



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI. MUSINGA & KANTAI. J.J.A)

CRIMINAL APPEAL NO. 364 OF 2011 (R)

BETWEEN

MOSETI TOKYO MARIGA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kisii (Sitati, J.) dated 26th January, 2010

in

H.C. CR. No. 60 of 2010)

JUDGMENT OF THE COURT

The appellant was charged and convicted on a charge of defilement contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 11th day of April, 2009 at about 6 p.m. in Kisii Central District within Nyanza Province, the appellant intentionally and unlawfully penetrated the genital organ of R.K.N., a girl aged 13 years with his genital organ namely, penis. After a full trial, the appellant was found guilty and convicted by the trial court and sentenced to 20 years' imprisonment.

The appellant was aggrieved by the said conviction and sentence and preferred an appeal against the same in the High Court of Kenya at Kisii. The first appellate court, having carefully analysed the evidence that was tendered before the trial court as required, found the appeal lacking in merit and dismissed the same. Undeterred, the appellant moved to this Court by way of a second appeal.

We will summarize the brief facts of the case as restated by the first appellate court. On the material day, that is 11th April, 2009 at about 6 p.m. the complainant, who testified as PW1, was sent by her mother, G.N.G., (PW2) to fetch some money from her uncle some considerable distance from their home. On her way, the complainant was accosted by the appellant whom she said was dressed in brown pair of trousers and a white T-shirt which on the front side had the words "Kisii Training Centre". The appellant, who was unknown to the complainant, told the young girl that he loved her and wanted to marry her. The girl resisted his advances and told him that she was a pupil then took off. The appellant gave chase and apprehended her after a short while, dragged her into a

nearby bush and defiled her. The complainant said that the ordeal lasted about one hour. When the appellant was through with the young girl, she collected herself from the muddy ground, dressed up and ran to the road where she met a man by the name **M K** and told him what had been done to her. M took the girl to his mother, Z who in turn informed the clan elder, **Margaret Nyamboke Kampuni**, PW5.

PW5 went to Z home and found the complainant. On examining her, PW5 found that the complainant was bleeding from her private parts and her clothes were torn and muddy. The complainant explained to PW5 what had happened and she gave a description of the appellant. PWS reported the incident to the area Administration Police at a nearby Chief's camp.

On the morning of the following day, armed with the description of the appellant as given by the complainant, PW5 accompanied by another village elder and an Administration Police officer went to the appellant's home. PW5 had known the appellant for nearly 25 years and her relationship with him was good. She had therefore no reason to frame him up.

R K, PW6, who was the complainant's auntie, told the trial court that when the appellant was escorted to Kisii Police Station, he was dressed in a pair of brown trousers and a white T-shirt with the words "Kisii Training Centre". At the police station, the complainant was handed over to **Corporal Lucy Makokha, PW7**. The complainant narrated to PW7 the ordeal she had gone through. She also described how the appellant was dressed when he accosted her and confirmed that he was indeed the one who had defiled her. PW7 escorted the complainant to Kisii Level Five Hospital where she was examined and treated. On 14th April, 2009 a P3 form was filled by **Jackson Murauni, PW4**, a Clinical Officer. He noted that the complainant was 13 years old, just as stated by the complainant's mother. Regarding her examination, PW4 said that her vagina had no tear or bruises but she had a white discharge. Further, a high vaginal swab showed presence of pus and yeast as well as sperms. There was also evidence of a sexually transmitted disease, gonorrhoea. PW4 also examined the appellant. His penis was normal but his urine had puss cells which was indicative of a sexually transmitted disease. From the above examination, PW4 concluded that the complainant had been sexually assaulted.

The appellant, who was unrepresented, advanced several grounds in his memorandum of appeal which we summarise as follows:

- 1. The first appellate court erred in failing to observe that a key prosecution witness, M, who was the first person to come into contact with the complainant after her defilement was not called as a witness.*
- 2. The first appellate court erred in law in confirming his conviction when the alleged T-shirt with the writing Kisii Training Centre'; which he was said to have been wearing had not been produced as an exhibit during the trial.*
- 3. The first appellate court erred in law in confirming the conviction when there was no conclusive medical evidence that he had defiled the complainant*

In his supplementary grounds of appeal, the appellant stated that the trial court erred in law in accepting the evidence of PW1, having testified that she had not known him before. He further faulted the trial court as well as the first appellate court for failing to confirm the age of the complainant by way of a birth certificate. Lastly, the appellant complained that his fundamental rights to a fair trial was violated because he was supplied with proceedings on the judgment day and he was not therefore able to prepare adequately.

During the hearing of the appeal, before this Court, the appellant addressed the Court briefly and basically rehashed the same arguments as summarized hereinabove. On the other hand, **Mr. Ogoti**, Senior Assistant Director of Public Prosecutions, submitted that the appellant's conviction and sentence were safe. Regarding the age of the complainant, Mr. Ogoti stated that the complainant's mother had testified that the girl was 13 years old and was in class seven. PW4 had corroborated the

evidence of PW2 regarding the complainant's age. Counsel further submitted that the complainant had given a detailed account of how the appellant had accosted her and having rejected his sexual advances, forcefully defiled her.

She described the appellant's mode of dressing shortly after the ordeal when her memory was still fresh. He added that failure to call M as a witness did not prejudice the appellant nor weaken the prosecution case in any way. In any event, the appellant had raised that same issue before the trial court at the close of the prosecution case and was given an opportunity to call M as a defence witness, but declined to do so.

Regarding the medical evidence that connected the appellant to the commission of the said offence, Mr. Ogoti submitted that shortly after the defilement the complainant was found to have contracted a sexually transmitted disease, just like the appellant. He however conceded that a DNA test which would have been more specific and conclusive was not done.

We have carefully considered the submissions made before us. This being a second appeal, the Court can only interfere with concurrent findings of fact where it is demonstrated that there was absolutely no evidence on the record upon which such findings could have been made or that the evidence that was there was so unreasonable that no reasonable tribunal, properly directing itself to that evidence and the applicable law could have come to the conclusions made, see **CHEMAGONG v REPUBLIC [1984] KLR 611**.

Section 8 (3) of the **Sexual Offences Act** prescribes a minimum sentence of 20 years' imprisonment for anyone who commits an offence of defilement with a child between the age of twelve and fifteen years. In a case of defilement the prosecution must adduce sufficient evidence regarding the age of the complainant because the punishment of such an offender is based on the age factor. In this appeal, the charge sheet stated that the complainant was 13 years old. In her *voir dire* examination the complainant told the trial court that she was 13 years old and in standard seven. That was also stated by her mother, PW2. PW4 also assessed the complainant's age to be 13 years and that of the appellant as 26 years. We do not think that the prosecution was under an obligation to produce the complainant's birth certificate. We take judicial note of the fact that there are many parents who have not procured birth certificates for their school going children. The sexual offences act adopts the meaning of age in Section 2 of the Children Act which defines **age as "where actual age is not known means apparent age"**. We cannot therefore accept the appellant's contention that the complainant's age could only have been proved by production of her birth certificate. We are satisfied that there was sufficient evidence that the complainant was within the age bracket stipulated under **Section 8 (3)** of the **Sexual Offences Act**.

The complainant testified that shortly after her defilement she met a man by the name M K who took her to his mother, Z. The evidence of PW5 shows that M was aged 16 years. Whereas it would have been desirable to call M as a prosecution witness, we do not think that failure to do so occasioned a miscarriage of justice in any way. As rightly observed by Mr. Ogoti, the appellant had indicated that he wanted to call M as a witness but he changed his mind shortly thereafter and proceeded to tender his statement of defence. We must therefore dismiss that ground of appeal.

Regarding the T-shirt which the appellant had allegedly worn when he committed the offence and which was written "Kisii Training Centre", the prosecution did not tell the court why the same was not availed as an exhibit. Both the complainant as well as PW6 had made specific reference to that T-shirt and it was a prominent identifying mark of the appellant. If indeed the complainant alleged that she saw the appellant wearing that particular T-shirt and at the time of his arrest he was found wearing the same, it ought to have been picked by the arresting officer and presented to court as an exhibit. However, in the circumstances of this case we do not think that failure to produce the same was fatal to the prosecution case. The complainant had given sufficient description of the appellant and PW6 had corroborated the evidence of the complainant regarding the appellant's mode of dressing. We must therefore reject the second ground of appeal.

Turning to the medical evidence that connected the appellant to the commission of the offence, we

believe that the evidence that was adduced by the prosecution, though not conclusive on its own, was nonetheless sufficient to connect the appellant to the charge herein. Both the complainant and the appellant were found to be having a sexually transmitted disease. The appellant's argument was that the complainant may have contracted that disease from another person with whom she may have had a sexual encounter and not necessarily him. The appellant further argued that the sperms that were found in the complainant's vagina were not scientifically matched with his so as to form conclusive evidence that he was the one who had defiled the young girl. He further faulted the prosecution for having failed to carry out a DNA test of his blood and sperm samples to arrive at the conclusive evidence as aforesaid.

We agree that the prosecution ought to have procured scientific evidence as would have been more appropriate to connect the appellant to the offence that had been committed. That notwithstanding, the absence of such evidence, per se, cannot vitiate a conviction that is otherwise well founded. The trial court as well as the first appellate court were bound to take the totality of all the evidence that was adduced by the prosecution and consider it against the appellant's evidence and arrive at a conclusion, which the two courts below did and having done so they were satisfied that the appellant's conviction was warranted. We may add that under **Section 124** of the **Evidence Act** in a criminal case involving a sexual offence where the only evidence is that of the alleged victim of the offence, the court can entirely rely on that evidence and proceed to convict the accused person if, for reasons recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. In this appeal, the trial court found the complainant truthful and rejected the appellant's defence and proceeded to convict him accordingly. We are not persuaded that the conviction ought to be disturbed for the reason advanced by the appellant.

Lastly, regarding the appellant's complaint that his fundamental right and freedom was violated because he was not provided with the first appellate court's proceedings until the day of the judgment, the record shows that on 31st October, 2012 when the hearing of the appeal was finalized before the High Court, the appellant applied for a copy of the proceedings and the application was granted. At the beginning of the hearing of the appeal the appellant had told the High Court that he was ready to proceed with the same and that he had prepared written submissions which he intended to rely on. He did not indicate that he had been handicapped in the preparation of his appeal because of lack of proceedings. In any event, he had been convicted and sentenced by the trial court on 29th March, 2010 and between that date and 31st October, 2011 when the first appeal was heard the appellant had had sufficient time to obtain the proceedings. We do not therefore agree that his constitutional right to fair trial was violated in any way.

All in all we find this appeal lacking in merit and dismiss it in its entirety.

Dated and Delivered at Kisumu this 21st day of March, 2014.

E.M. GITHINJI

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S.ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR