evidence that the appellant is undoubtedly the one who committed the offence as he was positively

identified.

6. By reason of Section 361(1) of the Criminal Procedure Code, our mandate on a second appeal is restricted to questions of law. In M' Riungu vs. R [1983] KLR 455 this Court held that *“where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.”*

7. The prosecution case was as follows: On 12th December 2010 at about 11.00pm, PW 1, the complainant, NAO, a minor aged 17 years at the time, her elder sister, CAO (PW2), B O L (PW3), (described on different occasions as either NAO's father, uncle, cousin or brother) and another person known as Korera were on their way home from church when the appellant, an Administration Police Officer, arrested them. The reason for the arrest, ostensibly, was that they did not possess national identity cards and for loitering. The appellant then escorted them to the administration police camp where PW3 and the said Korera were placed in a cell.

8. The appellant placed CAO (PW2) in a house alone and closed the door from outside and left with NAO. According to CAO, the appellant returned later and attempted to defile her.

9. According to NAO, the appellant took her to his house within the camp where, after closing the door, he pushed her onto a bed, undressed her and defiled her twice before releasing her at 6.00 am the following morning.

10. PW1, PW2 and PW3 were then set free to go home.

11. Whilst at the camp PW 3 had witnessed the appellant taking PW1 and PW2 to his house; he saw him dragging them and forcing them to walk and could hear noises from the house of the appellant as if there was a struggle. When in the morning PW1 revealed to him what had happened, he reported the matter to the police at Sena Patrol Base. Thereafter NAO was taken for treatment at Mbita Hospital and the appellant was arrested.

12. Police Constable Fredrick Ojwang, (PW6), who was attached to Sena Patrol Base investigated the matter before arresting and charging the appellant with the offences.

13. Stephen Oyare, PW4, of Mbita District Hospital, confirmed having examined NAO on 13th December 2010 and established that she had lacerations in her vagina and formed the opinion that the same were caused by forcible sexual intercourse and that there was penetration.

14. In his defence, the appellant stated that he was an Administration Police Officer at the time based at Sena Chief's Camp. He recalled that on 12th December 2010 at about 11.30 pm he was on his way to the camp from Sena Trading Center when he encountered PW 3 and another person and asked them to accompany him to the camp for not having identification cards. A few meters from where he had met PW3, he saw two girls and a man; the man ran away leaving the two girls; the girls, PW1 and PW2, did not have identification cards and for that reason, he also asked them to accompany him to the camp where he locked them up in cells; that he thereafter went to sleep. He went on to say that the following morning he released them after learning that they were from the church; that he was later called by Corporal Ojwang who told him that he had defiled two girls; that Corporal Ojwang then arrested him and took him to Mbita Police Station before charging him with the offence.

15. After evaluating the evidence, the learned trial magistrate was satisfied that the offence of defilement contrary to Section 8(1) of the Sexual Offences Act was proved. In his judgment, the magistrate stated:

“The accused has denied the charges. I will however wish to point out that the evidence the prosecution have placed before the court through the complainants, PW1 and PW2, and the

medical report placed before the court before the PW4, Steven Oyare who examined the PW1 reveal that the PW1, [NAO], was indeed defiled by the accused. It is the evidence by the clinical officer PW4 that he examined the girl and found out that she had a laceration on the lower part of her vagina. The laceration was caused by the penis that was used by the accused to penetrate into the vagina of the girl. Indeed the PW1 in her evidence has told the court that the accused had sexual intercourse with her at his one (1) roomed house at the DO's office. The court was told that the accused had sexual intercourse with the PW 1 twice during the night. I do not at all find merit in the defence by the accused.”

16. The High Court on its part reviewed and re-evaluated the evidence before concluding;

“From the evidence on record as well as P3 form I do not hesitate to find that the complainant was actually defiled and the only probable person who did this was the appellant. I find that the prosecution was able to establish their case right from the arrest of the complainant to being released the following morning and being taken to hospital as well as the arrest of the appellant. All these events took less than 12 hours and I do not buy at all the appellant's defence. Neither do I see malice on the part of the prosecution and its witnesses.”

17. There are therefore concurrent findings of fact by the two courts that the appellant took the complainant to his house at the camp where he defiled her. We can only interfere with those findings if they are contrary to the evidence. As this Court said in **Adan Muraguri Mungara vs. R [2010] eKLR**, we must:

“Pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.”

18. We think the decisions of the lower courts are well founded and supported by the evidence. PW1, PW2 and PW3 explained how the appellant arrested them and escorted them to the police station ostensibly because they did not have with them identification cards. The appellant acknowledged that he did arrest PW1, PW2 and PW3 for allegedly not having identification cards.

19. Where the appellant's version of what transpired radically differs from that of PW1, PW2 and PW3 is his claim that after locking them up in the cells he went to sleep. According to PW 1, the appellant took her to his house where he defiled her. PW2's testimony was that the appellant placed her in a different room, locked the door from inside and later returned and attempted to defile her. PW 3 stated that he saw the appellant take PW 1 and PW 2 to his house.

20. The appellant cross-examined PW 1, PW 2 and PW 3 at length but their testimony remained consistent and un-shaken. Accordingly, there is no basis upon which we can hold that the decision by the two courts is bad in law.

21. The prosecution established that the complainant was aged 17 years at the time the offence was committed. She was clear she was born in 1993. PW4 who examined her at the hospital on 13/12/2010 and stated as much in the P3 form and in the treatment notes. Examination of the complainant's genitalia revealed fresh lacerations on the basis of which PW4 concluded there was sexual penetration. All the necessary ingredients of the offence were proved.

22. The result is that the appeal fails in its entirety and is hereby dismissed.

Orders accordingly.

Dated and delivered at Kisumu this 27th day of May, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR