



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA.)

CRIMINAL APPEAL NO. 91 OF 2014

BETWEEN

JOHN MAKHANI KIMINJA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kakamega (Kimaru, J.) dated 5th May, 2012

in

HCCRA. NO. 99 OF 2010)

JUDGMENT OF THE COURT

1. The appellant was convicted by the Chief Magistrate's Court at Kakamega on a charge of defilement of a girl, **J. L.**, aged 9 years, contrary to **section 11(1)** of the **Sexual Offences Act** and sentenced to serve life imprisonment. His first appeal to the High Court was unsuccessful, hence this second appeal.
2. In his memorandum of appeal to this Court, the appellant faulted the first appellate court for upholding his conviction even when it was shown that a key witness had not been called to testify. He also alleged that there was insufficient evidence to connect him to the said offence. The appellant further stated that his defence was not taken into consideration.
3. This being a second appeal, our mandate as per **section 361 (1)** of the **Criminal Procedure Code** is confined to matters of law but because legal conclusions are derived from the facts and the evidence presented to a court, in this case we have to re-state, albeit briefly, the prosecution as well as the defence case before the trial court then relate that with the decisions arrived at by the two courts below.
4. The complainant testified that on 19th October, 2009 at about 2.00p.m. the appellant, whose father is a cousin to her father and was well known to her, came to their home. The complainant

was with her younger brother at the material time. The appellant requested the complainant to carry for him a piece of wood and promised to give her K.Shs.5/=. The girl narrated how the appellant took her to a bush near their home and defiled her. A neighbour by the name **M** caught the appellant red handed and reported that to the complainant's mother, **PW 3**. After the ordeal she was in such pain that she could not walk and had to crawl back home. **M** could not be availed as a prosecution witness because he disappeared shortly after the incident.

5. The girl's parents took her to Kakamega Provincial General Hospital where she was examined. **Doctor Nyikul Duncan, PW 2**, testified that the vulvas were inflamed and her hymen was broken. The witness concluded that she had been defiled.

6. In his brief defence, the appellant stated:

“In my defence I ask for leniency whether I did it or not. I leave it to God. When I think of it I get a shock because I never committed the offence.”

7. The trial court was satisfied that the prosecution evidence was overwhelming and proceeded to convict and sentence the appellant as earlier stated. Turning to the grounds of appeal, it is not in dispute that a person who allegedly saw the appellant defiling the complainant, one **M**, was not called as a witness. According to the complainant's mother, **M** disappeared after the incident. We believe that is the reason why he was not called as a witness. The court cannot speculate as to the reason why he disappeared. All we can say is that failure to call him was not fatal to the prosecution's case, given the provision to **section 124** of the **Evidence Act** which states:

“Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”

8. Applying the above quoted law, the learned trial magistrate convicted the appellant, holding that the complainant was truthful throughout. As held by this Court in **MOHAMED V REPUBLIC [2005] eKLR**, courts are no longer humstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years, if the trial court is satisfied that the child is truthful.

9. The child herein knew the appellant as he was a relative. She had no reason to frame him, if at all he was not the one who had defiled her. The offence was committed in broad day light and therefore the complainant's evidence was that of recognition which is always more reliable than that of identification; see **ANJONONI V REPUBLIC [1980] KLR 59**.

10. There was overwhelming evidence that the appellant defiled the complainant. Both the trial court as well as the first appellate court considered the appellant's defence but found it hollow and rejected the same.

11. We find this appeal lacking in merit and accordingly dismiss it in its entirety.

DATED and delivered at Kisumu

this 23rd day of October, 2015

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR