



IN THE COURT OF APPEAL  
AT NYERI  
(SITTING AT NAKURU)  
(CORAM: NAMBUYE, MWILU&KIAGE, J.J.A)  
CRIMINAL APPEAL NO. 366 OF 2012

BETWEEN

JOSIAH ZEDEC OGOLA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from the conviction and sentence of the*

*High Court of Kenya at Nakuru (Ouko, J.)*

*dated 28<sup>th</sup> September, 2012*

*in*

*H. C. CR. A. NO. 104 OF 2011)*

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**JUDGMENT OF THE COURT**

By this second appeal the appellant **Josiah Zedec Ogola** challenges the dismissal of his first appeal by the High Court at Nakuru (Ouko, J. as he then was) against conviction and a sentence of 20 years imprisonment meted on him by the Resident Magistrate at Nakuru for the offence of defilement of a child contrary to **Section 8(1)** as read with **8(3)** of the Sexual Offences Act, No. 3 of 2006.

The particulars of the charge were that *“on the 15<sup>th</sup> day of July 2009 at [particulars withheld] in Nakuru District within Rift Valley Province, the appellant unlawfully caused penetration with his genital organ, namely penis into [the] genital organ namely virgina (sic) of [SNN] (S) aged 14 years”*.

The fulcrum of the prosecution case was the testimony of S herself. She testified that on the material evening she was at her new place of work as a house help in the home of the appellant and his wife G (DW4), who was away from home having delayed and spent the night at *[particulars withheld]* where she had gone to collect clothes. The appellant took his 6 year old son into their shared bedroom while S washed dishes after dinner before sleeping in the sitting room. At about 10pm the appellant came into the

sitting room, removed his clothes, then entered her bed where he started fondling her breasts. She screamed once but he promptly covered her mouth, undressed her and had sex with her. When she asked him what he had done, the appellant apologized saying he did not know it would go that far, and promised to give her **“something small”** which she said she was not interested in and that she tell report him to Mama Junior (G).

The appellant returned to his bedroom and left her unable to sleep but in the morning she cooked the appellant tea and served him before going outside and borrowing a phone from a neighbour (PW4) with which she called her mother and reported the incident. S calls that neighbour “E” but the witness who testified to having been informed and requested to avail her phone was PW4 S W N (S). S heard S call her mother and request that she come and **“they meet at the gate since things had happened to her”** without giving further details. She took her phone back and did not follow up the issue.

PW5 A M (A) testified that she was a farmer and not employed. S was her 3<sup>rd</sup> born daughter born on 15<sup>th</sup> March 1994 as shown by the clinic attendance card. She stopped going to school having **“repeated class 5 thrice and surrendered.”** She had requested A to **“get her a course since she was bigger than her [fellow] pupils”**; but on 15<sup>th</sup> July 2009 she telephoned A crying and when the latter got to **[particulars withheld]**, she reported that her employer had defiled her. A reported to the security officer and was referred to Njoro Police Station where a P3 Form was issued and the two were referred to hospital where S was treated and the form duly filled. During that visit to the hospital, A saw S panty and they were blood-stained. This was also observed by Tabitha Ngugi (PW3) the clinical officer who examined S and found her to have a perforated hymen and inflammation of the vagina walls. She had tenderness and a whitish foul-smelling vaginal discharge but all tests proved negative and no pus cells or spermatozoa were seen. PW3 formed the opinion that S had been defiled.

The matter was investigated by PC Richard (PW5) who received S and A at the Njoro Police Station. After interviewing S and issuing a P3 form to her, he went to the appellant’s office in the company of two other officers and arrested him. The appellant led them to his house, described as **“three bed-roomed”**, where they saw and collected the complainant’s clothes which they inventorized, including the blood-stained panty.

When placed on his defence, the appellant gave sworn testimony in which he denied the charge leveled against him. He stated that on the material evening he came home from work and found S in the company of a gentleman the appellant recalled as the one who had come with her the first day she started working at the appellant’s house. The appellant left them in the living room of his one-bed roomed house as he went into his bedroom to change clothes. When he had changed, both S and the man had left but she returned shortly afterwards. After the usual motions of dinner, the appellant retired to bed and left S watching some soap opera on television with the appellant’s sister-in-law S M (S), who testified as DW3. In the course of the night the appellant’s son was brought into the bedroom while the two girls shared a bed in the sitting room.

Nothing unusual happened in the night and come morning the appellant found breakfast already prepared and left on the table, which he took but on calling S he received no response. The backdoor was open and a neighbour informed him that S had left the house. The appellant took his son to school and went to work where he was picked up by some 3 police officers at about 3.30pm on suspicion of defilement. He was taken to his house and later to Njoro Police Station where he was charged with the offence. While at the police station he received word from his wife that S’s mother had demanded some Kshs. 50,000 in order to drop the charge against her, which he did not agree to.

The appellant called three witnesses. The first was his immediate neighbour of a year and five months, M. He knew where the appellant lived and with whom. M testified that on 14<sup>th</sup> July 2009 he came home early at about 2.00pm and saw S in the appellant’s house with a young man with whom she left and returned a few minutes after 5pm, still with the man, and with the appellant’s son. They all stayed in the house until after the appellant arrived when S left with the young man. In the night M did not hear anything unusual in the appellant’s house and he did see S leaving through the gate, the following morning at about 7.00am.

Later, at about 2.00pm, M saw some 3 police officers come and enter the appellant's house in his and S's company. She showed the police some bed sheets which they took with them. He mentioned a demand for Kshs. 50,000 made by one of the police officers for the dropping of the case against the appellant. M essentially vouched for the character of the appellant.

Also testifying for the defence was S M M (DW3) who is G's sister. She swore that she slept with S in the sitting room on the material night who regaled her with stories on how she knew the appellant's father to be a professor and also how she would do all she could to enable her mother to buy a plot at **[particulars withheld]**. S saw nothing unusual that night as they slept between 9pm and 6.00am the next morning. She was also present when the police came and enquired whether the bed sheets S slept on were bloodstained.

The last defence witness was G and she confirmed that when she hired S, she came in the company of a young man called N whom she introduced as her cousin. She was away at **[particulars withheld]** on the material night but received a call on 14<sup>th</sup> July 2009 from the appellant reporting that S had left. When she got home she met S and M and then shortly the police came with the appellant and S in the company of her mother. The police took the bed sheets and when she followed them to Njoro Police Station where they took the appellant, one of them asked for some Kshs. 50,000 to be given to S's mother to secure the appellant's freedom. They could not, and did not raise that money.

Both the trial court and the High Court believed the prosecution version of these competing narratives, the one convicting the appellant and the other confirming that conviction and that provoked the present appeal. In his self-crafted Supplementary Memorandum of Appeal, the appellant raises the following grounds;

- “1. That the appellate court erred in law by accepting the age of the complainant and yet the required documents to ascertain the age of the minor was not produced in court.**
- 2. That the appellate court erred in law by accepting that the blood stain which was in evidence no. 3 (panty) were human blood yet the DNA was not done to prove the same.**
- 3. That the appellate court erred in law by rejecting my submission that the complainant was not able to identify and produce exhibit no. 3 which is trite law.**
- 4. That the appellate court erred in law that corroboration is not required which contravenes section 124 of the evidence act cap 80 laws of Kenya.**
- 5. That the appellate court erred in law by holding that the prosecution had proved an offence of defilement contrary to section 8(1) of the sexual act no. 3 (sic) of 2006 whereas the state counsel had disapproved that defilement was not proved beyond reasonable doubt”.**

Arguing the appeal, the appellant contended that S's age alleged to have been 14 years was not properly proved as no birth certificate was produced. In response to this submission, Miss Owino, the learned prosecution counsel was of the view that age need not be proved by way of a birth certificate and she cited in aid a recent decision of this Court's sitting in Kisumu namely **BASIL OKARONI vs. REPUBLIC** [2016]eKLR. She did concede, however, that as a matter of arithmetic given that S is said to have been born on 13<sup>th</sup> March 1994 according to her mother A, she was 15 years and 4 months old at the time of the alleged offence and not 14 years old as the outpatient card, P3 form and charge sheet indicated.

The appellant next assailed the evidence of the panty which was produced as Exhibit No. 3. He questioned the evidence of PW5 to the effect that he found it in the appellant's house alongside other clothes which he collected yet A and the clinical officer stated that S had it on when she was taken for medical examination. Indeed, the same investigating officer later stated that he retained the same panty after S was examined by the clinical officer. All this prompted the appellant in his submissions to wonder about its mobility with the question: **“why is this exhibit moving around?”**

Ms. Owino's response to this line of submission was the contention; unsupported by any evidence on record, that "***it is possible she [S] may have changed***" after the concession that it was not clear that the panty was one and the same especially in the contractions pointed out by the appellant regarding its colour witnesses having variously described it as green, yellow or cream.

The appellant next argued that S's claim that she started itching immediately after the alleged defilement proved that she cannot have been defiled by the appellant as no itch could develop immediately. He added that the clinical officer having found no pus or spermatozoa but only a vaginal discharge, there was no evidence tendered in proof of the alleged penetration, and by him at that, without any tests having been conducted on him. To this Miss. Owino, though conceding that an examination ought to have been done on both Se and the appellant, nevertheless maintained that the failure to do so was not fatal to the prosecution case.

The appellant finally attacked S's history and antecedents as not inspiring confidence as a witness of truth. He questioned why S had been employed in 3 homes within the span of 20 days between June and July 2009 leaving unpaid at the first in Nairobi, and being abused by the second in Nakuru. He contended that the medical evidence of penetration may well have been the result of sexual abuse by the 2<sup>nd</sup> employer and not the appellant.

It is noteworthy that the points raised by the appellant had been cited as the basis for the concession of the appeal by the prosecuting counsel before the High Court. That notwithstanding, Miss Owino opined that the offence against the appellant was properly and fully proved. She thus prayed that the appeal be dismissed.

This is a second appeal in which by statutory limitation we have jurisdiction over matters of law only (**Section 361 Criminal Procedure Code**). Accordingly, we are slow to interfere with concurrent findings of fact by the two courts below. We are however also cognizant that the deference paid to those findings is premised on the 1<sup>st</sup> appellate courts having conscientiously conducted its duty to re-appraise, re-evaluate and re-analyze the entire record of the evidence in a fresh and exhaustive manner and arrived at its own independent conclusions on the guilt of the appellant. It is a solemn duty and one that the appellant is entitled to demand and expect. See **OKENO Vs REPUBLIC** [1972] E.A. 32, **PANDYA Vs REPUBLIC**[1975] EA 336. Where it is alleged that the duty was not properly or at all discharged, as where an appellant complains that there were glaring contradictions and inconsistencies in the prosecution case which the first appellate court either did not notice at all or failed to resolve them in the appellant's favour, it becomes a matter of law falling for our consideration. Thus even though we are generally bound by concurrent findings of the two courts, we can and must interfere with them if they are shown not to be based on evidence (**THIONGO vs. REPUBLIC** [2004] 1EA 333) or are clearly wrong, perverse or unsupportable. See also **DZOMBO MATARA vs. REPUBLIC** [2010] eKLR.

Bearing those principles in mind, we must state that this matter has given us some anxiety. Whilst we take a very serious view of sexual offences against innocent minors by predatory adults, we must at the same time be resolute in insisting that convictions and punishment be based on clear evidence that meets the threshold of proof beyond reasonable doubt. That is a basic and inflexible tenet of our criminal jurisprudence without which much injustice would be wreaked. In the present case, we are most uneasy with the quality of the evidence that the two courts used to found and uphold the appellant's conviction. Right from the question of S's age, it seems quite obvious that the prosecution was determined to show that she was younger than she actually was. The charge sheet, the initial treatment cards and the P3 forms all reported the age of 14 years yet, from her mother's evidence S was 15 years and 4 months old. We found it puzzling that S herself could not tell her own age. This apparent attempt to manipulate S's age is a matter of concern considering that, as was stated in **KAINGU ELIAS KASOMO vs. REPUBLIC**;

**“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 case 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.”**

There is also the admitted contradictions revolving around S's panty. It is not at all clear whether S wore it after the alleged defilement. There is conflicting evidence as to whether it was collected from the appellant's house the following day as part of the bundle of clothes that was produced by the investigating officer or whether she had it on when she went for medical examination. Indeed, we find it quite curious PW5's evidence in cross examination that;

**“The complainant was putting on the panty produced as prosecution exhibit no. 3 when she was examined by the doctor, I retained the pant.”**

If that panty, the colour of which the prosecution witnesses do not even seem to be agreed on, was an important piece of evidence, we respectfully find the manner in which it was handled with the chain of custody either nonexistent, broken or unknown, to have been too careless to form basis for a finding of guilt. At any rate, the whole issue of its being blood-stained was left hanging in that the appellant's suggestion in cross-examination of A that the stains could have been from S's menses was not explored and satisfactorily excluded. Further doubt was cast on it by the apparent absence of any blood stains on the bedding and bundle of clothes produced as exhibits by the prosecution. These contradictions and the lack of clarity were acknowledged by Ms. Owino who attempted to explain from the Bar, without evidence, that it is possible S may have changed the panty. Moreover, this directly contradicted the evidence of PW5, the investigating officer.

The prosecution also failed to explain and exclude the possibility that any sexual activity involving S may have been by the boy named N or by her immediate former employer. Both of these possibilities were put to the prosecution witnesses by the appellant's counsel during cross-examination but no effort was made to rule them out. Indeed, Miss Owino conceded that tests should have been done on the appellant and samples taken from him. Indeed, although no spermatozoa were found in S, an attempt should have been made to investigate the presence of any emission from him.

It seems to us, from an anxious and careful consideration of the record, that both courts below first accepted the prosecution evidence as true and then proceeded to examine the evidence of the 4 defence witnesses and show that it was lacking in credibility. With respect, that was the wrong approach. The duty always remains on the prosecution to prove their case beyond reasonable doubt. The person accused bears no burden to prove anything. He could well remain silent. In the present case the appellant testified on oath and called 3 other witnesses. He did not have to prove his innocence and it was enough that his evidence raised a reasonable doubt. The defence need not be proved to be true so long as it was plausible. It would be another matter altogether if the defence raised an obvious lie, which was not the case herein. It would seem that the two courts weighed the two narratives and preferred the prosecution version over the defence's as if on a balance of probabilities, a contest of believableness. In this they erred.

In the final analysis we think that the prosecuting counsel who appeared before the High Court gave cogent reasons as to why the conviction of the appellant was unsafe and unsupportable. The appeal before us therefore succeeds and is allowed. We are not persuaded that the conviction was safe. The conviction is accordingly quashed and the sentence set aside.

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Nakuru this 2<sup>nd</sup> 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**