IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, OUKO & GATEMBU, JJ.A.

CRIMINAL APPEAL NO. 111 OF 2013

WILLIAM KIMANI NDICHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal of High Court of Kenya at Nairobi by (Ochieng, J.) dated 26th November, 2012 inH.C. CR. A. 452 OF 2010)

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JUDGMENT OF THE COURT

William Kimani Ndichu, **(the appellant**), appeals against the judgment of the High Court (Ochieng', J) which upheld a conviction and sentence by the Senior Resident Magistrate Kibera for the offences of having unnatural carnal knowledge of a young boy, against the order of nature contrary to Section 162 (a) of the Penal Code, defilement contrary to Section 8(1)(3) of the Sexual Offences Act and stealing contrary to section 279(b) of the Penal Code.

The particulars of the charges were as follows:-

Count 1 - Having unnatural carnal knowledge of a young boy, against the order of nature contrary to Section 162(a) of the Penal Code and the particulars were that ***"On the 29th day of December, 2008 at [particulars withheld] area in Kajiado North District within the Rift Valley Province, had carnal knowledge of A K M against the order of nature."***

In the alternative, the appellant was charged with indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006; whose particulars are that "***on***

29th day of December, 2008 at [particulars withheld] area in Kajiado North District within the Rift Valley Province, committed an indecent Act by placing his genital organs Penis into the genital organs

(anus) of A K M"

In Count II - defilement, contrary to Section 8(1)(3) of the Sexual Offences Act the particulars are that "***on 29th day of December, 2008 at[particulars withheld] area in Kajiado North District within the Rift Valley Province, unlawfully and intentionally committed an act by inserting his male genital organ into the genital organs (vagina) of D N W a child aged 12 years."***

The appellant was charged with the alternative to count II with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006, the particulars thereof being that "***on 29th day of December, 2008 at [particulars withheld]area in Kajiado North District within the Rift Valley Province, committed an indecent act by placing his genital organ into the genital organs (vagina) of D N W a child aged 12 years old."***

In Count III - housebreaking contrary to Section 304 (1) and stealing contrary to Section

279 (b) of the Penal Code the particulars are stated that ***"on the 4th day of March, 2009 at***

Kariobangi Area in Kajiado North District within Rift Valley Province broke and entered the dwelling house of Ruth Wangechi Ndombe with intent to steal one Meko Gas cooker and one bicycle all valued at Kshs. 9,000/= the Property of the said Ruth Wangechi Ndombe."

Upon taking plea the appellant denied the charges and the matter proceeded to full hearing. The prosecution presented ten (10) witnesses while the appellant tendered unsworn evidence.

The brief particulars of the case are that the complainant in Count 1 who we shall refer to as **AKM,** (**PW1)** for purposes of this judgment**,** was a young boy aged 12 years. After a ***voire-dire*** examination, he narrated how on 29th December, 2008 he was playing with his siblings outside their house. At around 11.00a.m the appellant, who he said he knew well before tricked him that he was being called by his mother. **AKM** followed the appellant who instead of leading him to his mother drew a knife and sodomised him.

DNW, (PW2), also a child aged about 12 years of age (2nd complainant) also narrated how she had been defiled after the appellant tricked her in a similar manner on the same date. Like Pw1, this child also testified that she knew the appellant well before that date.

J N M, PW3, PW1'**s** mother and **R W G PW4**, PW2's mother, both confirmed that their children had been sexually assaulted and that they had accused the appellant herein as the person who had done so. At different times they were able to take their children to Nairobi Women's hospital. Both **PW1** and **PW2** were confirmed to have been sexually abused and received treatment. **Dr. Ketra Muhombe**, **PW7,** based at the Nairobi Hospital confirmed that the Hospital treated the children. She produced the medical reports in respect of both children in evidence. The medical reports confirmed that both children had indeed been sexually assaulted as they claimed. **Dr Zephania Kamau, PW5**, also testified that he examined the two children and filled out the P3 forms which were produced in evidence. The reports were made at Ngong Police Station and after investigations; the appellant was arrested and taken to the Police station.

As part of the investigations, **CPL Mercy Situma, (PW10)**, the investigating officer from Ngong Police Station took some blood and saliva samples from the appellant, and some swab samples from the complainants. The same were taken to the Government Chemist for analysis.

Ruth Wangechi Ndombe, (PW6), also narrated how her house was broken into and several items stolen from therein**.** Her evidence was in respect of count 3. A bicycle which was one of the items stolen from her house was recovered from the appellant, hence the 3rd count.

In his defence, the appellant tendered unsworn evidence in which he denied the charges, and stated that while on his way to visit his mother a crowd pursued him shouting "catch him". The crowd caught him

and took him to the police station where he learnt of all the offences levelled against him. After considering the evidence adduced before the court, the trial magistrate found the appellant guilty of all the three main counts as charged and convicted him. After mitigation, the court made the following comments while meting out sentence.-

"The accused is clearly a menace to society and a man who should now be kept away from this society. His actions have earned him the following sentences. In count 1, he is sentenced to serve 15 years in jail. In count II he is sentenced to serve 20 years in jail, and in count III, he is to serve 3 years in jail. As all 3 offences were committed separately, each being its own act at separate times (accused as for count III on a separate date) the sentences will run consecutively."

Aggrieved by that decision, the appellant lodged his first appeal in the High Court. The High Court after re-evaluating the evidence tendered by the prosecution and the defence upheld the conviction and sentence on all the offences except the offence of housebreaking which it quashed. In doing so, the learned Judge expressed himself in the following terms:-

> ***"In the result, the convictions and sentences on counts 1 and 2 are upheld. Secondly, the conviction for the offence of stealing, on count 3, is upheld together with the sentence. The conviction for the offence of Housebreaking is quashed. There was no specific sentence handed down for that offence.***
>
> ***But assuming that the sentence of 3 years on count 3, was in relation to that offence, I set aside such sentence. However, this order does not affect the sentence for the offence of Stealing contrary to Section 279 (b) of the Penal Code."***

This decision provoked the second appeal before us. The appellant seeks that the appeal be allowed, conviction quashed and sentence set aside based on the grounds of appeal titled "Plea for Leniency" which, was filed on 14th December, 2012. The appellant enumerates the following grounds;

> ***"1. That the honourable court be pleased to grant me a chance to serve the sentences under count 1 and count 11 concurrently. Count 1 calls for 14 years maximum while count 11 calls for 20 years jail term.***
>
> 2. ***That all charges were under one case file no. 2012 of 2009.***
>
> 3. ***That since am first offender may this court put into account to the same while considering reducing the sentence as prayed herein.***
>
> 4. ***That I pray for non-custodial remedy so that I can join my family who are suffering due to my imprisonment as they depend on me as their bread winner.***
>
> 5. ***That this duration I have served (sic) in prison, I have acquired skills in prison industries especially in carpentry section and am now rehabilitated person who can vent for himself due to skills I have gotten"***

The appellant nonetheless with the leave of the court filed the following supplementary

grounds of appeal:-

"(1) That the 1st appellate court erred identification evidence of PW1 and due to the prevailing circumstances. in law in reliance of (sic) PW2 which was not positive

2. ***That the first appellate court erred in law by being impressed by my mode of arrest without taking into consideration time and circumstances that prevailed at the scene of crime.***

3. ***That the 1st appellate court erred in law by finding a minor laceration and a small tear on anal***

orifice and defilement for PW1 and PW2 respectively without the appellant being examined medically for corroboration evidence to verify the same.

4. ***That the 1st appellate court erred in law by failing to observe that the alleged stolen bicycle was not directly linked or recovered from me.***

5. ***That the 1st appellate court erred in law by failing to examine the evidence adduced before the trial court afresh, re-evaluate, re-assess it and reach its own independent conclusion.***

6. ***That since the 1st appellate court did not prove its case beyond reasonable doubt and not giving points of determination in the defense elements."***

When arguing the appeal before us, the appellant appearing in person, informed the Court that he was relying on the grounds and submissions on record and further urged the Court to consider allowing him to serve his sentences concurrently instead of consecutively, as ordered by the two courts below. He contended that the complainant claimed that she knew the appellant but she called him by two names **Wilson** and **Kamau** and yet she claimed to have known him for four years. He argued that on count three the Court did not consider the contradictions on how the entry had been obtained. He therefore urged the Court to dismiss the appeal.

Mr. B.L. Kivihya, learned counsel appearing on behalf of the Director of Public Prosecution opposed the appeal. He submitted on the issue of identification, that the victims were tenants of the appellant's father and they knew him for a period of four years. He emphasized that there was no chance of mistaken identity. He submitted further that the witnesses the appellant said should have been called were not witnesses to the crime and would not therefore have added any value to the appellant's case. Moreover, there was medical evidence adduced to corroborate the evidence in respect of the sexual offences. Learned counsel submitted that the charges were proved, the evidence was overwhelming and that the convictions were safe.. He urged the court to have the sentences run consecutively as the offences were committed at different times. He submitted that the sentences in nature were neither illegal nor excessive. He finally urged the Court to affirm the conviction and sentences; and dismiss the appeal.

This being the second appeal, the Court is restricted to matters of law only by dint of **Section 361(1)** of the **Criminal Procedure Code**. This provision has been amplified in several decisions of this court including **Dzombo Mataza v Republic**

[2014] eKLR (Criminal Appeal No 22 of 2013) where this court held:-

"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court…. By dint of the provisions of section

361(1) (a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

After considering the record and submissions before us we find that the points of law arising from this appeal are whether the appellant was properly identified; whether sexual assault was proved in both charges; whether the High Court re-evaluated the evidence of the trial court and arrived at a proper finding; and whether generally the prosecution discharged the burden of proof as by law required.

The other issue is on whether the sentence should run consecutively or concurrently. On the issue of identification, we hold the view that nothing much turns on that.

It is not disputed that the appellant was well known by both complainants herein, being a neighbour and their landlord's son. Both offences were committed in broad daylight after the appellant actually tricked

the children to follow him to some was properly determined by the two courts below. We agree with their concurrent finding to the effect that the appellant was properly identified by the witnesses. That ground therefore must fail.

The ground on whether the charges were proved beyond reasonable doubt and the burden of proof go together. The learned trial magistrate who took the evidence of the two children after conducting *voire dire* examination was satisfied that they were telling the truth. Their evidence was corroborated by the medical reports also produced evidence which clearly confirmed that the children had been sexually assaulted. We are satisfied that the prosecution proved not just the fact that the children had been sexually assaulted but, that it was the appellant who had committed those heinous crimes.

On the issue of re-evaluation of the evidence by the first appellate court, it is evident from the record that the learned Judge re-evaluated the evidence thoroughly and subjected the same to a fresh test. Indeed it was following this re-evaluation that the learned judge was able to arrive at a conclusion that was different from that of the trial magistrate to the effect that the limb of house breaking in count 3 had not been proved to the required standard. That ground in our view also lacks merit and we dismiss the same.

That leaves us with the issue of the concurrent and consecutive sentences. The appellant's submission on this issue was that since all the charges were prosecuted in the same file, then the two courts below erred in not ordering that the sentences run concurrently.

He entreats us to make that order.

Basically, sentencing is at the discretion of the judge or magistrate who hears the matter and passes sentence. As long as that sentence is lawful, and is not excessive in the circumstances of the case, then an appellate court will be reluctant to interfere with that sentence. Indeed, in this case, as the second appellate court, we must fall back on section 361(1) (a) which states that severity of sentence is a question of fact. The predecessor of this Court in the case of **Ogolla s/o Owuor V Republic [1954] EACA 270,** while addressing this issue stated:-

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factor. To this, we would add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."***

Following in those footsteps, this court in the case of **Kenneth Kimani Kamunyu - vs- R. [2006] eKLR**, this Court expressed similar sentiments as follows:-

> ***"The Court would not act on a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial Judge unless it was evident that the Judge acted upon some wrong principles or overlooked some material factors. Secondly that the sentence imposed on an accused person must be commensurate to the moral blame worthiness of the offender and it was thus not proper exercise of discretion in sentencing for the court to have failed to look at the facts and circumstances of the case in their entirely before settling for any given sentence."***

The appellant's complaint is not that the sentence was harsh or excessive if looked at on the basis of each count. His grievance is that the sentences would have been concurrent instead of consecutive so that he would end up serving 20 years imprisonment instead of a total of 38 years.

It is now trite law that in cases where a person has been charged with and convicted of two or more counts involving the same transaction in a charge sheet or information or a trial, the practice is to direct that the sentences should run concurrently: ***see R v Fulabhai Jethabhai & Another (1946) 13 EACA 179. See*** **Ng'ang'a v. Republic (1981) KLR 530** decision by Travelyan and Sachdeva Ag. J, and the case of **Ondiek v. Republic (1981) KLR 430,** Simpson J and Kneller J; where the Judges were unanimous on

the position that the practice is that if a person commits more than one offence at the same time in the same transaction save in exceptional circumstances the sentences imposed should run concurrently.

The former Court of Appeal has defined the phrase "same transaction" in **Rex v Saidi Nsabuga s/o Juma and another (1941) 8 EACA 81** and revisited it again in **Nathani v R (1965) EA 777**, where the court said that the proper construction of the phrase "same transaction" is that:-

> ***"If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction."***

The Court of Appeal sitting in Nyeri recently in the case of **BMN v Republic [2014] eKLR (Criminal Appeal No. 97 of 2013)** when dealing with a similar situation pronounced itself as follows:-

> ***"As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. "***

For us to be in a position to interfere with the sentences herein, we have to be satisfied that all the three offences the appellant was convicted for were so inter-related; that they formed a single transaction. Unfortunately for the appellant that is not so here. Each of these offences was committed at different times, and each was totally divorced from the other. They relate to different complainants, and from their very nature it is evident that each of them was planned and executed separately. The only thing they have in common is that they were lumped together in the same charge sheet and prosecuted together. They do not arise from one transaction.

Looking at the nature of the offences, we can understand the sentences meted out by the trial court. We note that on the charge of defilement, the appellant was given the statutory minimum sentence. The charge under section 162(a) of the Penal Code falls within the proviso giving a maximum of 21 years. It cannot therefore be said that the sentences are either unlawful or excessive.

It is our view also that they were actually merited considering the circumstances of the case. We do not therefore have any basis for interfering with the sentences and the concurrent findings of the two courts below. The upshot of all this is that we find this appeal devoid of merit and dismiss the same.

Dated and delivered at Nairobi this 22nd day of May, 2015.

W. KARANJA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR