IN THE COURT OF APPEAL

AT NAKURU

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 143 OF 2011

BETWEEN

EVANS MOKUA NDEGA……APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at

Nakuru (Wendoh, J.) dated 10th June, 2011

in

H. C. CR.A NO. 22 OF 2010)

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JUDGMENT OF THE COURT

1. ***Evans Mokua Ndega,*** the appellant, was charged with the offence of defilement contrary to ***Section 8(1) & (4)*** of the ***Sexual Offences Act*** and an alternative charge of indecent act with a child contrary to ***Section 11(a)*** of the ***Sexual Offences Act*** in the Principal Magistrate's Court at Nyahururu.
2. The particulars of the offence of defilement were that on the 9th April, 2009 in Subukia in Nakuru North District within the then Rift Valley Province, the appellant intentionally caused penetration of his penis to the vagina of MN, a girl aged 17 years who is an imbecile. The particulars of the alternative charge were that on the above mentioned date and place, the appellant indecently touched the private parts, namely vagina, of MN who is an imbecile.
3. The prosecution called a total of five witnesses. It was the prosecution's evidence that PW1, MWG (M) and PW2, EWG (E) lived together with their mother, PW3, MWG (M), their father and their sister, MN(N) in [Particular withheld] village. On 9th April, 2009 E and M left home and went to their shop which was nearby leaving N in the house. At around 2:00 p.m. the appellant passed by the shop and left a jug with his nephew who was at the shop and went to his sister's house which was about 10-20 metres away from M and E's home. Thereafter, E sent M to check up on N and to get onions from the house. When M got home she heard N coughing as if she was being strangled; M found the appellant lying on top of N outside their kitchen. M ran back to the shop screaming and told E what she had seen. E went to the house but she did not find the

appellant. She found N seated outside the kitchen and she noticed that N had urinated on herself and her dress was muddy. M told her father what had happened and their father called their mother, M. M testified that N was her first born daughter and suffered from epilepsy and she could not talk. She gave evidence that upon examining N on the material day, she noticed blood on her private parts and that she had urinated on herself. M reported the incident to the police and took N to hospital.

4. PW4, Isaac Gitonga (Isaac), a clinical officer, examined N and filled in the P3 form on 10th April, 2009. He confirmed that at the material time N was 17 years old. He observed that there was a blood stained discharge on N's vagina and her hymen had been broken. He testified that there was evidence that N was forcefully penetrated. M testified that she knew the appellant prior to the incident and she found him lying on top of N on the material day. M further gave evidence that the appellant was a brother to their neighbor one F and he used to frequently visit his sister. The appellant was arrested and arraigned in court.
5. In his defence, the appellant gave unsworn statement in which he denied the charges against him and maintained that they were framed by M. He testified that M held a grudge against him because he refused to allow her to be his broker in selling tomatoes he grew in his shamba.
6. Being satisfied that the prosecution had proved its case, the trial court convicted the appellant of the offence of defilement and sentenced him to 20 years imprisonment. Aggrieved with the decision of the trial court, the appellant preferred an appeal in High Court. The High Court (Wendoh, J.) vide a judgment dated 10th June, 2011 dismissed the appeal. It is that decision which provoked this appeal based on the following grounds:-

- ***The learned Judge erred in law when she upheld conviction and sentence and failed to find that the allegations raised were not proven under Section 107 (1) of the Evidence Act.***

- ***The learned Judge erred in law when she upheld the conviction and sentence and failed to consider that the complainant did not testify.***

- ***The learned Judge erred in law by failing to consider that the information of the charge as drawn was defective.***

- ***The learned Judge erred in law when she failed to re-evaluate and re-analyze the evidence as a whole before drawing her inference.***

7. The appellant appeared in person and relied on his written submissions and also made oral submissions. He submitted that he was framed by the complainant's mother because he had refused to engage her as an agent in the sale of his tomatoes. The appellant argued that he was convicted on the evidence of a single identifying witness who had a grudge against him. He contended that no sample was taken from him to connect him with the offence. He argued that the case was not properly investigated. The appellant submitted that the sentence meted out to him was harsh.
8. Mr. Chirchir, Senior Principal Prosecution Counsel, in opposing the appeal, submitted that the complainant was defiled and the only issue was identification. He submitted that PW1, M, found the appellant red handed on top of the complainant; M and the appellant knew each other. Mr. Chirchir argued that the circumstances for identification were favourable. He maintained that PW4, the clinical officer, confirmed that there was forced penetration and that the complainant was mentally retarded. He submitted that the sentence meted out to the appellant was legal.
9. We have considered the record, submissions by counsel and the law. This is a second appeal and by dint of ***Section 361*** of the ***Criminal Procedure Code,*** Chapter 75, Laws of Kenya, the jurisdiction of this Court is confined to matters of law only. In ***Chemagong -vs- Republic (1984) KLR 213*** at page 219 this Court held,

"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)"

10. The appellant contended that the two lower court's erred in law by convicting him without considering that the complainant, N, did not testify. The complainant's mother, M, testified that N suffered from Epilepsy and could not talk. The trial court saw N and formed an opinion that she could not give evidence. The High Court took into account a report which was prepared by Dr. Njau, a Provincial Psychiatrist. The psychiatrist confirmed that N was 17 years old and of unsound mind due to mental retardation. Therefore she was not capable of testifying. ***Section 125 (1)*** of the ***Evidence Act*** provides:-

"125(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether body or mind) or any similar cause."

We find that both lower courts did not err in finding that N was incapable of testifying.

11. It is not in dispute that the complainant was 17 years at the material time and that she was defiled. It was PW 4, Isaac's, uncontroverted evidence that upon examining N on 10th April, 2009, a day after the incident, he found bruises , blood stained discharge on her vagina and that her hymen had been broken. The issue that was in contention was whether the appellant had defiled her. Both lower courts made concurrent findings of fact that the appellant was positively recognized by PW1, as the person who defiled N. The issue that falls for our determination is whether the evidence of recognition was proper and safe to warrant the conviction of the appellant. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. In ***Wamunga -vs- Republic (1989) KLR 424,*** this Court held,

" It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

12. PW1, M testified that on the material day when she went home at around 2:00 p.m. and found the appellant on top of N. She ran back to the shop and told PW2, E what she had seen; E ran home and found N seated outside and when she woke up she notice that her dress was muddy and that she had urinated on herself. M testified that she had known the appellant prior to the incident; that he had severally visited his sister, F, who lived 10 metres away from their home. The appellant also admitted that he knew M and her family prior to the incident. This was clearly a case of recognition. We concur with the two lower court that the recognition of the appellant was positive. In ***Anjononi & others -vs- Republic (1976-80) 1 KLR 1566,*** this Court held at page 1568,

"This was, however 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 the personal knowledge of the assailant in some form or another."

13. The appellant faulted the two lower courts for basing his conviction on the evidence of a single witness. He also contended that the prosecution did not call Ns father who was a crucial witness. ***Section 143*** of the ***Evidence Act*** provides:-

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

We find that the witnesses that testified at the trial court proved the prosecution's case.

14. It was the appellant's position that no medical examination was conducted on him to connect him to the offence. We find that M's evidence on recognition was free from error and connected the appellant to the offence. The fact that there was no medical proof of spermatozoa linked to the appellant found on N did not in any way diminish M's evidence that it was the appellant who had defiled N. See this Court's decision in ***Simon Ngiri Thiogo -vs- Republic – Criminal Appeal No. 20 of 2012 & David Ndumba -vs- Republic- Criminal Appeal -No. 272 of 2012.***
15. The appellant also submitted that the sentence meted to him was harsh. The sentence issued by the trial court was in accordance with ***Section 8 (4)*** of the ***Sexual Offences Act*** which provides for a mandatory sentence of imprisonment of not less than 15 years. The appellant was sentenced to 20 years imprisonment. ***Section 361(1)(a)*** of the ***Criminal Procedure Code,*** Chapter 75, Laws of Kenya provides:-

"(1) A party to an appeal from a subordinate court may,subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section - (a) On a matter of fact, and severity of sentence is a matter of fact; .."

Based on the foregoing provision this Court has no jurisdiction to consider any issue on severity of sentence on a second appeal. See ***Solomon Kiptoo Sawe -vs- Republic- Criminal Appeal No. 66 of 2006 & James Oromo -vs- Republic- Criminal Appeal No. 68 of 2006.***

16. The upshot of the foregoing is that the appeal has no merit and is accordingly dismissed.

Dated and delivered at Nakuru this 20th day of March, 2014.

ALNASHIR VISRAM

….....

JUDGE OF APPEAL

MARTHA KOOME

….....

JUDGE OF APPEAL

J. OTIENO-ODEK

….....

JUDGE OF APPEAL

I certify that this a

true copy of the original.

DEPUTY REGISTRAR