



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE, MWILU, & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 239 OF 2011

BETWEEN

SAMWEL MBUGUA KIHWANGA.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal against Conviction/Judgment of the High Court of Kenya at Nakuru (Emukule J.)dated 18th July, 2011

In

Nakuru H.C. CRA. NO. 216 OF 2010)

JUDGMENT OF THE COURT

The appellant **Samwel Mbugua Kihwanga** was arraigned before the Senior principal Magistrate's Court at Naivasha on two counts of defilement contrary to **section 8(1)(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars for count 1 were that on the 17th day of December 2009 at about 10.30 am at **[particulars withheld]** village within Nyandarua South District Central Province he did cause his penis to penetrate the vagina of **G W W**, a girl aged 9 years. Those for count II were that on the same date and place he did cause his penis to penetrate the vagina of **D W N**, a girl aged 9 years. The appellant also faced alternative counts of indecent act contrary to **section 11(1)** of the **Sexual Offences Act No. 3 of 2006** in that on the same date place and time he did commit indecent act with **G W W**, by touching her vagina and **D W N**, also by touching her vagina.

The appellant denied all the counts prompting a trial in which the prosecution called six (6) witnesses to prove its case. In summary, the prosecution contended that on the 18th December, 2009 the appellant who was a neighbor and well known to the minor complainants lured them to his house within the same compound. While in the house he threatened to kill them if they screamed or told anyone. He then made them stand against the wall one after the other as he knelt down and defiled them in turns. Each felt pain in the process. He gave them little coins probably as a sign of appreciation.

It is **G W W.** who broke her silence when she disclosed to her mother **E PW2** what had transpired. **PW2**, in turn informed the mother of **D W N**. The matter was then reported to the police and booked in the **OB**. The appellant who had allegedly fled the place was arrested four days later on 23rd December 2009 at **Ndunyu Njeru** shopping Centre and handed to **Cpl. Angela Mwikali**, **PW6**. **PW6** placed the appellant in the cells and issued the minors with **P3** forms and referred them to the hospital where they were examined by **Dr. Peris Njiiri**. The findings were that the minors' hymens were broken but their genitalia were normal. Both were aged nine years. The filled **P3** forms were later produced in evidence as exhibits.

When put to his defence the appellant denied the offence alleging that he had been framed because his love affair with **E** had gone sour.

At the close of the trial the learned trial magistrate **T.W.C.Wamae SPM** found the prosecution case proved to the required threshold, found the appellant guilty as charged on both counts, convicted him and sentenced him to serve thirty (30) years imprisonment on each count, the sentences to run concurrently.

The appellant was aggrieved and he appealed to the High Court raising various grounds. In a judgment dated the 15th day of July 2011 **Emukule J.** dismissed the appeal against conviction but interfered with the sentence imposed by setting aside the thirty (30) year sentence and substituting it with life imprisonment.

The appellant is now before us on a second appeal raising these six (6) grounds of appeal;

1. **That the learned trial magistrate and 1st appellate judge erred in law by overlooking the fact count one lists the complainant as one G W W and its alternative count as C W C hence the charges were poached and fabricated (see Judgment).**
2. **That they erred in law in disregarding the fact that my fundamental rights as enshrined under article 49(1) f (1)(11) Constitution were violated.**
3. **That they erred in law by overlooking the various inconsistencies inherent in the prosecution case.**
4. **That they erred in law in overlooking the fact that some of the named essential witnesses were not availed in court to give evidence.**
5. **That they erred in law by failing to consider the existence of a grudge between PW2 and PW1 which activated her into fabricating these shameful allegations against me.**
6. **That the prosecution failed to prove prima facie case against me.**

The appellant, who appeared in person, handed in typed written submissions which he adopted as his submissions before us and urged us to evaluate them. We have done so. We find that in them the appellant contends that the enhancement of the sentence by the learned Judge was unlawful first because it was done without the learned Judge administering a warning to the appellant that the sentence could be enhanced if the appellant elected to pursue his appeal. It also went beyond the maximum sentence provided for an offence laid under **section 8(1) and 8(3)** of the **Sexual Offence Act No. 3 of 2006** of not less than twenty (20) years.

On the role of first appellate court, the appellant contended that the learned Judge failed to discharge his mandate of re-evaluating and reassessing the record properly because had he done so he would have noted that the appeal before him was incompetent as the same was filed beyond the fourteen 14 days permitted by law and without obtaining necessary leave of court and it should have been rejected under **section 352** of the **CPC**; that the charge sheet was defective as the offence was not properly framed; that the investigations were shoddy; that there were unreconciled contradictions both in the medical evidence as well as the testimonies of the alleged victims which would have rendered the prosecution evidence worthless and could therefore not support the appellant's conviction.

The appellant also raised complaints about the learned Judge's failure to interrogate why the report of the alleged commission of the offence was not immediately made to police or why it took almost a week for the victims to undergo medical examination and lastly that his defence was not given adequate weight.

In response to the appellant's submissions, **Miss Rugut D.C.**, the learned Senior Prosecution Counsel (SPC) urged us to dismiss the appeal on the grounds that the enhanced sentence was the lawful one that the trial court ought to have handed out. She conceded that no caution or warning was given to the appellant before the sentence was enhanced as per case law practice but no prejudice was occasioned to the appellant as the caution or warning is not anchored in written law.

As for alleged defects in the charge sheet and medical evidence with regard to the age of the victims and their particulars, counsel urged that there were none or otherwise any such alleged defects are curable under **section 382** of the **Criminal Procedure Code**. The ages of the victims were properly determined by information from their mothers and by the medical officer who carried out the assessment and tendered in the P3 forms in evidence. Moreover, the appellant's belated complaint is ungrounded as he never raised any objection when the medical evidence was tendered.

Learned counsel asserted that the defence was considered and rightly rejected because the only complaint raised by the appellant was that no explanation was given as to why it took five (5) days from the date of the incident to have him arrested, which was explained by the evidence adduced that he disappeared from the area.

In reply to the respondent's submissions, the appellant reiterated his written submissions that the lawful sentence for the offence laid was twenty (20) years and not the enhanced sentence; the glaring contradictions in the medical reports and the evidence indicate clearly that the information relates to different persons; and that discrepancies which went to the root of the prosecution case were never reconciled. He maintained that his defence was plausible as the mother of one of the complainants **Esther PW2** was his lover and had fabricated the case to fix him because their relationship had gone sour.

By dint of **section 361** of the **Criminal Procedure Code**, this Court on second appeal is restricted to matters of law only. 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 **Karingo versus Republic [1982] KLR 213 at page 219** where this Court stated;

“A second appeal must be confined to points of law and the Court of Appeal will not interfere with concurrent findings of fact of the two lower courts unless they are shown to have not been based on evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did”

We have examined the totality of the record in the light of the rival arguments set out above. In our view, three major issues emerge for our consideration namely:-

1. Whether the appellant's appeal to the High Court was competent.
2. Whether the High Court exercised its appellate mandate judiciously.
3. Whether the enhancement of the applicant's sentence by the High Court was legal.

We make no findings on issue number 1 as it was never raised in the grounds of appeal and was rightly not responded to by the State.

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".

The inconsistencies the learned Judge failed to reconcile relate to the discrepancies in the names of the complainant as given in count 1 and the attendant alternative charge the evidence and the medical documents.

In count 1 she is described as G W W, while in the alternative count as G W W. In the evidence E her mother refers to her as G W; in the P3 she was described as G N W. In the PRCI form as W G. In a receipt as G N W; in the laboratory request and report form as G W. Lastly in the general outpatient record sheet as G M. W. The appellant's contention with regard to these inconsistencies is that there is doubt as to whether all the names refer to one and the same person as the complainant in count 1. Further that once discounted the offence in count 1 falters.

The second complaint related to inconsistencies in the date the alleged offences took place. Both the main counts and their attendant alternative counts indicate the 17th day of December, 2009 as the date on which the alleged defilements took place. The two complainants, who gave their names as G.W. for count 1 and D.W. for count II gave the dates of 17th and 18th December, 2009 as the dates when they were defiled by the appellant. D.W. the complainant in count II never mentioned having been repeatedly defiled by the appellant since August 2009. Neither did G.W. mention in her testimony that it was on the 22nd day of December, 2009 when she was defiled and then reported to her mother on the same date.

In contrast with the above versions, Esther PW2, who was the mother to **G W**. stated in her testimony that it was on the 22nd day of December 2009 when her daughter **G W**. reported to her that she had been defiled by the appellant.

It is the appellant's contention that in the light of the above it is doubtful whether the alleged defilements ever occurred as charged and second any defilement occurred on the 22nd day of December 2009, and if so by whom as he was never charged with any defilement that occurred on the said date.

We have revisited the record and find that what the learned judge was confronted with in terms of grounds of appeal were nothing but a plea in mitigation vide which the appellant pleaded for the reversal of the custodial sentence to a non-custodial one on account of him having reformed. In declining to carry out an in depth re-evaluation of the evidence the learned judge *inter alia* made the following observations:-

"Secondly the duty of this Court is to examine and re-evaluate the evidence adduced before the lower court, and make and draw its findings and conclusions.

I have examined the evidence before the lower court, and there is no doubt that the prosecution proved its case beyond reasonable doubt. In any event arising from the appellant's own statement, owning up to the offence and a promise to henceforth lead a progressive life – that is to say a life without crime, there is no further need to examine that evidence in detail."

We have no doubt that this is the reason why the learned judge in his wisdom stated that there was no need for him to examine the record in detail on account of the nature of the grounds of appeal that were before him. The question we have to answer is whether the appellant is entitled to take a different stand from that which he had taken earlier on before the High Court. Our response is in the affirmative. Reason being that the mandate of a first appellate court as reiterated in the **Kiilu and another versus Republic case** (supra) was that the learned judge ought to have subjected the record before him to a fresh

reappraisal and re-evaluation to determine whether the conclusions reached by the trial court were based on evidence irrespective of the grounds of appeal then raised before him especially in a matter where, like in the instant appeal the appellant was unrepresented. We make no hesitation in finding that the learned Judge abdicated his role and the appellant is therefore justified in requesting us to intervene.

In deciding either way we have to bear in mind the caution set out above that we can only interfere with the concurrent findings of fact by the two courts below only where there is demonstration that these were based on no evidence.

The appellant's attack on the findings of the two courts below is that they failed to reconcile inconsistencies outlined above in his favour. In **Joseph Maina versus Republic Criminal Appeal no. 73 of 1993** the court held *inter alia* thus:-

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code this whether such discrepancies are so fundamental as to cause prejudices to the appellant or they are inconsequential to the conviction and sentence.”

In the instant appeal the inconsistencies outlined above are fundamental. Our reason for saying so is that once there is doubt as to whether the different names stated above related to G.W. the charge(s) in respect of G.W could not be sustained. Second the date of the alleged offence(s) was also fundamental because if the victims gave two dates and only one was indicated in the charge sheet there ought to have been explanations as to why the prosecution chose not to include the defilements that occurred on the second date. Further it was necessary to determine whether the offences occurred on the date indicated on the charge sheet or as put by Esther on 22nd December, 2009. The failure to so reconcile the above inconsistencies no doubt caused a miscarriage of justice to the appellant as these raised a doubt as to the appellant's commission of the alleged offences. In addition to the above it was mandatory for the two courts below to determine the practicability of the appellant defiling the minors while they were in a standing position and he in a kneeling position. This also creates a further doubt in the commission of the alleged defilements by the appellant as it is simply not practicable.

The above doubt is sufficient to dispose of the appeal in favour of the appellant. However since the issue of enhancement of sentence was argued we find it prudent to make a pronouncement on it. The approach we take is that taken by the court in. In **Macharia versus Republic[2008] IKLR (92 F) 117** the court held, *inter alia*, that:-

“The appellate Court does not alter a sentence on the mere ground that if a member of the Court had been judging the appellant they might have passed a somewhat different sentence”

In **Josea Kibet Koech versus Republic[2019] eKLR** the Court in reversing the High Court in similar circumstances had this to say:-

“The learned Judge may be entitled to condemn the manner the offence was committed but in view of the foregoing we agree with Mr. Omulele submissions that as there was no notice to enhance the sentence then what the learned Judge did was without jurisdiction”.

In **JJW versus Republic[2013] eKLR** the Court further added the following observations:-

“In this appeal the prosecution did not urge enhancement of service and did not file cross appeal to that effect. The court did not warn the appellant of that possibility or in any case there is no record of such a warning if any not stand, yet all of a sudden, in the judgment, the learned Judge enhances the sentence from seven years to ten (10) years. The need for prior information to be given to the appellant in such a situation is to enable him to prepare and argue his side of the case as regards such intended enhancement. In this case, the enhancement of the appellant's sentence to ten (10) years was done without affording him opportunity of persuading the court against such a proposal. We have perused the memorandum of appeal that was before

the first appellant court and we note that save for a small part in passing, the appellant did not specifically appeal against sentence in that court and hence the need to inform him of the possibility of enhancing the sentence.”

From the observations of the court in both the **Josea Kibet Koech** case and **JJW case** (supra) the obligation on an appellate court to fore-warn or caution an appellant before enhancing a sentence imposed against him by a trial court is not anchored on any law but in practice that has now gained such notoriety that it is proper that an appellant be warned of the consequences of proceeding with his appeal in circumstances where so proceeding may likely result in the sentence being enhanced to his disadvantage. It is simply to enable him weigh the options available and then make a decision that suits his best interests, especially in circumstances where, like in the instant appeal, an appellant is disadvantaged for not being schooled both in the law and legal procedures he may be confronted with during the course of the trial of his appeal. In this regard we find that the learned Judge fell into error when he enhanced the appellant’s sentence in the manner done. We would not have hesitated to interfere with it if the conviction had been soundly arrived at.

The upshot of the totality of the above is that we allow the appeal in its entirety, quash the conviction, set aside the sentence and order the appellant to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nakuru 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