



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 75 OF 2014

BETWEEN

KYALO KISWII APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the Judgment of the High Court of Kenya at Machakos (Jaden, J.)
dated 9th May, 2013*

in

H.C. Cr. A. No. 204 of 2009)

JUDGMENT OF THE COURT

1. **Kyalo Kiswii**, hereinafter referred to as the appellant, was convicted of the offence of defilement contrary to **section 8 (1) (3)** of the Sexual Offences Act. The particulars of that offence were that he, on the 13th July, 2009, at **[particulars withheld]** Village, [particulars withheld] Sub location in Kitui district, had carnal knowledge of MM, a girl aged 12 years.
2. By way of background, we shall briefly set out the facts led before the trial court. On the 13th July, 2009, MM left school and went home; the appellant, who was a worker at her home, served her some githeri and a cup of tea. After she ate, the appellant asked her to go and fetch the donkey. She went up to where the donkey had been tethered. The appellant came up behind her, put his hand over her mouth and held her around her neck. The appellant undressed her and pushed her to the ground; he then unzipped his trousers and inserted his genital organ into her private part. The appellant then proceeded to defile the complainant for an hour. After he finished, the appellant warned MM not to disclose what had happened to her, or else he would kill her.
3. The following day, MM told her mother, B L M (PW3), what transpired, and together, they went and reported the matter at the Kitui police station. PC Monica Aoko, (PW4) was the officer who investigated the matter. After receiving the report, she escorted the complainant and her mother to the Kitui Hospital. The complainant was treated by Martin Njue (PW1), a clinical officer at the Kitui Hospital. He determined that the complainant had been defiled and that she was HIV

positive.

4. In his defence, the appellant denied committing the offence for which he was charged. He denied having been in employment on the date of the defilement, and stated that he was arrested on the 20th July, 2009 when he had gone to meet the complainant's mother. The appellant stated that he had previously been employed by the complainant's mother five months before, yet she had not paid him.
5. The appellant also called his mother, Syonza Kisui (DW2) to testify on his behalf; she testified that the appellant had been employed by the complainant's parents for a period of five months, but that during that time, he had not been paid any money. Syonza further testified that since the complainant's parents were tested for HIV, then the appellant also ought to be tested in order to ascertain his status.
6. The appellant's father Kisui Mutunga (DW3) testified on his behalf as well. He confirmed that the appellant had been employed by the complainant's father and that on the material day the appellant was at the complainant's home.
7. After analysing the evidence advanced by the prosecution and the defence, the trial court was satisfied with the prosecution's account of the events of 13th July, 2009. The court was also satisfied that since the appellant was well known to the complainant, she was able to positively identify her attacker. The court rendered itself in the following manner on the appellant's guilt:

“This court therefore finds that based on the evidence on record the prosecution has managed to prove (sic) its case against the accused person to the required standards. The defence version is regarded as a made up story tailored for the defence, in any event that the accused was not paid his salary for whatever period he had not right whatsoever to attack the complainant whom she robbed her innocence.” (Sic)

8. The court therefore found him guilty and sentenced him to serve twenty years imprisonment. The appellant was aggrieved with this conviction and sentence, and appealed to the High Court, alleging that the complainant's evidence was uncorroborated; that the victim's clothes were not produced as exhibits; that there was variance between the charge sheet and the evidence in relation to the date of the offence; that he was not examined by a doctor, nor given an opportunity to defend himself; and that the sentence meted out upon him was unduly harsh.
9. The first appellate court, after setting out its duty to re-evaluate and reconsider the evidence tendered before it, was satisfied that the appellant's conviction was based on sound evidence. It thus upheld the conviction and sentence, and dismissed the appeal.
10. The appellant has now preferred an appeal to this court. He relies on his amended memorandum of appeal, as well as his written submissions, which set out the grounds of appeal. The appeal was opposed by Mr. B. L. Kivihya on behalf of the state.
11. As has been often stated, this Court, in a second appeal, is enjoined by **section 361 (1) (a)** of the Criminal Procedure Code, to determine only matters of law. In addition, a second appellate court will refuse an invitation to interfere with the concurrent findings of fact of the lower courts unless these are not based in evidence. See

Karingo v Republic [1982] KLR 214 and David Njoroge Macharia v Republic [2011] eKLR (Criminal Appeal No. 497 of 2007). These are the principles that we must bear in mind as we now set out to consider the appellant's grounds of appeal.

12. The appellant contended that the courts below erred in failing to appreciate that the charge was

incurably defective since it indicates that he was charged under **section 8**

(1) (3) (7) of the Sexual Offences Act, yet there is no such section. This, he submitted is a fatal defect that serves to invalidate the trial.

13. A perusal of the charge sheet indicates that the appellant was charged with

“defilement contrary to section 8 (1) (3) (7) of the Sexual Offences Act No. 3 of 2006”. It is not accurate, as the appellant submitted that **section 8 (7)** of the Act does not exist. That section provides that:

“(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act (Cap. 92) and the Children’s Act (Cap. 141).”

14. It is trite law that the charge must be clearly framed, and that an accused person must be charged with an offence that is known to law. This enables the accused person adequately prepare himself for trial.

15. The provisions relating to the offence of defilement of a child aged between twelve and fifteen years are found at **section 8 (1) (3)** of the Sexual Offences Act. In our view, the addition of the **subsection (7)** does not make the charge sheet defective. It merely serves to point out that the appellant may have been below the age of 18 years at the time that he was brought to trial. Indeed, this is a matter that was dealt with by the trial magistrate when she ordered for an age assessment before she sentenced the appellant. The appellant’s assertion that the charge sheet was defective is baseless, and this ground of appeal fails.

16. The appellant took issue with the medical evidence. In his view, this evidence ought to have been adduced by a medical officer. He relied on the High Court decision by Waweru J, in **Mutua Kivaya Nthenge v Republic [2012] eKLR (High Court Criminal Case No. 183 of 2009)** where Justice H. P. G. Waweru stated that:

“I must state at the outset that the medical evidence available was not satisfactory. It is doubtful that a clinical officer is a medical officer, within the legal meaning of that term, capable in law of giving medical evidence.” (emphasis provided)

17. The issue of whether or not a clinical officer is a competent person to give medical evidence was settled by this Court in **Raphael Kavoi Kiilu v Republic [2010] eKLR (Criminal Appeal No. 198 of 2008)**. In that appeal, it was alleged that a clinical officer was not qualified under the Evidence Act to give medical evidence in matters relating to sexual offences. The Court held that a clinical officer was in fact, authorised under the Clinical Officers (Training, Registration and Licensing) Act and therefore is fit to give medical evidence. The Court rendered itself in the following manner:

“Under section 2 of the Clinical Officers (Training, Registration and Licensing) Act Cap 260 (LOK) a clinical officer means:-

“a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act...”

Section 7(4) of the Act states:-

“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.”

The Act goes further to provide that such officers may engage in private practice “in the practice of medicine, dentistry or health work for a fee.”It follows that the clinical officer did testify in this case on his area of competence.”Emphasis ours.

18. We agree with this proposition. A clinical officer, being authorised under the Clinical Officers Act is an authorised person who can render medical services, and further can give medical evidence under **section 77** of the Evidence Act. Nothing therefore turns on this ground of appeal as well.
19. The appellant took issue with the fact that the complainant was found to have been infected with HIV, yet he himself is HIV negative. He submitted that this is in indication that he never had any bodily contact with the complainant. This issue was considered by the trial court in its assessment of the evidence before it. The trial court was of the opinion that the infection was not a result of the appellant’s assault on the complainant. The first appellate court also considered this issue and found that in the circumstances, the fact that the victim was infected with HIV had no bearing on the prosecution evidence, which was sound and established the fact that it was the appellant who defiled her.
20. Related to this issue was the appellant’s complaint that the evidence was full of inconsistencies, and was uncorroborated, and that the lower courts failed to consider that the matter was actuated out of a pay dispute between himself and the complainant’s mother. On his part, Mr. Kivihya submitted that the evidence was conclusive and showed how the appellant planned the incident out. He further submitted that the conviction was safe, and the sentence lawful, and that we ought to dismiss the appeal.
21. We agree with the findings of the lower courts that the HIV status of the appellant in the circumstances of this case would have no bearing on the weight of the prosecution evidence, which was cogent and clear, and irresistibly pointed to the appellant as the culprit. The evidence of complainant was clear that the appellant attacked her, and thereafter threatened to kill her. This evidence was sound and was not dislodged by the appellant when he was placed on his defence.
22. We find that there is no reason to warrant our interference with the concurrent findings of the lower courts. The conviction was proper and the sentence meted out was lawful. Consequently, this appeal is devoid of merit, and we hereby order it dismissed.

Dated and delivered at Nairobi this 30th day of January, 2015.

P. KIHARA KARIUKI (PCA)

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR