



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE, MWILU KIAGE JJA)

CRIMINAL APPEAL NO. 367 OF 2012

BETWEEN

ISSA HUSSEIN HASSAN.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal against Conviction/Judgment of the High Court of Kenya at Nakuru

(Emukule, J) Dated 27th June, 2013

in

H.C. CRA. NO. 12 OF 2011)

JUDGMENT OF THE COURT

The appellant **ISSA HUSSEIN HASSAN** was arraigned before the Principal magistrates Court at Nyahururu with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on the 29th April, 2010 at Nyahururu Township in Laikipia West District within Rift Valley Province unlawfully and intentionally caused his penis to penetrate the anus of **V K** a boy aged 12 years. He also faced an alternative charge of indecent act with a child contrary to **section 11(1)** of the **Sexual offences Act No. 3 of 2006 Laws of Kenya**. The particulars were that on the same date and place he intentionally caused his genital organ namely penis to come into contact with the anus of **V K** a boy aged 12 years.

The appellant denied both counts prompting a trial in which the prosecution called five (5) witnesses in support of its case, namely **V K** a minor who was the complainant, **PW1 S W K (S)** **PW2, S W (S)** **PW3, P.C. Valentine Yegon (P.C. Valentine)** **PW4** and lastly **Dr. Waitiki Kariuki (Dr. Waitiki)** **PW5**

In summary the prosecution's case was that on the material date of 29th April 2010, Susan **PW2**, who was the mother of the complainant **V K**. instructed her son at around 3 pm to return clothes she had purchased for him but which did not fit him. **V K**. did so. On his way back he met the appellant who informed him

(V K) that he (appellant) was a police man and was arresting him for an undisclosed offence and was taking him to the police station. He then led him to a maize plantation where he assaulted him, ordered him to remove his trousers, sodomized him and then released him to go his way. On the way V K. met *bodaboda* riders among them Simon PW3 (Simon) and narrated his ordeal to them. They noted he was walking with difficulty and was in pain. They took him to the Police Station where his report was booked in the OB before being referred to hospital for treatment. The next day Simon in the company of others assisted V K. trace the appellant at his mother's house hiding under the bed after his mother unsuccessfully tried to conceal his presence by feigning his absence allegedly on account of having left on a journey. He was arrested by Simon and others who declined to be silenced with an offer of 4,000/=. He was then escorted to the police station the same date of 30th April, 2010 where he was booked for the offence charged. V K was examined by **Dr. Lilian Marnet**, whose findings were that his genitalia were normal but there was a whitish discharge on the anal region which was taken to the laboratory for investigation and revealed presence of spermatozoa which indicated that there was anal sexual intercourse. At the hearing the P3 was produced by **Dr. Waitiki Kariuki** on behalf of **Dr. Lilian** as he was familiar with her handwriting.

When put to his defence the appellant gave unsworn evidence denying the offence. He stated that it is those who arrested him who demanded Ksh.4,000/- inducement from him and when he declined their request they took him to the Police Station and caused him to be charged with an offence he knew nothing about and which he, a Muslim could not have committed.

At the conclusion of the trial the learned trial magistrate **D.N. Musyoka R.M.** found the prosecution's case proved to the required threshold, found the appellant guilty of the offence charged, convicted him without specifying the offence for which appellant had been convicted and instead of sentencing him to serve twenty years imprisonment provided for under **section 8(3)** of the **Sexual Offences Act** enhanced the sentence to one of life imprisonment for the reasons given. The appellant was aggrieved. He appealed to the High Court raising various grounds. In a Judgment dated the 12th day of October, 2012 **M.J. Anyara Emukule, J.** dismissed his appeal in its entirety.

The appellant is now before us on a second appeal. Although the appellant's written submissions indicate that he had made submissions with regard to six (6) grounds of appeal what we have on the record are only three grounds. These may be summarized that the learned Judge fell into error:

- (i) when he failed to find that the prosecution's case did not meet the threshold of proof beyond reasonable doubt.**
- (ii) when he ignored irregularities that had occurred in the cause of the trial.**
- (iii) when he failed to give the appellant the benefit of doubt in the commission of the offence.**

The appellant handed in written submissions and invited us to adopt these as his submissions in support of his appeal which he urged us to allow. It is his argument that the trial court did not convict him of any offence and that the sentence of life imprisonment meted out on him by the trial court against him was illegal and should not have been affirmed by the High Court.

On identification, it is his argument that since the time the victim was accosted was 7 pm issues of visibility should have been interrogated to rule out the possibility of mistaken identity considering that the assailant was a stranger to the victim; the victim was roughed up and the possibility of him not having had the courage to stare at his assailant to register his appearance could not be ruled out.

On witnesses not called to testify, it is the appellant's submissions that we should draw adverse inference against the prosecution's failure to tender the evidence of all the motor cyclists who assisted the victim to report to police and thereafter to hospital besides PW3 Mwangi who was present when the appellant was allegedly removed from underneath the bed in his mother's house and those who led to his arrest because these too were possible perpetrators in the commission of the offence as they all had access to the victim that same night.

On medical evidence, it was the appellant's submissions that since the age of the appellant was not ascertained by production of the birth certificate, there was nothing to rule out the possibility that the appellant was not older than twelve years. It was also important for a DNA to be carried out to confirm whose spermatozoa that was detected in the victim's anal canal was.

In response to the appellants submissions **Miss Nelly Ngovi** the learned prosecution counsel urged us to dismiss the appeal on the grounds that though the sentence complained of may be harsh it is nonetheless legal as it is provided for in the law. Although this Court has a discretion to interfere as it may deem fit.

On witnesses not called, **Miss Ngovi** urged that no prejudice was suffered for the failure to call the witnesses complained of as the evidence tendered by the prosecution in support of the charge the appellant faced was sufficient and it met the threshold of proof beyond reasonable doubt.

On the failure to carry out any DNA examination **Miss Ngovi** urged that although this is a requirement under the Act (**Sexual Offences Act (SOA)**), it is mandatory where the perpetrator is not known. In the circumstances of this appeal, where the perpetrator was positively identified and placed at the scene of the crime, the failure to carry out the said DNA test was not fatal to the prosecution's case.

On identification **Miss Ngovi** urged that this was water tight as the evidence on the record indicates that the victim had registered the appearance of the assailant as he was taken to several Somalis (worias) but he said they were not the ones and as soon as the appellant was flushed out from underneath his mother's bed, the victim pointed him out as the assailant. Further the victim who was a small boy had no reason to fabricate a case against a stranger. The evidence on identification was consistent and supported the charge as correctly found by the courts below, added Miss Ngovi.

In reply to **Miss Ngovi's** submissions the appellant reiterated his written submissions that he was not medically examined in connection with the offence he faced and that the illegal sentence should be reduced.

This is a second appeal. Our mandate is restricted to address matters of law only. As this court has stated many times before, it will not normally interfere with the concurrent findings of fact by the two courts below unless such findings were based on no evidence, or were based on a misapprehension of the evidence or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See **Chemagong versus Republic [1984] KLR 611**. See also **Karinga versus Republic [1982] KLR 213** at page 219 where this Court had this to say:-

“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 Kareri S/O Karanja versus Republic [1956] 17EACA 146)”

We have revisited the record and considered it in the light of the rival arguments set out above as well as applicable principles of law. In our view the following issues fall for our determination namely:

- (i) Whether the learned Judge properly discharged his mandate as a first appellate judge.**
- (ii) Whether the failure to carry out a DNA examination in the circumstances of this appeal was fatal to the prosecution case.**
- (iii) Whether the failure to call the witnesses complained of by the appellant was fatal to the prosecution case.**
- (iv) Whether the evidence on identification was water tight.**
- (v) Whether the sentence meted out against the appellant by the trial court and as affirmed by the 1st appellate Judge is lawful.**

On the mandate of a first appellate court this court reiterated in the case of **Kiilu & another versus Republic [2005] KLR 174**thus:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

ii) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own conclusions only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”.

We have revisited the judgment of the learned judge on the record. We find he took the correct approach in setting out the offences then laid against the appellant, the complaint’s laid against the trial magistrate’s findings by the appellant; the evidence relied upon by either side and the applicable principles of law. These were then followed up by his reasoning and conclusion which we find prudent to set out as hereunder:-

“Those were the facts or the evidence. The appellant contended that the evidence of the complainant (PW1) as to defilement was not corroborated. The evidence of the complainant, needs no corroboration. It is protected by the proviso to Section 124 of the Evidence Act (Cap. 80, laws of Kenya, 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.”

The trial court found that the incident took place at around 7.00 pm. The appellant and the complainant had ample time talking and even walking together. At one stage, the appellant smoked a cigarette and puffed smoke into the victim’s face, and eyes, at another occasion the appellant removed his cap, and looked the complainant in the eye, and yet on another occasion the appellant fell down while crossing the fence, and another asking the complainant to look at him and asking the boy to forgive him, and yet proceeding to threaten the boy with arrest and detention at a police station. The boy was observant, heard the appellant boast on phone that *“nimeshika Kanyanga”* to be sleep in cells that night. This gave the complainant adequate time to identify the appellant. They were just the two of them. There was no mistake. There was no need for an identification parade. The time being about 7.00 p.m. It is still dusk, and darkness would not have set in. It is immediately after the sun set, and one can clearly see.

I am therefore satisfied that the learned magistrate came to a correct finding that the complainant had ample time to recognize and did recognize the appellant, and being a sexual offence, there was no reason for corroboration as the evidence of the victim PW1 was entirely credible.

It was in addition corroborated by the evidence of PW5, the doctor. The boy did not hesitate once the appellant was fished from under the bed, to say *“this is the man who defiled me.”*

In the circumstanced the appellant was properly recognized by the victim, and the circumstances are corroborated by the evidence of PW2, PW3 and PW4. There was no necessity of calling other witnesses who were companions of PW3. These would not have added anything more to the evidence of PW3”.

With the exception of the sentence which we shall revert to herein shortly, we find nothing wrong with

the approach the learned judge took in re-evaluating and reanalyzing the record before him. It is appreciated that no case law was referred to but we find that the learned judge did not only bear in mind the correct principles of law applicable to the issues before him but also applied them correctly to the evidence adduced and drew out the correct conclusion on the issues under review before him.

As for the quality of the medical evidence and proper assessment of the age of the complainant, we take it from the court's reasoning in the case of **Basil Okaroni versus Republic [2010] Eklr** thus:

“The appellant has complained that he was not subjected to a medical examination to prove that there was a nexus between the appellant and the alleged defilement which was contrary to the provisions of Section 26 of the Sexual Offences Act which provides:

‘where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

In Geoffery Kionji vs. Republic Cr. Appeal No. 270 of 2010 this Court stated that the medical examination of the accused is not mandatory, and that the Court can convict if it is satisfied even on the victim's evidence alone that the defilement was perpetrated by the accused person”.

In **Criminal Appeal No. 504 of 2010 Kaingu Elias Kasomo vs Republic** this court stated thus:

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.

In the case of **Francis Omuromi Vs Uganda Court of Appeal Criminal Appeal No. 2 of 2000** it was held:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense”.

We fully adopt the above reasoning in the cited case as stating the correct position in law. We therefore agree with the submissions of **Miss Ngovi** that failure to carry out a DNA test on the appellant was not fatal to the prosecution case and that the age of the victim was properly assessed.

On identification, this court time and again has restated well known parameters on the acceptance or otherwise of evidence on identification as being water tight or otherwise. We find it prudent to set out a few by way of illustration.

In the case of **GEOFFREY CHEGE MWANGI VS. REPUBLIC CRIMINAL APPEAL NO. 92 of 2007 (UR)**the learned judges observed thus:-

“As this Court has emphasized times without number, evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. We cite only two decisions for illustration:

In **Wamunga v Republic [1989] KLR 424**, the Court stated thus:-

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.

Whenever the case against a defendant depends wholly or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

And in Kariuki Njiru & 7 others –vs- R- Criminal Appeal No. 6 of 2001, the Court reiterated:-

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error.”

Some measures for minimizing this danger have been suggested in various authorities and we take it from the case of Republic vs. Turnbull [1976] 2 ALL ER 549 at page 551, thus:-

“First, whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such warning and should make some reference to the possibility that a mistaken witness, can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?”

In MAITANYI VS. REPUBLIC [1986] KLR 198 the Court added that there is need for a court to make an inquiry as to whether:

“...the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to the police.....”

In line with the above principles we find that the two courts below correctly accepted the evidence on the identification of the appellant as the perpetrator because what the appellant has raised in his submissions as possible impediments to the victims correct identification of the assailant were not put to the victim in cross examination to test them. As such they were therefore not available for review by both courts below. We find these not only belated but also an afterthought.

As for witnesses not called, we agree that the witnesses appellant contends should have been called were mentioned in the course of the proceedings.

Section 143 of the evidence Act cap 80 L.O.K. provides:-

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

The predecessor of this court in Bukenya and others versus Uganda [1972] EA549 held inter alia thus:

1.

2. the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.

3. The court has the right, and the duty to call witnesses whose evidence appears essential to the just decision of the case;

4. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

In the light of the above principles, we find that although the trial magistrate gave no reasons as to why he found the prosecution’s evidence credible, the learned Judge gave plausible reasons as to why he believed the victim’s evidence and affirmed the trial magistrates findings that the appellant was the perpetrator of the offence charged. We therefore, agree with Miss Ngovi’s submissions and as correctly found by the learned Judge, that no miscarriage of justice was occasioned for the failure to call the mentioned witnesses who did not even witness the incident. Their testimonies would have been confined to the role played by them in assisting the victim to the police station, hospital and lastly the arrest of the appellant a role we find PW3 played very well.

As for the sentence we agree with the court’s reasoning in the case of **Basil Okaroni v. Republic [2016] eKLR** that sentencing under the S O A is pegged on the age of the victim.

We have already upheld the two courts below findings that in the circumstances of this appeal the victim’s age was properly assessed to be twelve (12) years of age.

We also appreciate that the offence appellant faced was not laid under section 162(a) of the Penal Code as an unnatural offence. It was instead laid under section 8(1) as read with section 8(3) of the SOA. The appropriate sentence for the offence so laid is prescribed in section 8(3) thus:-

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years”

In **Apoya versus Uganda [1967] EA 752** the predecessor of this court had this to say on maximum sentences:-

“It seems to us beyond argument the words shall be liable do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it.”

In the instant appeal the learned trial magistrate did not impose the prescribed sentence. He instead opted for a harsher one and gave his reason thus:

“The accused is not remorseful at all for the offence he committed. He defiled a boy child of 12 years in the pretense of “askari” thereby tainting the image of the police force. The boy child is no longer safe at the hand of such defilers as the accused. Deterrent sentence needs to be meted on such people to act as an example to other would be offenders. I proceed to sentence accused to life imprisonment though the law requires a minimum sentence of 20 years”

This is the sentence that was affirmed on appeal and which the appellant has invited us to interfere with. The state also concedes that we may interfere rightly so in view of the clear provision of law set out in section 8(3) of the SOA.

The approach we take is that taken by the court in **David Ndumba versus Republic [2013] eKLR** in which the following observations were made:

“The principles upon which an appellate Court will act in exercising its discretion to review

or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of *Ogolla s/o Owuor*. (1954) EACA 270 wherein the predecessor of this court stated:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factor. To this, we would add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case (*R-v- Shershowsky* (1912)CCA28TLR 263. See also in *Omuse – v- R* (supra) while in the case of *Shadrack KipkoechKogo –v- R. Eldoret Criminal Appeal No. 253 of 2003* the Court of Appeal stated thus:- sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that that a wrong principle was applied or that short of these, the sentence itself is so harsh and excessive and therefore an error of principle must be interfered (see also *Sayka –v- R* (1989 KLR 306”

In the case of *Keneth Kimani Kamunyu versus R.* [2006] eKLR it is stated that an appellate court can only interfere with the sentence if it is illegal or unlawful.”

The circumstances peculiar to this appeal that we need to bear in mind are that the appellant was a first offender and although the offence committed by him was serious both courts below had no mandate to ignore the clear provision of law on the appropriate sentence for the offence charged. In the result we uphold the dismissal of the appellant’s appeal against conviction by the High Court save for making a pronouncement that the conviction is in respect of the offence of defilement contrary to section 8(1) as read with **section 8(3) of the Sexual Offences Act No. 3 of 2006** and affirm it. We allow the appeal against sentence. We set aside the sentence of life imprisonment and substitute it with one of 20 years imprisonment. The sentence to run from the date of conviction by the trial court.

Dated and Delivered at Nairobi this 2nd day of August, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR