



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & MURGOR, J.J.A.)

CRIMINAL APPEAL NO. 12 OF 2012

BETWEEN

EZEKIEL KIPKOSGEI CHELIMO APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Eldoret, (Mshila, J.) dated 19th January, 2012

in

H.C.CR.A. NO. 157 of 2011)

JUDGMENT OF THE COURT

1. The appellant was charged with the offence of defilement of a child aged about five contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act. He was in the alternative charged with indecent assault contrary to **section 11(1)** of the same Act. He denied those charges but after trial he was convicted on the main charge of defilement and sentenced to life imprisonment. His appeal to the High Court was dismissed. He has come to this Court on a second appeal.
2. The main complaints from the appellant's 11 grounds of appeal and his submissions before us were that his conviction was based on the uncorroborated evidence of the four years old complainant. The other witnesses who testified against him having not witnessed the alleged commission of the offence, their evidence was hearsay. The appellant also faulted the two courts below for dismissing his defence instead of finding that he could not have defiled the child hardly 10 to 30 metres away from where DW2, DW3 and DW4 were waiting for him.
3. In response, Mr. Mulati, learned Principal Prosecution Counsel, submitted that though young, the complainant narrated her ordeal in a clear and consistent way. Although there was corroboration from medical evidence, that narration alone sufficed to found the appellant's conviction. He therefore urged us to dismiss this appeal.
4. In a second appeal such as this, **Section 361** of the Criminal Procedure Code prohibits the second

appellate court from entertaining issues of fact and restricts its consideration to only points of law. The rationale for this is the argument that the two courts below cannot have both erred on matters of fact more so when it is born in mind that the trial court had the advantage of seeing and hearing the witnesses testify and was therefore better placed to assess their demeanor in determining their credibility. The second appellate court should therefore pay home to the concurrent findings of the two courts below. See **Adan Muraguri Mungara v. Republic, [2010] eKLR (Criminal Appeal No. 347 of 2007)**.

5. However, as this Court has repeatedly stated in cases such as **Otieno Dida v. Republic [2011] eKLR**, conclusions reached on the basis of the evidence on record are legal points falling within the ambit of **Section 361** of the Criminal Procedure Code.
6. In this case, the appellant has faulted the High Court, as the first appellate court, for failing to properly re-evaluate the evidence on record as it was obliged to. His contention is that had the learned Judges of the High Court subjected the evidence on record to an exhaustive re-evaluation as they were obliged to, they would have found that his conviction had no factual foundation. This obliges us to examine the evidence on record and determine whether or not the same supports the appellant's conviction.
7. The prosecution case was that at the material time the appellant and Rehema Chelagat Kemboi, PW1, lived in [Particulars Withheld] Forest. Their homes were about 2 km apart. In the morning of 20th August 2010, the appellant borrowed PW1's panga to use in pruning trees in the forest. At about 1.00 pm, PW1 took her daughter S.C. (the complainant) to a neighbour's house, about 3 metres away, to have her hair plaited. PW1 left the complainant with the neighbour and went to fetch green maize for roasting. When she returned at about 2.00 pm, she noticed that the complainant was unhappy. She took her to their house and the complainant told her that after her hair had been plaited, she decided to take the hair comb to their house. Upon arrival, the appellant knocked at their door, entered the house and told the complainant he had returned the panga. He then held her hand, put her on the sofa set and defiled her. The matter was thereafter reported to the police and the appellant was charged.
8. Having read the record of appeal and considered the rival submissions by counsel for the appellant and those made by the learned prosecution counsel, we find that the issue of the child having been defiled is not in controversy. PW1 saw the child walking with her legs astride. On examining her, she saw a whitish substance in her vagina. David Cheruiyot, PW5, the Clinical Officer who examined the complainant said her vulva was bruised. Her thighs were tender and the vaginal area was swollen and had a wet discharge. In the circumstances, we find, like the two courts below did, that the complainant was certainly defiled. The issue for our determination is the identity of the person who defiled the child.
9. As is often the case in sexual offences, it is the victim's word against that of the predator. This is because sexual offences are never committed in public. So the issue of the perpetrator's identity takes centre stage and revolves around visual identification by a single witness. That is the scenario in this case.
10. As this Court has repeatedly stated, for instance in cases such as **Cleophas Otieno Wamunga vs. Republic [1989] KLR 424**, unless handled with care, evidence of a single visual identification witness especially in circumstances that did not favour a positive identification can cause a miscarriage of justice.
11. In this case the offence was committed in broad daylight. The complainant had met the appellant earlier in the day and on instructions of her mother, she had handed a panga to him. In what we may term a village identification parade, the complainant picked the appellant from a group of five people. That was after she had told her mother that it is the appellant who had defiled her. We are satisfied that she was not mistaken on the appellant's identity.

12.The appellant testified on oath and called four witnesses, three of whom corroborated his claim that he could not have defiled the complainant while they waited for him at the road hardly 10 to 30 metres away. The two courts below rejected that defence because those witnesses were far away from the house.

13.We have no reason to doubt the concurrent findings of the two courts below. The complainant testified that the appellant defiled her in a hurry and left. The appellant knew that with his friends several metres away, he could do his thing quickly, which he did, and join them. When the complainant’s mother confronted the appellant later on the same day and asked him why he had committed such a heinous crime against her child, the appellant panicked and trembled as he protested his innocence. One of his witnesses, DW5, exhorted the complainant’s mother to forgive the appellant. Why would he do that if the appellant was innocent?

14.We find no merit in this appeal and we accordingly dismiss it in its entirety.

DATED and delivered at Eldoret this 10th day of December, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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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