



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A.)

CRIMINAL APPEAL NO. 93 OF 2013

BETWEEN

LUKAS KIURA NJERU APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Embu

(Majanja, J.) dated 30th October, 2013

in

H.C.C.R.A No. 126 of 2011)

JUDGMENT OF THE COURT

1. **Lukas Kiura Njeru**, the appellant was charged with the offence of defilement contrary to **Section 8(1) &(3)** of the **Sexual Offences Act** and with an alternative count of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** in the Principal Magistrate’s Court at Siakago.
2. The particulars of the offence of defilement were that on 22nd August, 2010 in Mbeere South District within Embu County, the appellant caused his penis to penetrate the vagina of RW, a child aged 13 years. On the alternative count, the particulars were that on the aforementioned date and place, the appellant committed an act of indecency with RW a child aged 13 years by touching her vagina with his hands.
3. The appellant pleaded not guilty and the prosecution called a total of six witnesses. It was the prosecution’s case that on 22nd August, 2010 at around 5:00 p.m. PW1, RW (R), boarded a vehicle at Kiritiri heading to her home in [Particulars Witheld]. Upon arrival she alighted together with the appellant who was also on board the said vehicle. The appellant walked ahead of her and stopped at the gate of the homestead where he was working. The appellant then grabbed R and locked her in the house which was under construction in the said compound. The appellant left and returned at around 8:00 p.m., he defiled R the whole night. R testified that the appellant released her the following morning at about 5:00 a.m.
4. R went home and informed her mother PW2, MWM (M), what had transpired. It was R’s evidence

- that the appellant was known to her prior to the incident; he used to work around R's village. The matter was reported to the police and the appellant was arrested. PW5, John Mwangi (John), a clinical officer, testified that he examined R and noticed she had a discharge on her vagina; he also noticed that her hymen had been perforated leading to the conclusion that there was actual penetration. It was the prosecution's case that at the material time R was 13 years old. Subsequently, the appellant was arraigned in court and charged.
5. In his defence the appellant gave an unsworn statement. He testified that prior to his arrest he used to do construction work; on 22nd August, 2010 he was in Nairobi when he received information that his grandfather had died; he travelled from Nairobi on 23rd August, 2010 to attend the burial at Kiambere. He was arrested on 24th August, 2010 while he was in the market purchasing *miraa*. The appellant denied committing the offence he was charged with.
 6. The trial court convicted the appellant for the offence of defilement and sentenced him to 20 years imprisonment. The appellant preferred an appeal in the High Court which was dismissed vide a judgment dated 30th October, 2013. It is that decision that has provoked this second appeal before us.
 7. At the hearing of this appeal, the appellant appeared in person while the state was represented by Mr. Kaigai, Assistant Deputy Public Prosecutor. The appellant submitted that the two lower courts erred in relying on the prosecution's evidence which was full of contradictions. He argued that PW1 (R) and PW5 (John) testified that the incident occurred on 22nd August, 2010 while PW4, Eston Ileri Njeru(Eston), the Assistant Chief indicated that he had received a report on 24th August, 2010 from R's mother that she had not returned home on the 23rd August, 2010.
 8. According to the appellant, the prosecution had not proved the complainant's age and hence the sentence meted out to him was unlawful. The charge indicated that the complainant was 13 years old at the material time while the complainant in her evidence testified that she was 15 years old at the time. The appellant further submitted that there was no medical evidence linking him to the alleged defilement of the complainant. The appellant further submitted that the two lower courts erred in rejecting his alibi defence. He urged us to allow the appeal.
 9. Mr. Kaigai in opposing the appeal, submitted that the prosecution proved its case against the appellant to the required standard. The evidence of the complainant was clear and consistent as to who actually defiled her. The complainant knew the appellant prior to the incident and there was no possibility of a mistaken identity. He argued that the two lower courts correctly rejected the appellant's defence. He urged us to dismiss the appeal.
 10. We have considered the record, submissions by counsel and the appellant and the law. By dint of **Section 361** of the **Criminal Procedure Code** we are restricted to only consider matters of law in this second appeal. In **Chemagong -vs- Republic (1984) KLR 213** at page 219 this Court held,

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja- vs-Republic 17 EACA146).”

11. From the record, R testified that the incident occurred on 22nd August, 2010. PW4 (Eston), the Assistant Chief, on the other hand, testified that R's mother, PW2 (M), informed him that the complainant had failed to go back home on 23rd August, 2010 and that she had been defiled on the said date. There is clearly a discrepancy between the complainant's and Eston's evidence as to the actual date of the incident. This Court has decided that discrepancy as to the date of the offence is not considered material in a case if it does not cause prejudice to the appellant or if it is inconsequential to the conviction and or sentence. It is also considered curable under **Section 382** of the **Criminal Procedure Code** which provides;

“Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or

in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

12. The test for making a decision on cases with discrepancies is established in ***Joseph Maina Mwangi -vs- Republic Criminal Appeal No. 73 of 1993*** wherein it was held:-

“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 viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”

We find that the aforementioned discrepancy is curable under ***Section 382*** of the ***Criminal Procedure Code***.

13. ***Section 8(1)*** of the ***Sexual offences Act*** provides:-

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”

From the foregoing provision, it was imperative for the prosecution to prove that there was actual penetration on R and the identity of the perpetrator. Both lower courts made concurrent findings that the complainant, R, had been defiled by the appellant. The only evidence in respect of what actually happened was that of the complainant. We are cognizant of the proviso to ***Section 124*** of the ***Evidence Act*** which provides:-

“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 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.”

14. In this case, the complainant (Rachael) gave a detailed account of what transpired. She testified that she alighted at the same place with the appellant; the appellant dragged her into a house which was under construction, locked her in and left. The appellant returned at 8:00 p.m. and defiled. The trial court found that the complainant was a truthful witness. In ***Nelson Julius Irungu –vs- Republic- Criminal Appeal No. 24 of 2008***, this Court held,

“As this Court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses.”

We see no reason to interfere with the trial court’s finding on the credibility of the complainant.

15. PW5, the clinical officer testified that upon examining R he noticed that her hymen had been perforated and he concluded that there was actual penetration. This evidence proved that R had been defiled. As to the identity of the perpetrator, we concur with the two lower courts that this was not a case of mistaken identity but of recognition. In ***Anjononi & others -vs- Republic (1976-80) 1 KLR 1566***, this Court held at page 1568,

“This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another.”

The complainant was able to identify the appellant as the perpetrator because he was known to her prior to the incident.

16. On the issue of the appellant's age, we note that R testified that at the material time she was 15 years old while her mother testified she was 13 years old. We find that the said inconsistency did not in any way prejudice the appellant and is curable under **Section 382** of the **Criminal Procedure Code**. Why do we say so? We note that the P3 form indicated that the complainant was 13 years old; PW6, Bernard Kiganjo (Bernard), the head teacher at [particulars withheld] Primary School wherein the complainant attends also testified that she was 13 years old and produced school records to that effect. We find that the prosecution did prove that the complainant was actually 13 years old.
17. On the issue of alibi, we find that R's evidence displaced the appellant's defence that he was in Nairobi at the material time. R recognized the appellant as the person who had defiled her.
18. Section 8(3) of the Sexual Offences Act provides:-

“A person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than twenty years.”

The appellant herein was sentenced to twenty years imprisonment. We find that the said sentence was lawful.

19. The upshot of the foregoing is that we find that the appeal herein lacks merit and is hereby dismissed.

Dated and delivered at Nyeri this 20th day of January, 2015.

ALNASHIR VISRAM

JUDGE OF APPEAL

MARTHA KOOME

JUDGE OF APPEAL

J. OTIENO- ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR