



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 241 OF 2012

BETWEEN

JOSEPH LOLO..... APPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega

(Thuranira J.) dated 12th July, 2012

in

HCCRA NO. 273 OF 2011)

JUDGEMENT OF THE COURT

The appellant in this appeal, **Joseph Lolo**, was convicted by the Vihiga Resident Magistrate, **T.N. Bosibori**, for the offence of defilement contrary to **section 145 (1)** of the Penal Code. It had been alleged, in the charge sheet, that on 20th November, 2005 at [particulars withheld] village, [particulars withheld] sub-location, [particulars withheld] Location in Vihiga District within Western Province, the appellant had unlawful carnal knowledge of **S V**, a girl under the age of sixteen years. There was also an alternative count of indecent assault of a female contrary to **section 144** of the same code. Upon his conviction, the appellant was sentenced to serve twenty (**20**) years imprisonment. His appeal to the High Court (**B. Thuranira Jaden, J.**) was dismissed hence this second appeal.

In view of **section 361 (1) (a)** of the Criminal Procedure Code, only issues of law may be raised for consideration as this Court has stated time without number that it will not interfere with concurrent findings of fact by the courts below unless such findings were made on no evidence at all or on a misapprehension of it or if no tribunal properly directing itself on the evidence would make such finding which would be the same thing as saying that the decision is bad in law. See for example the case of **M'Riungu -Vs – Republic [1983] KLR 455**.

The appellant was before us, represented by learned counsel, Mr. **Ouma**, as he did before the two court's below. He put forward 9 grounds of appeal which raised the following issues of law:-

1. ***That the case was not proved beyond reasonable doubt.***
2. ***That essential witnesses were not called to testify.***
3. ***That the appellant's defence was not adequately considered.***

We shall revert to these issues and the submissions thereon later in this judgment after briefly setting out the facts as found by the two courts below:-

The complainant was, at the material time, aged fourteen (**14**) years and was in class seven at [particulars withheld] Primary School. On 20th November, 2005 at about 1.00 p.m., the appellant purchased a domestic fowl from her mother **A L (PW2) (A)**.

The appellant asked the complainant to take the fowl to his house which was nearby. The complainant obeyed but on reaching the appellant's house found it locked. She decided to join her cousin who was washing clothes at a nearby stream. She still had the domestic fowl. The appellant joined her there and told her to take the fowl to his house which she did. The appellant followed her. While in his house he grabbed the complainant and took her to his bed. The complainant tried to scream but was ordered to keep quiet by the appellant. According to the complainant, the appellant then **“did bad manners”** to her which was understood by the two courts below to mean the appellant had sexual intercourse with her. She felt pain. The appellant's wife (**now deceased**) found the appellant without a shirt and asked the complainant to take outside the fowl she had taken there. She did so.

In the interim, A was informed by the deceased wife of the appellant that she had found the appellant having sex with the complainant upon which A rushed to the appellant's house and found him half naked and the complainant crying. She claimed she examined the complainant and found sperms in her private parts. She then reported to the village elder, **Joseph Bwosi (PW3)** and he and A accompanied the complainant to Vihiga police station and later to Vihiga District hospital.

At Vihiga police station, PC **Philip Chikoli (PW4)**, attended to them and issued a P3 form to the complainant which was completed and signed by Doctor **Solomon Kamau (PW5)**. The doctor, on examining the complainant, found bruises around her vagina and a broken hymen. He concluded that there had been penile penetration. He produced the P3 which documented those findings. He also examined the appellant and found nothing untoward.

Put on his defence, the appellant in a sworn statement, denied committing the offence. He contended, in the main, that he had been framed by his deceased wife with whom they had disagreed over his drinking habits.

The learned Resident Magistrate believed the complainant. She, **inter alia**, said, in her judgment, as follows:-

“He was married to her aunt. Her narration is consistent, clear and credible. There is no mistaken identity. Her evidence as to when the act took place has been corroborated by the medical examination papers.”

On the appellant's defence, the learned Resident Magistrate stated:-

“That on this particular day, the wife had called him for reconciliatory talks only for him to learn that she had hatched a plot to fix him and the complainant's mother was part of the said plot. In my well considered view, this line of thinking does not add up, since the same would appear to suggest that they plotted to have the complainant defiled by somebody else on the day the accused was coming home to meet his wife for reconciliatory talks and then coached the complainant to record her statement with the police in such away that would incriminate the accused and not that other person further that they ensured all the other evidence including that of the doctor corroborated the testimony of the complainant. This to my mind is next to impossible if not impossible.”

The High Court upon its evaluation of the evidence came to its own independent conclusion as follows:-

“Having re-evaluated the evidence adduced, before the trial magistrate’s court, I find that the complainant (PW1) gave sworn evidence and was cross-examined. The complainant narrated to the court how the appellant did “bad manners” to her after placing her on the bed and pulling up her skirt. According to the complainant, she wore no underpants and she felt pain in her vagina. Although the complainant was not pressed to expound on what she exactly meant by bad manners, the evidence of her mother PW2, ASIBETA LIGAKA and that of PW5, Dr Solomon Kamau sheds more light on the matter.

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The trial magistrate believed the evidence of the complainant and found that there could be no mistaken identity. After re-evaluating the complainant’s evidence, I arrive at the same conclusion.”

On the appellant’s defence, the learned trial magistrate stated:-

“I have re-evaluated the appellant’s defence. The defence that the appellant was framed up is not plausible in view of the strong evidence adduced by the prosecution witnesses.”

The appellant was still aggrieved and, as stated earlier, raised the issues already identified above. Mr Ouma, learned counsel for the appellant, referred us to inconsistencies in the evidence and submitted that the complainant should not have been believed. Counsel further argued that given the inconsistencies, the case was not proved beyond reasonable doubt and that the appellant’s defence of being framed was plausible.

Mr. **Abele**, the learned Assistant Director of Public Prosecutions, in response submitted that the charge of defilement was proved beyond reasonable doubt against the appellant. In his view, there was no question of mistaken identification as the appellant was known by the complainant and the incident took place in broad daylight. Counsel further submitted that given the age of the complainant and the relationship she had with the appellant her evidence could not be discredited. Mr. Abele was also of the view that the crucial ingredient of defilement of penetration was demonstrated beyond reasonable doubt and the inconsistencies pointed out by counsel for the appellant according to him were irrelevant. Learned counsel did not however, support the sentence imposed upon the appellant. In his view, the trial magistrate should not have punished the appellant under the **Sexual Offences Act** which was not in operation at the time the offence was committed.

We have anxiously considered the record, the grounds of appeal and the submissions of counsel. We begin with whether the offence for which the appellant was convicted was proved to the required legal standard. We will consider that issue together with the issue whether the appellant’s defence was adequately considered. A determination of the two issues will resolve the third issue of whether essential witnesses were not called to testify.

The appellant was convicted mainly on the evidence of the complainant, A and Doctor Solomon Kamau. We have already set out, in summary, the evidence of the three witnesses. The complainant was in no doubt as to who “did bad manners” to her. She knew the appellant very well as he was married in her family: R, the deceased’s wife of the complainant was her aunt. The two courts below accepted as a fact that there was no question of mistaken identity. They believed the evidence of the complainant and gave reasons why they did so. They were in no doubt as to what “bad manners” were. Dr Solomon Kamau put, beyond doubt, what the “bad manners” were as he found that the complainant’s vagina had been bruised and her hymen broken. Penetration had, in his view, taken place. No one could therefore doubt what the “bad manners” were. So, on the issue of identification, the two courts below reached concurrent finding that it was the appellant who “did bad manners” to the complainant and on what “bad manners”

were, the two courts reached concurrent finding that they meant defilement. The two courts also believed that the complainant was truthful. In those premises, we cannot interfere. We too find that, notwithstanding the conflict in evidence pointed out by learned counsel for the appellant, the prosecution presented a water-tight case against the appellant. We therefore find, without merit, the complaint that the case was not proved beyond reasonable doubt.

Given the conclusion that the prosecution proved its case against the appellant beyond reasonable doubt, we have no difficulty in finding that the evidence, adduced by the prosecution displaced the defence of being framed put forward by the appellant. Our perusal of the record shows that the two courts below indeed considered the appellant's defence at length and rejected it and in our view, properly. The appellant's complaint in that regard is without merit and we too reject it.

Regarding the complaint that essential witnesses were not called, the answer is in **section 143** of the Evidence Act which stipulates that no specific number of witnesses are required to prove any fact unless the law says so. The duty of the prosecution is to present before the trial court such witnesses as it thinks will establish its case beyond reasonable doubt. Our consideration of the record has convinced us that it discharged its duty in the appeal before us. The appellant's complaint in that regard is accordingly without merit.

With regard to sentence, we can interfere only if the same is illegal. We cannot interfere if the complaint is against severity of sentence by dint of the provisions of **section 361 (1) (a)** of the Criminal Procedure Code. The learned Assistant Director of Public Prosecutions submitted that the appellant should not have been sentenced under the **Sexual offences Act No. 3 of 2006** but under the Penal Code. In the premises, the issue is one of law and not of mere severity of sentence.

The appellant was charged under **section 145 (1)** of the Penal Code as the Sexual Offences Act No. 3 of 2006 had not been enacted. Under the former the maximum punishment for defilement was fourteen (14) years imprisonment and under the latter the minimum punishment for the same offence is twenty (20) years imprisonment. The learned trial magistrate felt he could sentence the appellant under the Sexual Offences Act by reason of the first schedule to that Act which reads:-

TRANSITIONAL PROVISIONS

1. ***Notwithstanding the provisions of any other Act the provisions of this Act shall apply with necessary modifications upon the commencement of this Act to all Sexual offences.***
2. ***For greater certainty, the provisions of this Act shall supersede any existing provisions of any other law with respect to sexual offences.***
3. ***Any proceedings commenced under any written law or part thereof repealed by this Act shall, so far as practicable be continued under this Act."***

In our view, we do not think these provisions authorized the imposition of the punishments provided under the Sexual Offences Act upon persons whose cases were continued when the Act became operational. We say so, because such interpretation would offend against the maxim that a person should be charged and convicted of a known offence whose punishment is certain. In this case, the appellant was convicted of an offence he committed when the punishment provided under the law he violated was less severe than that provided under the **Sexual Offences Act No. 3 of 2006**. Under the latter legislation, the minimum sentence provided under the provision applied by the trial court is twenty (20) years imprisonment whilst under **section 145** of the Penal Code, there was no minimum sentence which meant that on conviction under the Penal Code, the court would impose any term of imprisonment of upto 14 years. The court also had discretion to order the sentence to be served with hard labour and also order corporal punishment. The court could even discharge a convicted person or place him on probation. Those options are not available under **section 8 (3)** of the Sexual Offences Act which the learned trial magistrate applied and which the High Court confirmed. The appellant, in our humble view, was entitled to the least severe of the punishments. Our view has now been codified in **Article 50 (2) (p) of the**

Constitution, 2010 which reads:-

“ 50 (2) Every accused person has the right to a fair trial, which includes the right -

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(p) to the benefit of the least severe of the prescribed punishments for an offence if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;”

It is illustrative that the High Court delivered its judgment on 12th July, 2012 which was then two years after the Constitution, 2010 was promulgated. We think the relevant provisions of that Constitution were not brought to the attention of the learned Judge and we have no doubt that if they had been, the sentence of the trial court would not have been confirmed.

The punishment for defiling a child under the age sixteen (16) years under the repealed **section 145 (1)** of the Penal Code, as stated, was a maximum of life imprisonment. We do not think there were exceptional circumstances which would attract the maximum sentence. Considering all the circumstances, we are of the view that a sentence of ten **(10)** years imprisonment would meet the ends of justice.

In the result we allow the appeal on sentence. The appeal against conviction is dismissed. The appeal against sentence is allowed to the extent that the sentence of twenty **(20)** years imprisonment is set aside and is substituted with a sentence of ten **(10)** years imprisonment to run from the date of the judgment of the learned trial magistrate, namely, 20th December, 2011. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF OCTOBER, 2014

E.M. GITHINJI

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JUDGE OF APPEAL

F. AZANGALALA

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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