



IN THE COURT OF APPEAL

AT NYERI

(SITTING IN MERU)

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

CRIMINAL APPEAL NO. 112 OF 2015

BETWEEN

JAPHETH NGERA MIKWAAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Wendoh, J.) dated 20th March, 2012

in

H. C. CR. A. NO. 41B OF 2012)

JUDGMENT OF THE COURT

By this second appeal, **Japheth Ngera Mikwa** (the appellant) challenges the High Court’s judgment (R. Wendoh, J.) delivered on 30th March 2015, which dismissed his first appeal against conviction and sentence of life in prison imposed by the Nkubu Senior Resident Magistrate for the offence of incest contrary to **Section 20(1)** of the Sexual Offences Act.

The particulars of the offence were that on 17th February 2011 at [particulars withheld] Village and [particulars withheld] Location in Meru Central District of Meru County, he committed an act which caused penetration with his genital organ into the genital organ of EKM a child aged 11 years who to his knowledge was his grand-daughter.

The prosecution had called a total of four witnesses. The first two were the minor complainant herself and her 15year old brother A.K. (PW2) who both testified under oath after the trial court was satisfied through a *voir dire* examination, that they were competent to so testify. The other two witnesses were formal. PW3 was Dr. Njuguna Mbeere, a medical officer based at Meru Level 5 Hospital. His role was that of producing the P3 Form that had been completed by his former colleague Dr. Macharia after examining E.K.M. and concluding, on the basis of a bruise on the labia minora and vagina as well as the perforated hymen, that **“there was evidence of penetration.”**

PW4 P.C. Ann Wanjiku of Kariene Police Station was the investigating officer.

As to the alleged incident itself, the testimony, which the two courts below believed, was that on the material day at about 5.00pm EKM was coming from school when she met the appellant who asked her to pick some firewood. When she got home, he asked her to go look for a torch in his bedroom and as she was doing so, he followed her there and removed her clothes while wielding a knife and threatening to kill her if she screamed. He then lay on top of her and defiled her. He was interrupted by her brother PW2 who came calling her name. At that the appellant got out of the house and chased PW2 away. This gave EKM the opportunity to escape which she did while naked and put on her clothes when she got to her house. She thereafter took a bath and washed her clothes then slept. She did not tell her father who was at home, but informed her mother who had been away but was at home when she returned from school the next day. The mother, who was not called as a witness, took EKM to hospital and then reported to the police.

In cross examination EKM told the trial court that other than her father, her other 'grandfather', the appellant's brother, was also at home on the day and time of the incident and she told him about it. That grandfather's presence was confirmed by PW2 who also said that his cousin K K and M G were also at home. None of these persons were, however, called as witnesses.

Placed in his defence, the appellant gave a brief unsworn statement stating that the charge against him was untrue and **"Even God Knows"** he was telling the truth. He called his wife Julia Japheth (DW2) who also briefly stated that the charge against the appellant was a frame up. She was at home at the time of the alleged offence, she stated, and the incident did not occur.

In his self-crafted grounds of appeal before this Court, the appellant describes himself as over 75 years old and thus the sentence imposed on him was harsh and excessive. We state right away that, his age notwithstanding, the issue of severity of sentence is expressly stated by **Section 361** of the Criminal Procedure Act to be a matter of fact over which, on a second appeal, we have no jurisdiction.

The more substantial ground the appellant raises is that the first appellate court did not appreciate and analyze the evidence and so failed to adequately address the contradictions therein. When on a second appeal an appellant contends that his first appeal did not benefit from a sufficient analysis of the evidence on record, that is a matter of law that we have jurisdiction to entertain and enquire into. The duty of a first appellate court to subject the whole evidence to a fresh, thorough and exhaustive re-evaluation, re-appraisal and re-analysis lies at the very heart of appellate justice and an appellant is entitled to expect and indeed demand it of such court.

In the appeal before us, we note that the learned Judge was aware of her duty on first appeal and even referred, albeit without reference to its citation, to the case of **OKENO –vs- REPUBLIC** [1972] EA 32. She stated that before analyzing it, she would recap the evidence adduced before the trial court, which she did. At the end of that recap, the learned Judge simply rendered herself thus;

"I have read the judgment of the trial court. It is evident that the Court did consider the defence and found it to be a bare denial. The Court did consider the evidence adduced before it before arriving at its findings.

This offence was committed during the day, at about 5.00pm by a person well known to the complainant. Dr. Macharia examined the complainant on 14.2.2011 and found that she had external bruises to her external genitalia, to the labia minora, the vagina and the hymen was perforated, which is evidence of penetration. There is no doubt that the complainant took part in a sexual act. PW1's evidence was sufficiently corroborated by that of PW2, that it is the appellant who committed the act. The trial Court arrived at that same finding. The conviction is well founded and I confirm it."

With great respect to the learned Judge, we are unpersuaded that those two short paragraphs amounted to a sufficient reanalysis, re-evaluation, and re-assessment of the evidence in totality in a fresh and

exhaustive manner before arriving at an independent conclusion. Rather, it would seem the learned Judge first accepted the conviction as sound and proceeded to find confirmation of its soundness from the record. Such an approach does not do justice to a first appeal which essentially proceeds by way of re-hearing but on the basis of testimony and other evidence tendered on the record. It is not enough for a first appellate court to rehash, restate or summarise the evidence and state that the court below it was justified to convict. There ought to be seen on the record an engagement with and interrogation of the various facets of the evidence tendered and a weighing of it to determine whether it is consistent and sufficient to prove the case beyond reasonable doubt. Such a process properly undertaken would no doubt reveal any contradictions, inconsistency or blind spots that there may be on the evidence with an indication of whether the court considers them to be material or not.

A failure to note such gaps and inconsistencies only adds credence to a complaint such as was raised herein, that the duty or re-evaluation was either not discharged or was discharged in an insufficient manner.

We think that had the learned Judge properly and fully addressed her mind of the entire record as required, she would have noted at least the following;

- While EKM stated that the appellant had a knife in his hands as he threatened her not to scream, PW2 said he saw the appellant holding a panga whom he chased and even hurled at PW2.
- EKM did not testify to having bled from the alleged incident but PW2 stated that she told him she did, hence her taking a bath afterwards.
- Even though both EKM and PW4 stated that, EKM was treated by a doctor at Meru Hospital before reporting to the police, no medical records of any kind were produced to show such visit and treatment.
- PW4 stated that PW2 called the appellant and got no response, found the door locked, peeped through the window and **“found him defiling PW1”** but PW2’s version does not indicate that he saw the appellant in the act. Moreover, EKM stated that it is her that PW2 called, and she did in fact answer, and not the appellant.
- Even though the P3 Form was issued on 18th February 2011 a day after the incident, there is no explanation given why it was not filled until six days later on 24th February 2011.
- Further, even though the P3 Form indicates that there was bruising on the labia minora and vagina and perforation of the hymen presumably on 24th February 2011, there is a conspicuous omission to indicate under Section B the requisite “2. Approximate age of injuries (hours, days, weeks) against which Dr. Macharia indicated “N/A.”

We think that in the absence of the initial treatment chits, it was careless, to put it mildly, for the doctor to have failed to indicate the approximate age of the injuries. Without such indication it begs the question as to when the indicated injuries were inflicted. Would bruising of the labia minora have been visible six days after the event or were the injuries visible to the doctor of a later infliction? In a criminal charge, and one as serious as the one that was before the court, it cannot be left to guess work or mere supposition as the duty is clear on the prosecution to prove its case beyond reasonable doubt.

A more glaring and disturbing aspect of the case is the failure of the prosecution to call any of the adults who were said to be present at home when the incident occurred. It is wholly inexplicable and quite strange that the appellant’s brother, who PW2 says was in his house with problems with his legs and could not walk was not called as a witness. EKM testified in cross examination that;

“I told your brother, my other grandpa too.”

It would have been of vital importance for the prosecution to call that grandfather as the first adult to whom EKM made her report. We are not able to say whether he is the person named **“David”** who the prosecutor had mentioned to the trial court was to be called alongside two others. EKM and PW2’s father was also at home at the time and no explanation was ever proffered as to why he was not called.

We think that had the learned Judge considered the entire evidence she would have found it to have been

barely adequate and that those uncalled witnesses would have shed some further light. She ought also to have found that the failure to call them, and without any explanation at that, invited the inference, in line with the decision of the predecessor of this Court in **BUKENYA –vs- UGANDA**[1972] EA 549 that their evidence would have been adverse to the prosecution case.

The conclusion is inescapable from our consideration of this appeal that the appellant’s conviction was unsafe. We accordingly quash it, set aside the sentence and order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Judgment delivered under **Rule 32(2)** Court of Appeal Rules as W. Karanja JA declined to sign.

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

E. M. GITHINJI

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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