IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A.)

CRIMINAL APPEAL NO. 57 OF 2014

BETWEEN

MARK KARIUKI NTHIA.....….....……..APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Embu

(Ongundi, J.) dated 13th February, 2014

in

H. C. CR.A. NO. 97 OF 2010)

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JUDGMENT OF THE COURT

1. On the 21st October 2008, at about 6.00 p.m, JM, a 15-year old school girl, was walking home alone from Karurumo market in Embu county. She had, an hour or so earlier, been sent to the market by her mother PW3, to buy various household items which she did. At a point near Karurumo Primary School, JM found the appellant whom she knew as Kariuki, a bicycle repairer in the market, seated on his bicycle on the side of the road. She by-passed him. After JM had walked about 300 meters, the appellant came along riding his bicycle and by-passed her. About 70 meters further on, the appellant stopped and parked his bicycle in the bush. He then started walking back towards JM and she thought he had forgotten something. However, when he reached her, the appellant grabbed her and dragged her into a nearby bush. She tried to scream but the appellant produced a knife and threatened to kill her if she screamed again. He forced her to lie down, removed her skirt, bikers and pants , unzipped his trousers, exposed his penis and defiled her as she struggled in vain. When he finished, he left her in the bush.

2. Some 200 meters away was the home of PW2. She walked there with difficulty and found PW2 and narrated her ordeal to him. She told him the name of the person who had defiled her and PW2 realized it was a person he knew very well. They went together to the scene and collected the various items which she had dropped. PW2 escorted her home but they did not find her mother who had left earlier to look for JM when she did not arrive home within the time expected of her return. She returned shortly and JM reported to her what had happened. On checking JM's genitalia, PW3 found them soiled by semen-like

substance. They went to Karurumo Health centre in the market where JM was treated at 8.30 p.m. *En route* to the health centre, they went through the chief's office and reported to the Administration Police Officers (APs) there. They returned to the health centre the following morning for further treatment then reported the incident at Runyenjes police station. JM recorded her statement and gave the appellant's name to the police. She also left the clothing she was wearing on the fateful day. The police gave her a P3 form and directed her to St. Michael Nursing Home in Runyenjes town for completion.

3. According to PW5, the clinical officer who attended to JM at Karurumo Health Centre soon after the incident, JM's ***"clothes were stained, petty coat muddy, and skirt wet and dirty".*** On vaginal examination, ***"the external parts had some pigmentation, the hymen was broken, had a yellowish discharge and clotted abrasions or bruises on vaginal wall".*** HIV tests performed were negative and medication appropriate for rape victims was prescribed.

4. Three days later, PW4, the medical doctor at St Michael Nursing Home, examined JM and found ***"bruises on the walls of her vagina and a broken hymen. She had a whitish vaginal discharge which on examination did not reveal sperms or bacteria".*** He concluded JM had sexual intercourse. JM also told him she knew the person who defiled her.

5. The investigating officer, PW6, confirmed that JM and her mother, PW3, had reported the incident at the police station at 2.00 p.m on 22nd October 2008 and gave the appellant's name as the perpetrator of the crime. He also confirmed that he rearrested the appellant on 23rd October 2008 when he was brought to the police station by APs from Karurumo APs camp. The arresting AP was PW7 who had received information on the alleged crime and details of the suspect from the chief and he proceeded to arrest the appellant on 23rd October, 2008.

6. The appellant was arraigned before Runyenjes SRM's court on 23rd October 2008 for the offence of defilement of a girl contrary to S**ection 8(1)** as read with **Sub-section (3)** of the **Sexual offences Act** and an alternative charge of indecent assault contrary to S**ection 11(1)** of the same Act, both of which he denied. In his unsworn statement he said he could not have committed the offence because he was arrested on 21st October 2008, the day before the alleged offence was allegedly committed, and the charge sheet was his exhibit. He said on that day at 11.00 a.m, he was with the chief, two policemen and the headmaster of Karurumo Primary School. He was then shown to the complainant who did not talk to him and he was locked up until 4.00 p.m when officers from Runyenjes police station came and picked him up. He was told about an incident he was allegedly involved in on 19th October 2008 but was surprised to be charged with an incident of defilement which occurred on 21st October 2008.

7. Upon assessment of the facts stated above, the trial magistrate convicted the appellant on the main count for defilement and sentenced him to serve 25 years in prison. He was aggrieved by the conviction and sentence and preferred a first appeal to the High court which dismissed the appeal on conviction and confirmed the sentence. This, therefore, is his second and final appeal. What are the issues raised?

8. The appellant was not represented by counsel before us. It is no wonder, therefore, that in his homemade **"Grounds of Appeal"** he listed 10 grounds, several of them repetitive, and handed in a lengthy document of hand-written submissions, both of which mainly challenge concurrent findings of fact made by the two courts below. Needless to say, it is not a function of this Court on a second appeal to re-examine the findings of fact made by the two courts below as its jurisdiction is limited to issues of law under **Section 361(1)** of the **Criminal Procedure Code**. Severity of sentence is also a matter of fact. An issue of law will, nevertheless, arise where those findings are not based on any evidence at all, or are based on a perversion of the evidence on record.

9. That position was stated in the old case of ***Rex v. Hassan Bin Said [1942] EACA 62***:-

"A second appeal lies only upon questions of law. In such a case this Court is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings though it may think it possible or even probable that it would not have itself come to the same

conclusion; it can only interfere where it considers that there was no evidence to support the findings of fact, this being a question of law."

10. It has since been restated many times and we take it from ***Adan Muraguri Mungara v Republic [2010] eKLR (Criminal Appeal No. 347 of 2007)*** :

"As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

11. The main complaint raised before us by the appellant, as it was before the two courts below, was that he was arrested on 21st October 2008 and was in police custody when the alleged offence was committed. He relies on the charge sheet which on the face of it records the ***"Date of Arrest"*** as ***21st October 2008***. As the charge sheet was not amended at any time, he contends that it was bad in law and ought to have been so declared.

12. In our view, the date of the appellant's arrest was a factual matter which the two courts below dealt with on the recorded evidence. It is not open for the appellant to raise it before us. The finding made by the trial court was as follows:-

"Having carefully listened to the evidence of the prosecution witnesses it is clear in my mind that the date of 21/10/2008 appearing on the charge sheet as date of arrest of the accused is clearly an error. From the evidence of PW6 and PW7 the accused was arrested on the 22/10/2008. In fact from the evidence of PW6 he received 2 calls on the 23/10/2008 that the accused was already arrested and was at Karurumo APs Camp. It is clear that the accused having noted the error on the charge sheet seeks to take advantage of the same for his benefit. Having carefully considered the entire evidence I find that the said error does not affect the substance and credibility to be attached to the prosecution case"

13. The High Court confirmed that finding stating thus:-

"On the 1st and 2nd grounds the charge sheet shows that the appellant was arrested on 21/10/2008 and arraigned in court on 23/10/2008. This issue was raised in the appellant's defence and was addressed by the learned trial Magistrate in his judgment.....

The evidence of the witnesses is clear that the appellant was arrested on 22.10.2008, the report having been made on the same date. Secondly he did not at any time tell the court which was this offence that he had been arrested for on 21.10.2008. The 1st and 2nd grounds must fail."

14. We find nothing in the ground of appeal now raised before us which amounts to an issue of law. At all events, as correctly submitted by learned Assistant Director of Public Prosecutions, Mr. Kaigai, the defect pointed out by the appellant was curable under **Section 382** of the **Criminal Procedure Code**, since the date of arrest was clear from the evidence on record. We find no prejudice occasioned by that finding. That ground of appeal has no merit and is dismissed.

15. Another set of the grounds of appeal challenge the evidence on identification of the appellant and this is an issue of law. The appellant contends that his identification came from a single witness who purportedly recognized him but did not give out his name to PW2 who was the first person she met. In his submission, the mention of the appellant's name long after the incident amounted to an afterthought as stated by this Court in the case of **Peter Achieng Okumu vs. R [1987] EACA** (sic). There was also no warning given by the trial court to itself before relying on that evidence.

16. It is indeed necessary for trial courts to warn or caution themselves where a case wholly or substantially depends on identification. That is because a mistaken witness can be convincing and several

of them can be mistaken. But this is more so where the identification relied on is visual rather than recognition of an assailant. As this court stated in **Anjononi & others -vs- R (1976-80) 1 KLR 1566**, at page 1568:

"….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."

17. *In this case, JM recognized her assailant and gave out his name to PW2 and PW3 at the first opportunity. It cannot be said to have been an afterthought. The trial court saw JM in the witness box and heard her testimony. It believed her evidence because in its assessment, she was a credible witness, stating:-*

"PW1 gave clear and cogent evidence as to how the accused whom she knew as a bicycle repairer at Karurumo market confronted her and defiled her on the evening of 21.10.08. Immediately after accused left she informed not only PW2 who came to her rescue but also her mother PW3. Infact it was from the description that the accused is a bicycle repairer that the police were able to arrest him. Though the accused has been identified only by PW1, I find PW1 to be both intelligent and consistent in her evidence. She was subjected to thorough cross examination by the accused even after being recalled for further cross examination yet she remained consistent and steady in her evidence.

I find no possibility that she may have been mistaken about the identity of the person who defiled her. Though the incident occurred very late in the evening PW1 was consistent that visibility was still good and she could see the accused well."

18. "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion." *So stated the Court in* ***Peters v. Sunday Post [1958] EA 424 at page 429****.*

19. A fortiori, the proviso to ***Section 124*** *of the* ***Evidence Act*** *is clear that the evidence of JM was on its own sufficient to support the charge if the trial court believed and gave reasons as it did in this case. The proviso states as follows:-*

"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 the 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."

We reject that ground of appeal also.

20. Two of the remaining grounds of appeal allude to the manner in which the first appellate court re-evaluated the evidence and this again is an issue of law which we may consider. The submission is that the evidence on record was 'contradictory, inconsistent, uncorroborated, unreliable and unworthy', but the High Court failed to so find. It was all those things because there was no DNA conducted on both the appellant and the complainant; the medical evidence was produced by two different institutions and was contrary to ***Section 77*** *of the* ***Criminal Procedure code****(sic); there was no confirmation about the age of the broken hymen; no spermatozoa was seen; crucial witnesses were left out; and that JM, PW2 and PW3 were not consistent on the identity of the items which were retrieved at the scene of crime, and whether the state of the clothing worn by JM was blood-stained or muddy.*

21. We have re-examined the record and we are satisfied that the High Court was alive to its duty to re-evaluate the evidence and reach its own conclusions, and did so state, citing the case of ***Kiilu vs. R [2005] 1 KLR 174****. It has been stated before that in any trial, there are bound to be inconsistencies and*

discrepancies. This Court said so in ***Joseph Maina Mwangi v Republic*** ***[2000] eKLR (Criminal Appeal No. 73 of 1992)*** *thus:-*

"***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 sentence."***

22. *We find no serious inconsistency in the evidence of JM, PW2 and PW3 and the inconsistencies pointed out by the appellant are reconcilable with the rest of the evidence. The corroborative medical evidence was produced in accordance with* ***Section 77*** *of the* ***Evidence Act*** *(not* ***Criminal Procedure Code*** *as complained by the appellant) and we find no breach of the law in receiving such evidence. Whether it was from a private or public institution is of no consequence as it was the Police investigators who directed the complainant to such facility. Lack of DNA testing or absence of spermatozoa did not, in our view, diminish the prosecution evidence as there was other evidence, sufficient to prove the elements of the offence beyond doubt. As for witnesses who were left out,* ***Section 143*** *of the* ***Evidence Act*** *stipulates clearly that "****no particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact".***

23. We have said enough, we think, to show that this appeal has no merit and we order that it be and is hereby dismissed.

Dated and delivered at Nyeri this 27th day of May, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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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