



IN THE COURT OF APPEAL

AT NYERI

(SITTING IN MERU)

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

CRIMINAL APPEAL NO. 113 OF 2013

BETWEEN

JAMES MWEBIA M'IRWARE.....APPELLANT

AND

REPUBLICRESPONDENT

(An appeal against the Conviction/Judgment of the High Court of Kenya at Meru (Lesiit, J.) dated 28th October, 2010

in

H.C. Cr. A. NO. 25B OF 2010)

JUDGMENT OF THE COURT

The appellant was convicted by the Senior Principal Magistrate, Nkubu Meru for the offence of defilement contrary to **section 8(1)(2)** of the **Sexual Offences Act** and sentenced to life imprisonment. His appeal to the High Court against the conviction and sentence was dismissed triggering the present appeal.

The particulars of the charge stated that the appellant, on 25th December 2007 at about 14 hours defiled DG (full name withheld), a minor aged 9 years.

Four witnesses gave evidence in support of the charge namely; **E N (PW1)**, (E) - the mother of the child, **DG (PW2)** - the child complainant, **DK (PW3)**, (D) - the sister of the complainant and **Seberina Kaimatheri (PW4)** the clinical officer who examined the child.

The prosecution case was briefly as follows:

On 25th December 2007, at about 2.00 p.m. the appellant who is a close neighbour to E went to the house of E and asked E to allow him to send the child, DG who was aged 9 years. E agreed and the appellant and the child left together. On arrival at the appellant's house, which was about 70 meters from E's

home, he held the child, pulled her into the house, closed the door, put her on the bed, removed her pant and defiled her. The child cried and E who heard the cries sent D to find out what was happening. D went to the appellant's house and called him out and getting no reply pushed the door of the appellant's house open. When she entered into the house, she found the child lying on the bed on her back crying and the appellant was on top of her having defiled her. D cried out and retreated in confusion.

E upon hearing noise rushed to the appellant's house. She found the child on the appellant's bed crying and her pant on the said bed, while the appellant was standing beside the bed with his trousers lowered. The appellant dressed up and ran away. The child had substance resembling male semen in her private area. E reported to the village elder who referred her to the Assistant Chief who in turn told her to report to police. She reported at Nkubu police station the following day and a police officer called Rose accompanied her and the child to Nkubu Hospital. The child was examined by Seberina Kaimatheri who found bruises on upper vaginal wall and the hymen was perforated. She did not trace spermatozoa on the child.

The appellant on his testimony denied defiling the child and stated:

“The complainant’s family alleged my brother killed their father and was not charged. They said they will make sure I am charged. They fixed me and not my brother as I am their immediate neighbour.”

The trial magistrate made a finding in part:

“There is strong, consistent and reliable evidence by PW1, PW2 and PW3 that it is the accused who asked for PW2 from her mother to go with her to his house so as to send her. He was allowed to do so and for the time the two were together he had an opportunity to commit the alleged offence.”

Regarding the appellant's defence the trial magistrate stated:

“Accused’s defence is a sham. He would not have been fixed by the eye witnesses for what his brother was suspected to have done. If that was the case, they would have found a way of fixing the said brother.”

In his appeal in the High Court the appellant faulted the trial court for failure to call the arresting and investigating officer as witnesses. However, the High Court stated that the failure to call the two witnesses was a serious omission but nevertheless made a finding that the omission was not fatal to the prosecution case as it had no effect as the evidence adduced by the prosecution was sufficient to support the prosecution case and to sustain a conviction.

On the complaint that his defence which was not challenged was erroneously rejected, the High Court made a finding that the appellant's defence was given detailed attention and upon its own evaluation, rejected the defence.

The High Court agreed with the finding of the trial magistrate that the witnesses were truthful and their evidence consistent and made a specific finding that there was no chance of any possibility that the case was fabricated against the appellant.

The grounds raised in this appeal fault the first appellate court for, amongst other things, relying on inadequate and insufficient evidence which was not supported by scientific evidence (DNA); failure to appraise the evidence and to find that the case was not proved beyond any reasonable doubt and rejection of a defence which was plausible and cast doubt on the strength of the prosecution case without giving cogent reasons.

An appeal to this Court is allowed on points of law only. The appeal indeed raises points of law - failure by the first appellate court to re-evaluate and analyse the prosecution evidence including the defence and

reach its own conclusions and whether the finding of the courts below were based on sufficient evidence.

On second appeal, this Court should not normally interfere with concurrent findings of facts of the two courts below unless based on no evidence or on misdirection and non direction (**Mwita C.A. vs. Republic (2004) 2 KLR 60**). Further, an appellate court should not interfere with findings of the trial court which are based on the credibility of witnesses unless no reasonable tribunal could have made such a finding or it was shown that there existed errors of law (**Republic vs. Oyier [1985] KLR 353**).

In this case there were concurrent findings of fact that the appellant asked E to allow him to go with the child so as to send her; that the appellant took the child to his house and defiled her, that, the appellant was found by D red handed, that, E upon going to the appellant's house in response to the child's cries and screaming by D, found the child lying in bed and the appellant standing beside the bed half dressed and that the appellant ran away. The trial magistrate found this evidence to be strong, consistent and reliable.

The High Court made its own finding that the witnesses were truthful and the evidence consistent. The High Court appreciated that the evidence was from family members but found corroboration of the fact of defilement from the medical evidence. While recognizing that the failure to call the investigating and arresting officers as witnesses was a serious omission, the High Court made a finding that such omission had no effect on the prosecution evidence which the High Court found to be cogent and overwhelming.

There was evidence by E that she reported the commission of the offence to the village elder and to the Assistant Chief who advised her to report to police which she did.

The defence of the appellant was considered by the two courts below and found to be incredible. The High Court made a specific finding that there was no possibility that the case was a fabrication against the appellant. The reasons for rejection of the appellant's evidence by the two courts below were reasonable and valid.

In conclusion, it is evident that the prosecution case was dependent on the credibility of both prosecution and the defence witnesses. The trial magistrate considered the entire evidence and believed the prosecution case. The first appellate court, after subjecting the evidence to a fresh exhaustive re-appraisal affirmed the findings of the trial magistrate. The quality of the prosecution evidence was good and proved the prosecution case beyond any reasonable doubt.

For the foregoing reasons, the appeal has no merit and is dismissed in the entirety.

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