



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI JJ.A)

CRIMINAL APPEAL NO. 24 OF 2013

BETWEEN

SHEM MANG'ULA APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisumu (Abida-Aroni, J.) dated 31st February, 2012

in

H.C.CR.A. NO. 80 OF 2012)

JUDGMENT OF THE COURT

The appellant, **Shem Mang'ula**, was charged before the Chief Magistrate's Court at Kisumu with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the Sexual Offences Act No. 3 of 2006. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the same Act.

The particulars of the principal charge were that on the 22nd day of October, 2010 at [particulars withheld] Estate in Kisumu District (now Kisumu County) within Nyanza Province, the appellant penetrated, with his penis, the vagina of **J K**, a child aged 15 years.

As the appellant was convicted of the principal charge we need not set out the particulars of that alternative count.

The trial of the appellant commenced on 13th January, 2011 when the complainant, **J K**, a girl aged 15 years testified on oath. She testified how, on the material night, she was sent by her mother, **R I (PW2) (R)**, to buy kerosene from a local store. On her way back, she met the appellant, her boyfriend who invited her into her neighbour's, **Javan** alias **Julius Anyanga's (PW4) (Anyanga's)** house where they watched T.V.

In the interim, R became anxious when the complainant failed to return. So, she started looking for her, finally tracing her at the house of Anyanga. The complainant and the appellant escaped. R reported the matter to Obunga Police Post where she found **PC Kimiko Natili** who, together with other police officers, raided the appellant's house at Obunga Estate. The complainant and the appellant again escaped into another house where they spent the night together. According to the complainant, the appellant had sex with her once that night.

The next morning, she went home and her mother took her to Obunga Police Post where she was referred to New Nyanza Provincial Hospital where she was attended to and a P3 completed which was produced by **Dr. Wetanga** of the same hospital.

The appellant was subsequently arrested and charged as already stated.

When put to his defence, the appellant, in his unsworn statement, told the trial court that he did not commit the alleged offence.

The trial court considered the evidence before it and came to the conclusion that the prosecution had proved the charge against the appellant to the required standard and entered a conviction against the appellant as charged. Pursuant to the conviction, the appellant was sentenced to 20 years imprisonment.

Being dissatisfied with that conviction and sentence, the appellant filed an appeal to the High Court. The High Court (*Aroni, J.*) considered what was before it and the learned Judge properly appreciated the duty of the first appellate court to analyze the evidence, re-evaluate the same and come to its own independent decision. The learned Judge did not merely appreciate her duty as a first appellate court but proceeded to analyze the evidence, re-evaluate the same and arrived at her own independent conclusion. Having confirmed the findings of facts by the trial court the learned Judge proceeded to state as follows in her judgment:-

“From the evidence adduced in the trial court, the prosecution in my opinion was able to prove beyond any reasonable doubt that the appellant had sexual intercourse with PW1. I therefore find that the conviction was safe. (and) that the sentence imposed against the appellant is lawful.”

Having so stated, the learned Judge proceeded to dismiss the appeal.

Still dissatisfied with the foregoing, the appellant now comes to this Court by way of a second appeal. That being the case, only issues of law fall for consideration – See **Section 361(1)** of the Criminal Procedure Act (*Cap 75 Laws of Kenya*).

This Court in the case of **Njoroge - V – Republic [1982] KLR 388**, held:

“On a second appeal the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower court unless those findings were shown not to be based on evidence.”

See also holding number 3 in the case of **Obanda -V – Republic [1983] KLR** to the effect that this Court cannot go beyond points of law. That is indeed what **Section 361(1)** of the Criminal Procedure Act prescribes and **sub-sections 361(1) (a)** leaves no doubt that severity of sentence is an issue of fact.

In his home made Memorandum of Appeal dated 24th July, 2014, the appellant complained as follows:-

“1. That I humbly beg the Hon. Court to hear this second appeal on the basis of mitigation factors after the dismissal of the first appeal by the High Court which was against the conviction and sentence of 20 years imprisonment in jail.

2. That it is my humble request to the second appellate court to consider that both the lower trial courts judgments were against the weight of evidence adduced in court hence the decision was harsh and excessive as a whole.

3. That it is my humble prayer that this Honourable second appellate court considers the reduction of 20 years imprisonment in jail with a more reasonable punishment such as non-custodial sentence by virtue of the fact that my health has markedly deteriorated due to severe illness i.e Acute Ulcers.

4. That I have undergone a series of theological courses and been awarded Diploma certificates hence spiritually and emotionally nourished and capable of abiding by the law of this nation if given an opportunity back to the society as a resourceful person.

5. That I kindly ask the second appellate court to consider having leniency on me and allow me serve a more lenient sentence and be able to join back to (sic) the society as now I am a reformed and rehabilitated man who is ready to abide by the law of the land.

6. That may this Hon. Court consider my plea for leniency over the upheld sentence of 20 years imprisonment in jail as far as the foretasted grounds of mitigation factors are concerned.”

When the appeal came up before us for hearing on 18th November, 2014 the appellant appeared in person and relied on the above grounds of appeal. As can clearly be observed, save for ground 2, which complains that his conviction was against the weight of evidence, the rest of the complaints are against the severity of sentence. We are therefore not at all surprised that Mr. Sirtuy, the learned Principal Prosecution Counsel, who represented the State, opposed the appeal on the ground that no issue of law had been raised by the appellant.

We have carefully considered what has been urged before us and it is plain to us that the appellant’s main complaint relates to the severity of the sentence of 20 years imprisonment imposed upon him. The complaint relating to the weight of evidence does not raise an issue of law. In any event that complaint cannot be correct. The complainant knew the appellant and considered him her friend. She was categorical, in her evidence that the appellant had sex with her on the material night. Her mother, R, spent the early part of the night chasing after them. The appellant’s friend, Anyanga, confirmed that the two were friends and that they were at his house before police came calling on the material night. Dr. Wetanga (PW5) produced the P3 form completed and signed by his colleague in respect of the medical status of the complainant. In his oral testimony at the trial, he stated, in cross-examination, as follows:-

“She was defiled at 8.p.m. on 22nd and was seen at 10.a.m on 23rd.”

The appellant was given an opportunity to defend himself and in his unsworn statement did not displace the case put forward by the prosecution against him.

The appellant has not shown any grounds of law in his Memorandum of Appeal for consideration by this Court.

In view of the foregoing we find no merit in this appeal and we order that it be dismissed in its entirety. Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF FEBRUARY, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR