



IN THE COURT OF APPEAL

AT NYERI

SITTING IN MERU

(CORAM: GITHINJI, KARANJA & KIAGE, J.J.A)

CRIMINAL APPEAL NO. 29 OF 2015

HASHON BUNDI GITONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court at Meru (Wendoh J) dated 13th March, 2015

in

H.C.C.R.A. NO. 97 of 2012)

JUDGMENT OF THE COURT

Hashon Bundi Gitonga ('the appellant') was charged in the Principal Magistrate's Court at Marimanti with the offence of defilement contrary to **Section 8 (1) (2) of the Sexual Offences Act, No. 3 of 2006**. The particulars are that the appellant on 2nd February, 2012 at [Particulars withheld] Sub-location, Marimanti Location in Tharaka South District within Eastern Province, intentionally caused his penis to penetrate the vagina of H.K. (name withheld) a child aged ten (10) years.

He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act, No. 3 of 2006**. The particulars are that the appellant on 2nd February, 2012 at [Particulars withheld] sub-location, Marimanti location in Tharaka South District, within Eastern province intentionally touched the buttocks, breasts and vagina of H K a child aged 10 years.

In the first instant after the charges were read over to the appellant, he admitted the charges and the case was adjourned to enable the prosecutor to present the facts on a subsequent date. When the facts were read over to him later, the appellant disputed them and the court consequently entered a plea of 'not guilty' on both charges.

When the matter came up for hearing on 8th March, 2012, the prosecutor introduced an amended charge sheet in which another count of assault causing actual bodily harm contrary to **Section 251 of the Penal**

Code, was added. The particulars of the additional charge were that the appellant on 2nd February, 2012 at [Particulars withheld] Sub-location, Marimanti location in Tharaka South District within Eastern province, assaulted H K thereby occasioning her actual bodily harm.

A brief recapitulation of the facts as presented by the prosecution was as follows:-

H K (PW1), after being subjected to a *voire dire* examination, testified on oath. She told the court that on 2nd February, 2012 at around 8:00 p.m, the appellant found her collecting firewood opposite his place of employment. He was a watchman at Kathima Marimanti Academy. The appellant pulled her into a nearby bush, removed her clothes and proceeded to defile her. When she attempted to scream for help, he held her by the throat and put his fingers in her mouth to keep her quiet. At one point, he even bit her lip. After defiling the girl he poured soil into her genitalia. When another watchman, **Daniel Kirema** (PW2) was attracted by a scream in the bush, he found the appellant on top of H K PW2 was able to recognise the appellant since in addition to moonlight he was carrying a torch. PW2 alerted **Mwikamba Mitambo** (PW5) who was walking by as to what was happening in order to help H K and apprehend the appellant who was armed with a club. The appellant, on seeing the two men, ran away.

In the meantime, (PW3) H K's mother, went home from her place of work and found her daughter missing, and went out to look for her. She met PW2 and PW5 who had the complainant in their company. PW2 explained to PW3 what he had witnessed. PW3 examined her daughter and found that the child could not walk properly and had blood and soil on her vagina. On the way to hospital they came across the appellant who was still carrying the club. The appellant was arrested and together with H K., was taken to the police station.

No. 93414 PC (W) Robina Oyier (PW7) escorted both the complainant and the appellant to Tharaka District Hospital for the complainant to be treated. The doctor confirmed that H K had indeed been defiled. **Dr. Felix Oindi** (PW4), who produced the P3 form testified that the complainant had bruises on the neck area and a bite wound on the lip; there were lacerations on H K's vaginal wall and the hymen was perforated; and that spermatozoa was present after a vaginal swab was done. It was concluded that H K had been defiled.

When placed on his defence, the appellant by way of unsworn testimony denied having committed the offence. He claimed that on 2nd February, 2012, he was unwell and went to hospital. On his way home he met a young man whom he stayed with until around 8:00 p.m when they parted ways. On his way home, he met with a mob that arrested him accusing him of having defiled a child and took him to the police station.

Following the trial, he was found guilty and convicted on the main charge of defilement under **Section 8 (2) of the Sexual Offences Act**, and sentenced to life imprisonment and on the second offence of assault to six months, with the sentences running concurrently. Dissatisfied with the decision he appealed to the High Court at Meru, where upon re-evaluation and re-analysis of the evidence, Wendoh J determined that the age of H K had not been conclusively proved. Since the learned Judge was satisfied that H K had been defiled by the appellant, she invoked the provisions of **Section 186 of the Criminal Procedure Code (CPC)**, which provides as follows:-

“186. When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.”

On this basis the learned Judge convicted the appellant of the offence of rape under **Section 3 of the Sexual Offences Act** as read with **Section 186 CPC**. The learned Judge quashed the conviction for assault contrary to **Section 251 of the Penal Code** and set aside the sentence. On the main charge, Wendoh J upheld the sentence of life imprisonment.

The appellant now appeals to this Court on the grounds that: *the learned Judge erred in law by*

sentencing the appellant without independent and sufficient evidence from the witnesses; that the learned Judge erred in law and fact by convicting the appellant on the evidence of identification and/or recognition and failed to note that conditions were not favourable for identification; that the learned Judge erred in law and fact in declining to attach weight on the appellant's evidence; the learned Judge erred in law by failing to find that there was an error by the trial court allowing evidence of previous proceedings to be produced which was prejudicial to the appellant; and the learned Judge erred in law by relying on clinical officer's evidence without sufficient proof of truth.

When the appeal came up for hearing, the appellant opted to proceed by way of written submissions which he tendered to Court. He expounded on his grounds of appeal in these submissions and urged us to allow the appeal, quash the sentence and set him free.

Mr. A. Musyoka, learned prosecution counsel appearing for the respondent opposed the appeal. Counsel submitted that the appellant was known to H K who positively identified him as her attacker. PW2 also found the appellant on top of H K and he too knew the appellant. PW2 was able to identify the appellant as he was standing only 1 ½ metres away from him and assisted in his arrest. Counsel submitted that the appeal lacked merit and ought to be dismissed.

This being a second appeal, the jurisdiction of this Court is as prescribed by **Section 361** of the **CPC**, and succinctly expounded by this Court in a long list of authorities. In **Njoroge -vs- Republic [1982] KLR 388**, at page 389 this Court held that:

“..On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence. See M’Riungu -vs- Republic [1983] KLR 455.”

Only points of law call for our determination in this appeal.

The appellant has raised an issue that the learned Judge erred in convicting him without independent and sufficient evidence from the witnesses. As a general rule of evidence under **Section 124 of the Evidence Act**, an accused person is not liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to this section makes an exception in sexual offences and provides as follows:-

“Provided 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.”

See: **Stephen Nguli Mulili v Republic, Criminal Appeal 90 of 2013 [2014] eKLR.**

Also under **Section 143 of the Evidence Act** no particular number of witnesses is required for the proof of any fact. In the instant case, there are several witnesses whose evidence corroborated each other. The evidence of the complainant H K is corroborated by the evidence of PW2, PW3, PW5, PW6 and the medical evidence of PW4. This is in regard to the sequence of events from the time of H K's defilement to the appellant's arrest. Both courts below made concurrent findings to the effect that the complainant was a truthful witness, and believed her evidence. The two courts below also believed the evidence of the other witnesses, and found it credible. It was the finding of both courts below that H K's identification/recognition evidence was corroborated by that of PW2. The appellant was not only identified but recognised by the two witnesses.

It is trite law that recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. See: **Anjononi & Others v Republic [1980] KLR 59.**

H K had spoken to the appellant before and knew him as a watchman of Kathima Marimanti Academy.

PW2 worked with the appellant and was therefore able to identify him easily as H K's assailant.

We must ask ourselves at this juncture whether the appellant has established good reasons to convince us to depart from the concurrent findings of the two courts below. As this Court has stated often times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are 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 v. R [1984] KLR 611** and **Kaingo v R [1982] KLR 219**.

We have re-examined the evidence presented before the trial court and the reasons given by the first appellate court in upholding the trial court's conviction. We see no reason whatsoever for us to depart from those findings. The two courts did not consider any extraneous matters, nor did they omit to consider any important aspects of the evidence, or the law. We have no grounds at all to allow us to interfere with these findings. The evidence against the appellant, in our considered view, was water-tight. It was corroborated, consistent and sufficient to support the conviction.

On the alibi defence raised by the appellant, we find that the two courts below also arrived at the correct finding to the effect that the evidence of the complainant and the other eye witnesses had dislodged the appellant's alibi. His defence was a mere denial, and a vague attempt at the defence of alibi. In the case of **Victor Mwendwa Mulinge V R [2014] eKLR** this Court rendered itself on the issue of alibi and held:-

“It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see KARANJA V R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”

We find that the prosecution dislodged the appellant's defence and proved beyond reasonable doubt that it was indeed the appellant who had defiled the complainant.

This brings us to the last issue pertaining to the age of the complainant. When addressing this issue, Wendoh J pronounced herself as follows:-

“The charge reads that the complainant was aged 10 years. In the voire dire examination, PW1 said she is 12 years but in her testimony, she said she is 10 years old. She did not tell the Court when she was born and there was no documentary evidence in the form of a birth notification or birth certificate produced in evidence, or age assessment done by an expert. It is not enough for the doctor to state in the P3 what the age was. The result is that PW1's age was not proved and hence one of the ingredients of defilement under section 8(1) as read with section 8(2) was not proved.”

On this issue we add that we also observed from the proceedings, that no evidence was led from the complainant's mother as to the age of her daughter. This was clearly an oversight on the part of the prosecution, as no attempt was made to resolve the contradiction in respect of the complainant's age. Was she twelve years old as she stated in her *voire dire* examination, or was she ten (10) years old, as she stated in her evidence in chief? We reiterate however this lack of proof of the proper age does not impugn a conviction. It only determines the sentence as the sexual offences Act provides for different sentences for different age bands.

This Court discussed this issue in the case of **Stephen Nguli Mulili v R, Criminal Appeal 90 of 2013 [2014] eKLR** and most recently in **Evans Wamalwa Simiyu v Republic, Criminal Appeal No. 118 of 2013 [2016] eKLR**. In **Tumaini Maasai Mwanja v R, Msa Criminal appeal No. 356 of 2010** (unreported), this Court pronounced itself as follows:-

“...proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age.”

This statement was further expounded by the Court in **Evans Wamalwa Simiyu** (supra) which we quote in extensor for its relevance in the present case.

“[16] Thus in relation to the appellant’s case proof of age was relevant at two levels. First, to establish that the complainant was under the age of 18 years and therefore a child; and secondly, to establish that the complainant was between the age of 12 and 15 years such as to bring the sentence of the appellant, if convicted, within the minimum provided under section 8(3) of the Sexual offences Act.

[17] In this regard the evidence before the trial court was that of the complainant who stated during her voir dire examination that she was 12 years old. Her evidence was corroborated by PW5 who examined the complainant and filled the P3 form, which was produced as an exhibit and which stated the complainant’s age as 12 years. Although no age assessment report, nor a certificate of birth or baptism certificate was produced in proof of complainant’s age, the fact that the trial court found it necessary to carry out a ‘voir dire’ examination to determine whether the complainant understood the nature of an oath or was of sufficient intelligence to understand the importance of speaking the truth, is a clear indicator that the trial court formed the impression that the complainant was a child of tender years, and therefore the fact of her being under eighteen years of age was apparent. Indeed section 2 of the Children Act define “age” as meaning apparent age in cases where actual age is not known. Thus we are satisfied that there was ample evidence before the trial court, to show that the complainant was under 18 years of age and we have no hesitation in finding that for the purpose of establishing the offence of defilement the complainant was established to be a child.

[18] As to whether the appellant’s age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant’s mother did not offer any useful evidence in this regard as she did not say anything about the complainant’s age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children’s Act “age” where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus although the actual age of the minor complainant was not established, the apparent age was established as 12 years. This means her actual age was less or more and this was sufficient to bring the complainant within the age bracket of 12 – 15 years or the purposes of the penalty under section 8(3) of the Sexual Offences Act.”

This case falls on all fours with the Wamalwa case above. Whereas the learned Judge made the correct finding to the effect that the prosecution failed to establish the complainant’s actual age, it was clear that the complainant’s age was somewhere between 10 years and 12 years. The learned Judge did not need to call in aid the provisions of **Section 186 of the Criminal Procedure Code** in order to sentence the appellant. All she needed to do, which we hereby do, was to give the appellant the benefit of the less harsh sentence by placing the complainant in the next band, or age bracket provided for under **Section 8(3) of the Sexual Offences Act**.

Ultimately therefore, we dismiss the appeal, but set aside the conviction and sentence on the charge of rape and substitute thereof or a conviction on the charge of defilement under **Section 8(1) of the Sexual Offences Act** as read with **Section 8(3) of the Sexual Offences Act**, and sentence the appellant to twenty (20) years imprisonment.

Dated and delivered at Meru this 21st day of December, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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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