IN THE COURT OF APPEAL

AT KISUMU

CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A

CRIMINAL APPEAL NO. 25 OF 2013

BETWEEN

SAMSON ABAKUKU ALIAS BOYI..... APPELLANT

AND

REPUBLIC……..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Chemitei, J) dated 28th November, 2011

in

H.C.CR.A. NO. 75 OF 2011)

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JUDGMENT OF THE COURT

This is a second appeal and by dint of ***Section 361(1)(a)*** of the Criminal Procedure Code only issues of law may be considered by this Court. Judicial pronouncements on this legal principle are germane - see for instance ***NJOROGE VS.REPUBLIC [1982] KLR 388*** and ***JOHN GITONGA alias KADOS VS. REPUBLIC*** (Nyeri) ***Criminal Appeal No. 149 of2006 (UR).*** In the latter case it was stated:-

> ***"This being a second appeal, we are reminded of our primary role as the second appellate court namely to steer clear of all issues of facts and only concern ourselves with issues of law…"***

The appellant, ***Samson Abakuku*** also known as ***Boyi*** was charged before the Principal Magistrate's Court, Maseno, on two counts. In the first count he was charged with defilement of a girl contrary to ***Section 8(1)*** and ***(3)*** of The Sexual Offences Act No.3 of2006, particulars being that on 28th February, 2010 at 9.20 p.m in Emuhaya, he unlawfully penetrated into the genital organs (vagina) of "L.A.", a child between the age of twelve and fifteen years.. There was an alternative charge to count 1 which was a charge of Indecent Act with a Child contrary to ***Section 11(1)*** of the said Act. Particulars of this charge were that, on the same day at the same place, he intentionally touched the vagina of the said child with his penis. The second count was grievous harm contrary to ***Section 234*** of the Penal Code, particulars being that on the said day and at the same place he unlawfully inflicted grievous harm to the said girl.

A trial took place before the learned Resident Magistrate (S. Ongeri) and in a judgment delivered on 11th

May, 2011, the appellant was convicted on both counts and was sentenced to serve 20 years imprisonment on the first count and four years imprisonment on the second count, both sentences ordered to run concurrently.

The appellant appealed to the High Court of Kenya at Kisumu and the appeal was heard by *Justice HK Chemitei* who in a judgment delivered on 28th November, 2011 dismissed the same. The appellant then filed this appeal.

In the homemade memorandum of appeal filed in this Court on 7th October, 2014, the appellant takes issue with the findings of the learned Judge because according to the appellant, there was no sufficient light at the scene of crime to enable positive identification of the appellant. The appellant also questions the finding that he was positively identified by witnesses and says that the learned Judge failed to consider his defence. He also says that the sentence awarded was harsh and there was failure to take into account the fact that he had been in custody for three and half years before he was convicted.

Taking the last complaint on severity of sentence first, ***Section 361(1) (a)*** of the Criminal Procedure Code declares severity of sentence to be a matter of fact and we have no jurisdiction, as already stated, to deal with matters of fact in a second appeal like this one. In any case ***Section 8(1)(3)*** of the Sexual Offences Act under which the appellant was charged provides for imprisonment to a term of not less than (20) twenty years to a person who commits defilement to a child aged between twelve and fifteen years. The appellant was charged with defiling a girl aged between twelve and fifteen and the sentence imposed was the sentence provided in law and the complaint in that regard has no merit and is dismissed.

The case made out by the prosecution was fairly straight forward. "LA" (PW1), then aged 13 years, was on 28th February, 2010 at 9.00 pm in the house she shared with her brother "J.O." (PW2). They were orphans who lived in their home on their own. They were doing homework from school. There were two tin-lamps in the house which were lit and there was also moonlight outside. Because the toilet they used was outside "L.A." Opened the main door to go there but as she did so the door was pushed violently from outside and a man who both recognized as the appellant entered the house and turned off the lit lamps. "L.A." tried to scream for help but the appellant held her by the mouth. Her brother was able to escape. The appellant strangled "L.A." by the neck, pushed her outside and pulled her into a muddy trench. He tore off her clothes and defiled her. Meanwhile "J.O" had ran to the home of a neighbor, ***"IOC" (PW3)*** and reported to her that the appellant had invaded their home. "IOC" hastened there and found the main door opened with "L.A's" blouse lying at the door. She screamed for help which attracted neighbours who came to the home, "L.A." then appeared from the trench crying, bleeding, muddy and with torn clothes. She told those present that she had been defiled by the appellant.

The appellant was then brought from his house to the scene by a village elder, ***Samuel Imukwa (PW4).*** The whole party went to Luanda Police Station where the appellant was arrested and detained. "L.A." was taken to hospital. The village elder testified that when they searched the appellant's house, they found a brown trouser and a shirt which were all wet and stained in mud. ***Joel Makanga Marwa, (PW5),*** a Clinical Officer at Emuhay District Hospital examined "L.A." the following day and found that besides other injuries sustained, she had been defiled.

No. 71293 Corporal Meshack Otiimo previously of Luanda Police Station investigated the case and charged the appellant accordingly.

Put on his defence the appellant gave unsworn testimony where he stated that he was a casual labourer. He admitted that he knew the complainant and denied the charges stating that he had a land dispute with the village elder which was why he had been arrested.

The trial magistrate believed the evidence of "L.A." and "J.O.' that they knew the appellant and that they had recognized him when he entered their house on the fateful night. The trial magistrate therefore convicted the appellant. The first appellate court re-evaluated this and the other evidence on record and like the trial court believed it and thus that appeal failed.

On whether there was sufficient light at the scene to enable for positive identification, the learned trial magistrate found as a fact that the appellant was a neighbor of PW1 and PW2 and that they were able to recognize him as soon as he entered their house.

There was sufficient light in the house through two tin lamps which PW1 and PW2 used to do their homework. PW2 escaped from the house as soon as the appellant entered and ran to the house of PW3 where he reported to her that the appellant had entered their house and attacked them. When PW1 emerged from the trench from where she had been defiled she immediately reported to all present that she had been defiled by her neighbor, the appellant. All this evidence was re-evaluated by the first appellate court which believed it.

So the evidence presented proved that the appellant was recognized by the two witnesses. As was stated in ***ANJONONI AND OTHERS VS.REPUBLIC [1976-78] IKLR 1566:-***

> ***"This was 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 personal knowledge of the assailants in some form or other. We draw attention to the distinction between recognition and identification in SIRO OLE GITEYA V. REPUBLIC…"(unreported).***

Like the two courts below we are of the considered opinion that the evidence on identification which, in the case before those courts was actually evidence of recognition, was overwhelming. PW1 and PW2 recognized their neighbour, the appellant, who intruded into their house and attacked them. He knew that they lived in their home alone. Of this, the learned Judge on first appeal said, and we agree:-

> ***"…the appellant took advantage of the complainant (sic) situation. There were two (2) orphans struggling in life. They were doing homework. An adult who has a wife should not have taken such a heinous act. As a neighbor he should have ensured that the welfare of the complainant is taken care of…"***

This appeal has no merit and it is accordingly dismissed.

DATED and DELIVERED at KISUMU this 14th day of May 2015.

D.K.MARAA

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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 of the original.

DEPUTY REGISTRAR