



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KIHARA KARIUKI - (PCA), KARANJA & MARAGA, JJ.A**

**CRIMINAL APPEAL NO. 128 OF 2013**

**BETWEEN**

**ANTHONY NJUGUNA WANJEMA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(An Appeal from a Ruling of the High Court of Kenya at Nairobi (Mbogholi, J.) dated 13<sup>th</sup> November, 2012***

***in***

***H.C. CR. A. NO. 195 OF 2010)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is a second appeal by **Anthony Njuguna Wanjema, (appellant)** the first one having been dismissed by the High Court (Mbogholi Msagha, J) on 13<sup>th</sup> November, 2012.

The first appeal emanated from the conviction and sentence of 20 years imprisonment by the Resident Magistrate Gatundu on 29<sup>th</sup> March 2010. The appellant was charged before that court with the offence of defilement of a girl contrary to **Section 8(1)** as read with **sub section 3** of the **Sexual Offences Act 2006**.

It was alleged that on diverse dates between 30<sup>th</sup> and 31<sup>st</sup> May 2009, at [Particulars Withheld] in Gatundu District, intentionally and unlawfully the appellant committed an act which caused penetration to **L W M**, a girl aged fifteen (15) years old. He was in the alternative charged with indecently assaulting her by touching her genital organs. He pleaded not guilty and the matter proceeded to full hearing with the prosecution calling a total of five witnesses, while the appellant proffered an unsworn defence.

In a nutshell, the prosecution case was that **L W M** (complainant) a 15 year old girl met the appellant in a matatu on her way to her grandmother's house. They went to the grandmother's house together, and thereafter they ended up together in the appellant's house where they had supper. She told the court that she then took some medication which she usually used to take and somehow, she ended up in the appellant's bed. It was her evidence that she had some seizures and did not know what happened to her thereafter. She woke up the following morning at about 9.00 am only to find that the appellant had

already left the house. She said that she noticed some mucus like discharge on her skirt, and felt an itch in her private parts when she passed urine. She realised that she had been defiled as she slept. She testified that she spent another night with the appellant but nothing happened between them that night. The following morning the appellant escorted her back to her grandmother's house but they were arrested by the area chief on arrival and taken to Gatundu Police Station where they were both locked up.

The complainant was later taken to Gatundu District Hospital where she was treated by **Dr. Rosa Chemwei (PW4)**. According to the doctor, on examination of the complainant, she noticed no abnormalities on the external genitalia. She did not notice any abnormality in the cervix or any other significant orifices. The only significant finding was that the hymen was broken. The notes did not nonetheless indicate whether the hymen had been broken recently or much earlier. Her conclusion however, was that there had been penetration.

The appellant was subsequently charged with the offences stated earlier. In his brief unsworn statement of defence, the appellant denied having defiled the complainant. After considering this evidence before him, the learned trial magistrate convicted the appellant on the main count of defilement and sentenced him to serve 20 years imprisonment.

On appeal, the learned Judge reconsidered the evidence and found that the complainant was sexually assaulted by the appellant. He found corroboration of this fact in the medical evidence adduced by the prosecution through the Doctor (PW4).

The learned Judge also found that the appellant was properly identified by the complainant and PW2. We may point out here that the identification of the appellant was actually never an issue as he left PW2's house with the complainant and even escorted her back to the same house two days later. The learned Judge found the appeal devoid of merit and dismissed it in its entirety.

Aggrieved by the said dismissal, the appellant filed the present appeal principally on three grounds: - namely; *that the High Court failed to scrutinize the entire evidence and arrive at its own decision; that his defence was not considered; and that the burden of proof had not been discharged as by law required.*

This being a second appeal, by dint of **Section 361** of the **Criminal Procedure Code**, only issues of law fall for our determination. As this Court has stated often times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See **Chemagong v. R [1984] KLR 611** and **Kaingo v. R. (1982) KLR 219.**

At the hearing of the appeal, the appellant who appeared in person handed in written submissions which expounded the said grounds of appeal.

In reply Mr. Orinda learned Assistance Deputy Public Prosecutor opposed the appeal. On whether the High Court re-evaluated the evidence of the trial court, it was the learned counsel's submission that the High Court considered the same and even the defence proffered by the appellant and found the evidence cogent and sufficient to support the conviction. He posited that the appeal lacks merit and the same is therefore for dismissal.

We have carefully considered the record along with the said grounds of appeal and submissions made for and against this appeal. On the submission that the appellant's defence was not considered, we note that the court considered the defence tendered before it within the context of its relevance and evidential weight. If an appellant only tells the court how he was arrested, and the act of arrest itself is not disputed, and says nothing on the charges themselves or on the evidence adduced by the prosecution, what is the court to make of such a defence? The defence advanced by the appellant was irrelevant and hollow and did not in fact impact on the case at all. That ground does not therefore hold water and is therefore rejected.

That said however, we note that when it came to re-evaluating the evidence on record, the learned Judge appears to have taken the evidence of the Doctor (PW4) at face value and did not critically re-assess it. This was important given the circumstances surrounding the matter. Such circumstances include the fact that the complainant claimed to have had seizures and passed out; when she woke up in the morning the appellant was not in the house; she could not tell when he had left the bed or the homestead. Indeed, even after discovering that all may not have been well, she continued to stay in that homestead and even voluntarily spent another night there in bed with the appellant.

Her conduct is not that of an innocent ignoramus who was as it were being led by the appellant by a tether as she would have wanted the court to believe. Although we appreciate that we did not see her testify and cannot therefore read her demeanor, it is evident that she was not a witness of truth. Her evidence needed to be treated with necessary circumspection. This was more so given the fact that the only relevant medical findings on the P3 form and other medical notes only revealed a torn hymen. There was no mention on whether the same had been recently broken or it was an old scar. The Doctor saw no lacerations, abrasions, tenderness or any other abnormalities in the external genitalia or in the cervix.

The complainant herself volunteered evidence that she had engaged in sexual activity before although she said it was with young boys. There existed a possibility that the said ‘young boys’ could have been the ones who deflowered her – and not the appellant.

Having not seen or even felt the appellant having carnal knowledge of her, there is a possibility, however remote that somebody else could have had an opportunity to do so. In any event, given that the evidence on the soiled clothes was only from the appellant, and given the doubtful veracity of her testimony, then, the doubt lingering over the prosecution case was more than reasonable. Had the learned Judge of the High Court scratched slightly deeper into the gist of the evidence adduced before the trial court, then certainly, he could have arrived at a different conclusion.

It is our view therefore that although, there appears to have been re-evaluation of the evidence adduced before the trial court, the same was more of a concurrence than a critical evaluation or serious scrutiny of the evidence.

In view of the foregoing, grounds one and two of the appellant’s memorandum of appeal must carry the day. We find this appeal meritorious and allow the same with the result that the conviction against the appellant is hereby quashed and the sentence set aside.

We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

*Dated and Delivered at Nairobi this 13<sup>th</sup> day of June, 2014.*

**P. KIHARA KARIUKI (PCA)**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**