



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 86 OF 2013

BETWEEN

FRANCIS NJERU KOBUTHI..... APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Ong'undi, J.) dated 16th July, 2013

in

H. C. CR. A No. 108 of 2007)

JUDGMENT OF THE COURT

1. The appellant, **Francis Njeru Kobuthi**, was initially represented by counsel before this court but on the hearing date, he filed a notice of intention to act in person. He appeals against his conviction by Runyenjes Resident Magistrate, (D. O. Onyango) for the offence of Defilement contrary to **section 8(1)** as read with **sub-section 2** of the **Sexual Offences Act, 2006**. On appeal to the High Court, (H. Ong'undi J.) the conviction was upheld but the offence was altered to incest contrary to **Section 20(1)** of the **Sexual Offences Act**.

2. The concurrent findings of fact relied on by the two courts below to convict were fairly straight forward. The appellant was not the biological father of the complainant (hereinafter, CK) (PW2) but he accepted her as his daughter after marrying her mother. He and the wife had three other children but they separated and the wife remarried elsewhere leaving all the children under the care of the appellant. They all lived in a one-roomed house in Nduru village in Kanja Sublocation of Embu county, and slept on the same bed. According to a community health worker (PW3) who, in the company of other health workers, visited the home in March 2007, they were living in deplorable conditions and the children were jigger-infested and malnourished. The appellant was advised to have a separate bed for the children and to feed them, but he said he lacked money.

3. CK testified that she was the eldest child and was aged 9 years in 2007. The appellant was their father who took care of her and her siblings after their mother left the home. He also used to cook for them. However, on three occasions, the appellant had removed her clothes after they

went to bed and done ‘bad things’ on her. No one else had ever done bad things on her. This was confirmed when PW3 returned to the home in April 2007 and found CK walking with difficulty and started crying when PW3 asked her what the problem was. CK then disclosed that the appellant had defiled her three times. The matter was reported to the Area Chief who arranged for medical examination by Dr. Maina (PW4) who confirmed that CK’s hymen was broken and there were bruises on her genitalia. The appellant was then arrested and charged with the offence as earlier stated.

4. In his brief unsworn defence, the appellant denied that he had any carnal knowledge of CK although he had stayed with and taken care of the children for one year and nine months since his wife deserted them. The allegations were only made by some people who came to the home to check on the children and after one month accused him of defilement. He added that at times he would leave the children on their own when he went to work.

5. The two courts below had no difficulty in finding that CK was a minor under the age of 11 and that she was defiled. As to who committed the offence, the trial court believed the evidence of CK and found support for it from the medical evidence of PW1 and the testimony of the community health worker, PW3. The High Court found no reason to disturb the trial court’s reliance on the sole direct evidence of CK since **Section 124 of the Evidence Act** permits the acceptance of the sole evidence of the victim of a sexual assault and reliance thereon to convict, subject to positive assessment of credibility and giving of reasons. The court also found the prosecution evidence consistent and was not persuaded by the appellant’s defence.

6. As for the offence committed, the High Court had this to say:-

“For the 3rd issue, I do find that the evidence clearly shows that the appellant defiled a child who he knew to be his daughter. He ought to have been charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act.”

In passing, we find no impropriety in this finding. The sentence prescribed in both offences is life imprisonment which the High Court confirmed.

7. The appeal before us is predicated on three grounds which are urged in a document submitted by the appellant at the hearing of the appeal and headed ‘**Amended Grounds of Appeal**’. In essence he asserts that the two courts below erred in law and fact in:-

i). relying on the evidence of PW2, PW3 and PW4 without considering that it was riddled with doubts;

ii). upholding the conviction when the case was not proved beyond reasonable doubt;

iii). rejecting the defence which was unchallenged.

8. In his lengthy handwritten submissions (probably written on his behalf), which may be summarized, the appellant, on the first issue, pointed out the contradiction of the evidence of CK who stated that the appellant was cooking for the children while PW2 testified that the children were malnourished. In his view, this was a ploy to portray him as irresponsible in the eyes of the court. He also asserted that the evidence by CK that they were all sleeping in one bed was untruthful because she did not explain whether their mother carried away the bed they were using. As for the evidence of the arresting officer, PW4, he submitted that PW4 did not confirm that the house had one room and one bed. All the incriminating evidence by CK, PW3 and PW4 was therefore concocted and untruthful and it ought not to have been believed.

9. On the second issue, the appellant submitted that there were yawning gaps in the prosecution case in that: the actual date when CK was defiled was not proved; the possibility was not excluded

that CK was having affairs with boys when the appellant was out at work; if CK was defiled three times, she would have informed the neighbors or her grandmother but did not; PW3 came to his home twice in the company of other people but she was the only one called to testify; the arresting officer, PW4, was accompanied by other officers and the Chief and APs were involved but it was only PW4 who was called to testify on arrest; and that the medical Doctor, PW1, did not identify who broke CK's hymen and therefore the medical report was incomplete.

10. Finally on his defence, he submitted that it was plausible and preferable to the untruthful evidence of PW2 and PW3. He cited the case of ***Stephen Mungai Mucheru v. R, Cr. A. No. 1 of 1994*** relying on the holding that:-

“We would state here that, when the appellant put forth an alibi as his defence, it was upon the prosecution to disprove it since an accused person is under no obligation to prove his own innocence as the burden of proving a case against an accused remains on the prosecution throughout the trial.”

He orally added that his former wife planted the case against him.

11. In response, learned Assistant Director of Public Prosecutions, Mr. Kaigai, submitted that the evidence of CK was truthful and reliable and it received support from the equally truthful evidence of PW1, PW3 and PW4. The two courts below cannot be blamed for believing the evidence and basing the conviction thereon. Nor should the appellant blame his former wife who was not a witness and had no interest after being remarried.

12. We have examined the record and grounds of appeal put forward by the appellant and considered the submissions made in the matter. The standard of review at this stage is limited to issues of law as provided in **Section 361(1)** of the **Criminal Procedure Code**. We take it from the case of ***Chemagong -vs- Republic (1984) KLR 213*** at page 219 where this Court stated:

“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).”

In the case of ***Christopher Nyoike Kangethe v Republic [2010] eKLR*** it was also stated as follows:-

“an invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so. And the only compelling reason(s) would be that no reasonable tribunal could on the evidence adduced have arrived at such findings, or in other words, the findings were perverse and therefore bad in law.”

The findings would, of course, be perverse if *they were based on no evidence at all or on a misapprehension of the evidence, or the court is shown demonstrably to have acted on wrong principles in reaching the findings.*

13. *With those principles in mind, we have considered the complaints raised in this appeal and, in our view, they are based on the credibility of witnesses. In other words, according to the appellant, the case was not proved beyond reasonable doubt because reliance was made by the two courts on witnesses who were not worth believing. On this premise, we must bear in mind the principle stated by this Court in ***Peters v. Sunday Post [1958] EA 424 at page 429*** that:-*

“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.”

14. *In this case the trial court assessed the credibility of CK as follows:-*

“I have considered that the only direct evidence against the accused is that of the minor who is aged 9 years. I have considered the danger of relying on the sole evidence of the minor. I watched the minor testify. Though she appeared timid, she had no difficulty pointing to her father the accused as the one who defiled her. I have considered that the person who the complainant named as the one who defiled her is the accused. The complainant mentioned the name of the accused to PW3 immediately she was asked about her problem in walking. I find no reason whatsoever why the complainant would want to frame her father for no apparent reason. I equally find no reason why PW3 would lie against the accused. Though the accused denied the charge, his statement did not displace the evidence of the complainant which directly implicates him with the charge herein.”

15. We have no reason to doubt that assessment which the first appellant Court endorsed. Nor do we find any strong ground for challenging the evidence of PW1, PW3 and PW4. There may well have been other persons present when those persons witnessed what they testified to, but it is not the plurality of witnesses that is necessary to prove a fact. **Section 143** of the **Evidence Act** is clear on that. We are satisfied, as the two courts below were, that the evidence on record was credible, consistent and probative of the offence charged beyond doubt. The defence put forward by the appellant could not stand in the face of such evidence.

16. This appeal has no merit and we order that it be and is hereby dismissed.

Dated and delivered at Nyeri this 13th day of May, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. 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