IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 85 OF 2014

BETWEEN

HEZRON AURA NGUTU……..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Kisumu, (Chemitei, J.) dated 20th March, 2014

in

HCCRA. NO. 14 OF 2010)

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JUDGMENT OF THE COURT

1. The appellant, Hezron Aura Ngutu, was on 19th November 2012 convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act and sentenced to serve a prison term of 20 years. The High Court (A. O. Muchelule, J.) dismissed the appellant's first appeal in a judgment delivered on 10th March 2014.

2. This is his second appeal, which by reason of Section 361(1) of the Criminal Procedure Code should be confined to questions of law. [See **M 'Riungu vs. R [1983] KLR455**]. Furthermore, this Court cannot, on a second appeal, interfere with the concurrent findings of fact by the lower courts unless such findings are not based on evidence, or are based on a misapprehension of the evidence, or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings. In **Karingo vs. Republic [1982] KLR 213**] the Court stated:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari s/o Karanja vs. Republic* (1950) 17 EACA 146)".***

3. The appellant appeared before us in person. He relied on his written submissions in which he

argued that he was wrongly convicted because two essential elements of the offence with which he was convicted, namely penetration and the age of the complainant, were not proved to the required standard. His other complaints are that he was not positively identified; his defence was not considered; and that Section 200(3) of the Criminal Procedure Code was not complied with.

4. Opposing the appeal, learned Prosecution Counsel Mr. E. Ketoo submitted that all elements of the offence were proved to the required standard; that the appellant, a teacher in the victim 's school, was well known to her and was positively identified; that the conviction was safe and the sentence is legal; and that Section 200 of the Criminal Procedure Code was complied with.

5. DAO (PW1), a standard 6 primary school pupil, stated in her evidence before the trial court that she was born in 1996; that on 16th June 2010 at about 5.00 p.m. she was on her way to a flour mill; that on reaching the gate of one Bon, he (Bon) enquired from her where she was going; that Bon then told her to get into the house; that she complied and Bon then locked the house from outside; that inside the house she found the appellant who held her hand and pulled her to the bedroom where he removed her clothes and raped her. Thereafter, she went on to say, Bon opened the door and released her. She proceeded to the flourmill before returning home where she reported the incident to her mother. The incident was then reported to the school headmaster. Subsequently DAO was examined and treated at Kombwe District Hospital and a report of the incident made to a police station.

6. Paul Owiti, (PW2) a clinical officer at Kombwe District Hospital, testified that he examined DAO at that hospital on 18th June 2010 and completed a P3 Form that he produced as an exhibit. On physical examination, he observed bruises on her vagina and a laceration on her hymen. He concluded that she was defiled. He stated that he ascertained her age from the parents to have been 14 years.

7. Police constable Juma Kishori, (PW3) stated that on 18th June 2010, DAO accompanied by her father made a report at Kombwe Police Post that a teacher had defiled her; that the father produced a baptism certificate in respect of DAO, which he produced as an exhibit, that indicated her date of birth to be 2nd January 1997; that he recorded her witness statement, issued her with a P3 Form and escorted her to hospital.

8. Patricia Achieng (PW4) and Dereck Ouma (PW5) both pupils in class 5 and 4 respectively at Jonyo Primary School, testified that on 16th June 2010 at about 5.00 pm, they were herding cows near Bon's house; that they saw DAO enter Bon's house after which Bon locked the house from outside; that DAO was inside the house with the appellant for "*about 15 minutes*", according to PW4 and "for long" after which Bon opened the house and they accompanied DAO to the flour mill to grind maize.

9. In his defence the appellant stated that he was a teacher at Chonyo Primary School when the alleged offence took place in June 2010; that although he knew DAO, her testimony was a fabrication; that on the date he is alleged to have committed the offence on 16th June 2010, he left school at 4.30 pm and went to assist his aunt serve customers at her hotel in Kombwe Market; that he got to the hotel a few minutes to 5.00 pm and remained there until 10.00 pm; that although he knew Bon as support staff teacher employed by Parents Teachers Association, he was not at his house on the material day.

10. The appellant's aunt, Agnes Acho Milo (DW2) testified in his defence and stated that on the material date between 4.00pm and 5.00 pm, she saw the appellant at her hotel at Kombewa where he was assisting her serve customers; and that she closed at 10.00pm and that "he did not leave within that time."

11. After reviewing the evidence, the trial court stated:

"I have considered also submissions by both accused and prosecution. PW1 stated how she was called by Bon and entered the house where she found accused who defiled her. PW2 Mr. Owiti confirmed the PW1 's genitalia had injuries, a sign of penetration. PW3 and PW4 both saw PW1 entered the house and they saw accused also enter the house. PW1 said accused defiled her. The baptismal certificate said the girl was born in 1997 and therefore by material date she was 14 years. Thus the age is clearly proved and the offence beyond reasonable the evidence of prosecution (sic) witnesses is duly corroborated and squarely placed accused at the scene. He is the one who committed the offence. I reject his defence as it is an afterthought. "

12. The High Court on its part reviewed and reevaluated the evidence. The Judge stated:

"I have considered the prosecution evidence on which the appellant was convicted. The defence by the appellant was that he was not at the scene and neither did he defile PW1. This was alibi defence. The court considered it and rejected it and accepted the prosecution version that he was at Bon 's house in which he defiled PW1. There was no dispute that PW1 was the appellant's pupil. No dispute or grudge was raised between them that would have made the charge of defilement to be framed against the teacher. The incident was during the day. PW1 was subsequently examined and found to h ave been defiled. The trial court accepted that evidence. I find no reason to depart from that finding. The alibi defence was not true."

13. There are therefore concurrent findings by the lower courts that DAO was defiled; that all the ingredients of the offence were proved to the required standard and that the appellant was positively identified as the perpetrator of the offence. Those findings were, in our view, well supported by the evidence tendered by the prosecution that displaced the alibi defence offered by the appellant. As this Court stated 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**."

14. We do not therefore have any basis for interfering with the findings and the decisions of the lower courts.

15. As to whether Section 200 of the Criminal Procedure Code was complied with, the record shows that on 15th March 2012, the appellant's counsel stated that "we shall proceed from where we left" when J. Ongondo took over the conduct of the trial and the record indicates that the provision was complied with.

16. The result is that the appellant's appeal is devoid of any merit. It is dismissed.

Orders accordingly.

Dated and delivered at Kisumu this 29TH day of July, 2016.

D. K. MARAGA

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR