



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR JJ.A)

CRIMINAL APPEAL NO. 277 OF 2011

BETWEEN

PETER MUNYWA WANJIRA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment and sentence of the High Court of Kenya

at Nairobi (Ochieng J) dated 20th June 2011

in

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

JUDGMENT OF THE COURT

The appellant, **Peter Munywa Wanjira**, was tried by the Resident Magistrate's court at Gatundu on a charge of defilement of a young girl contrary to **Section 8(1)** as read with **sub-section 3** of the **Sexual Offences Act**. Particulars of the charge were that on the 4th June 2008 at **[particulars withheld]** Academy in Thika District of Central Province, he intentionally and unlawfully committed an act which caused penetration to **R.W.W**, the complainant, a girl aged 14 years. He also faced an alternative charge of indecent act with a female contrary to section 11(1) of the Sexual Offences Act, the particulars of which were that the appellant intentionally and unlawfully committed an indecent act with **R.W.W**, by

touching her genital organs. The appellant denied both charges. The prosecution called six witnesses while the appellant was the sole witness for the defence.

The brief facts of the case are that, the complainant was sent by one Madam C, the school matron to the kitchen to take a knife, where she found the school cook, the appellant. The appellant grabbed hold of her as she placed the knife on the kitchen table, and proceeded to undress her. He warned her not to scream or he would stab her with the knife. The appellant then removed her black bikers and tore her panties, and defiled her. The complainant cried as she was in pain. Immediately after the ordeal, the complainant reported the incident to Mrs. K and Mrs. N, who dismissed the complaint believing that the appellant was not capable of defiling a girl. The following day, the matron again sent the complainant to the appellant,

this time to take him a mobile phone. This time the appellant touched her breasts.

About a week after the defilement the complainant ran away from the school and reported the incident to her guardian **G W W (PW2)**, who escorted her to report to the Assistant Chief Kimunyu Area, **Lillian Wangari Kariuki (PW4)**, and to the Gatundu Police Station where the report was received by **PC Eunice Lokapel, (PW6)**. The complainant was subsequently treated at Gatundu District Hospital. **Dr. Rose Chemwei (PW5)** who testified, on behalf of Dr. Sarah Kagia who had examined the complainant but had since left Government service stated that, the complainant was examined on 16th June 2008, and according to the treatment notes, her upper and lower limbs were normal, that her approximate age could not be estimated, and her external genitalia was normal but the hymen was broken. There was no discharge but blood was noted. All tests were negative but there was evidence of penetration but features of forceful penetration were absent.

The appellant gave an unsworn statement, where he stated that he was arrested on allegations of defilement by the complainant, which he denied, and claimed instead that, the complainant had a grudge against him as he had on one occasion, refused to give her a second serving of food.

This Court is now called upon to consider the appellant's appeal in respect of seven grounds of appeal which when summarized are that, the charge that was preferred against the appellant were not proved beyond reasonable doubt; that the ingredients of **section 8 (1)** of the **Sexual Offences Act** were not fully met; that the appellant's defence was not taken into consideration; that the learned judge did not evaluate the entire evidence; that the medical report did not connect the appellant to the alleged offence; that the prosecution failed to call a vital witness and finally that the evidence was not conclusive in respect of the charge of defilement of a girl contrary to **section 8 (3)** of the **Sexual Offences Act**.

Being dissatisfied with the conviction and sentence of the magistrates' court, the appellant filed an appeal at the High Court at Nairobi, where upon re-evaluation of the evidence the appeal was dismissed by Ochieng J, on 20th June 2011, thus provoking this second appeal, which is before us.

When the appeal came up before us **Mr. Obok** learned counsel for the appellant stated that he would base his submissions on the Supplementary Grounds of Appeal filed on 31st December 2013, and would abandon the Grounds of Appeal filed on 7th July, 2011 and the Supplementary Grounds of Appeal filed on 24th July 2012 by the appellant in person. Counsel submitted that in failing to evaluate the evidence as the complainant's evidence was contradictory, in that, the learned judge failed to consider that the offence was committed on 4th June 2008, and that the complainant was examined more than one week later; that the complainant testified that she was sexually assaulted at **[particulars withheld]** Academy, yet, she was a pupil of **[particulars withheld]** Primary school; and that the prosecution should have called Mrs. K to testify that the complainant had indeed complained to her about having been defiled, so as to corroborate her testimony; that the medical report was inadmissible as PW5 did not examine and treat the complainant; that the report failed to indicate the complainant's age; that even though the hymen was broken this did not point to the appellant as the defiler; that the statement in the report that there was no forceful penetration and no bruises, leads to the conclusion that the incident was not proved; that the prosecution did not prove its case as no connection was established between the appellant and the incident.

Mr. Kivihya learned counsel for the prosecution opposed the appeal and submitted that the evidence was conclusive. Counsel contended that the complainant was 14 years old, and was defiled by someone known to her in the school, which is the reason for her having run away from school; that it was irrelevant that there was forceful penetration or not, that there was penetration was sufficient, particularly of a minor, and there was no question of consent; that with respect to calling of vital witnesses to testify, counsel submitted that the teachers were part of the cover up, and nothing would have been gained by calling them to testify; and that regarding the medical report, it showed that the complainant had been defiled.

This being a second appeal only matters of law may be considered – **see section 361(1)(a)** of the

Criminal Procedure Code. It is trite law that in a second appeal the appellate court will not normally interfere with concurrent findings of fact by the two courts below unless it is apparent that on recorded evidence no reasonable tribunal could have reached that conclusion – see *M’ Riungu v. R. [1983] KLR 455*; and *Karingo v. R. [1982] KLR 213*. It is also trite law that an appellate court would not normally interfere with the findings by the trial court which are based on credibility of witnesses unless it be shown that no reasonable court could have made such findings - see *Republic v. Oyier [1985] KLR 353*.

Guided by these principles, on the issues that the learned judge failed to evaluate the evidence, which was contradictory, that the offence was committed on 4th June 2008, but that the complainant was examined more than one week later; that the complainant testified that she was sexually assaulted at *[particulars withheld]* Academy, yet when she was testifying, she testified as a pupil of *[particulars withheld]* Primary school. When we consider the judgment, it is clear that the learned judge evaluated and analysed the evidence. In so doing he stated thus,

“The offence was committed on 4th June 2008. The complainant immediately reported to Mrs. K and Mrs. N. Very sadly indeed Mrs. N dismissed the complainant because she believed that the appellant could not have defiled the complainant. Thereafter, when Mr. M was asked for permission to allow PW1 to go home he refused. As a consequence of the actions of the employees of the [particulars withheld] Academy, the complainant did not get an immediate opportunity to report to the police or to be examined by a medical practitioner. To my mind the persons who were on trial are the staff of [particulars withheld] Academy. I will not condemn them yet as I have not given them a hearing.”

We can find no contradictions or inconsistencies in the complainant’s evidence. We consider that the learned judge properly analysed and re-examined the evidence, and was satisfied that the complainant’s evidence was cogent and logical and clearly described how the appellant had defiled her in the school kitchen. Following the incident on 4th June 2008, the complainant of her own volition left school after the school, in an effort to cover up the crime, failed to conduct investigations into the matter. This meant that the complainant could only be examined after she left the school a week later. Furthermore, given the ordeal that she had undergone at *[particulars withheld]* Academy, it is inconceivable that she would return to the school where she had been brutalized, misjudged and deprived of her entitlement to the safety and protection demanded of the school. As a consequence, she had joined another school, in this case, *[particulars withheld]* Primary School. It is whilst in her new school that she gave her testimony. In our view, there are no disparities in the evidence. If anything, this evidence only seeks to further reinforce the fact that a heinous crime was committed against the complainant, and as such we see no merit in this ground.

The next issue was that the prosecution failed to call Mrs. K, a vital witness to testify, given that the complainant had reported to her about her defilement. We take the view that the prosecution called several witnesses who testified that the complainant reported to them that she had been defiled. In particular, PW2, PW3 and PW4 testified that the complainant had reported to them that she had been defiled by the appellant while in school, and that as a consequence had run away from school. The complainant also testified that she had reported the incident to Mrs. K and Mrs. N both of whom dismissed her complaint. As both the trial magistrate and the learned judge observed, the staff of the school were involved in a cover up of the facts, and therefore would not have been of any assistance to the prosecution. In any event, **section 143** of the **Evidence Act** provides that no particular number of witnesses is required to prove a particular fact. As such, we take the view that it was the prerogative of the prosecution to determine and call such witnesses as it deemed necessary to prove its case. As a consequence this ground fails.

On the complaint that the medical report was inadmissible as PW5 did not examine and treat the complainant, from the evidence, Dr. Kagia examined the complainant on 16th June 2008 and completed a medical report which was produced in court by PW5 as Dr. Kagia had since left the public service.

In *Hassan Odhiambo Kalameni vs Republic* eKLR [2003] this Court stated,

“Mr Kithi’s second ground of attack was the admissibility of the Medical Examination Report’ or P3 Form produced to prove that violence was meted out on the complainant. The Form was produced by the Police Inspector (P.W. 5) without objections being raised or the insistence that the Doctor completing the form be called for cross examination. Under the provisions of section 77 of the Evidence Act, that evidence was admissible.”

Likewise in the instant case, the medical report was prepared by a medical doctor, Dr. Kagia who examined the complainant, and completed and signed the form, which PW5, also a medical practitioner produced in Court. No objection was raised regarding the production of the report by PW5. Consequently, the medical report was admissible, and this ground accordingly fails.

Finally, on the contention that the prosecution did not prove its case as there was nothing to connect the appellant to the defilement of the complainant, and further that in the absence of forceful penetration and bruises, the incident was not proved, we agree with the learned judge when he stated thus,

“Notwithstanding the delay in having the complainant examined, the doctor who examined her found that she had been penetrated. Yes, her hymen may, conceivably been lost to physical activity, and it is also possible that the blood which was viewed may or may not have been from her menstrual flow; but even if the evidence of her being penetrated is put in the perspective prevailing the rest of the evidence presented to court, there can be no doubt that the complainant was indeed defiled.”

As the learned judge correctly concluded, the medical report required to be considered in conjunction with the totality of evidence tendered before the court. The complainant, whose age was 14 years testified that she had been defiled by the appellant whom she knew on 4th June 2008. According to her testimony she complained to Mrs. K and Mrs. N, who thoughtlessly and irrationally dismissed her complaint. As a consequence she left school and reported the incident to PW2, PW3 and PW4 naming the appellant as the culprit. When this evidence is considered together with the medical report, which showed that there had been penetration of the complainant’s genitals, there can be no doubt that the evidence pointed to the appellant as having defiled the complainant. The complainant knew the appellant very well as a cook in their school. There could be no mistaken identity. In the circumstances, we find that this ground has no merit and accordingly fails.

We accordingly dismiss the appeal and uphold the conviction and confirm the sentence.

DATED and DELIVERED at NAIROBI this 13th day of JUNE, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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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