



IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 95 OF 2013

BETWEEN

PETER KAMAU NJOROGE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Nairobi by

(Justice L. A. Achode) dated 20th December, 2012

in

HC. CR. A. 447 OF 2010

JUDGMENT OF THE COURT

The appellant **PETER KARANJA NJOROGE** was charged, tried and convicted before the Chief Magistrate's Court at Kibera on a charge of defilement contrary to **Section 8(1)** as read with **Subsection (4)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars of the charge were that on the 12th day of April 2008 at Dagoretti Market within Nairobi Area Province, he had carnal knowledge of JWK a girl of seventeen years. After hearing the appellant's mitigation and the prosecution's brief address, the learned trial Magistrate sentenced the appellant to 23 years imprisonment.

Disgruntled by that conviction and sentence, the appellant preferred a first appeal against both to the High Court. That appeal was heard by L. A. Achode J who, by a judgment delivered on 21st December 2012, found it to be devoid of merit and dismissed it. That provoked the present appeal in which the appellant by a Memorandum of Appeal filed on 14th May 2013 complains that the learned Judge erred by; failing to consider that **Section 214** of the **Criminal Procedure Code** was contravened rendering the charge fatally defective and the trial a nullity; failing to find the prosecution evidence to be highly incompetent and contradictory thus unsafe to found a conviction as the case was not proved beyond reasonable doubt and finally that **Section 169 (1)** of the **Criminal Procedure Code** was not complied with.

At the hearing of the appeal the appellant tendered some written submissions. The first thrust of the submissions was that the term of 23 years imprisonment imposed on him by the trial court and

upheld by the High Court was not only excessive but unlawful. He cited **Section 8 (4)** of the **Sexual Offences Act** which lays a minimum sentence of fifteen years for the defilement of a child between the ages of 16 and 18 years in support of his contention.

Next the appellant stated that there was a variance between the evidence of the complainant and the charge in that whereas the charge sheet stated the offence of defilement only, the complainant's evidence was that she was both defiled and sodomized. This, in the appellant's contention, made it difficult for him to know exactly what charge he was facing and he faults the courts below for not seeing the necessity for the charge sheet to have been amended pursuant to **Section 214** of the **Criminal Procedure Code**.

The appellant finally submitted that the offence of defilement was not proved as the prosecution did not prove penetration, which is an integral part of the offence. He contended that in so far as the medical evidence tendered by way of the P3 Form indicated that the complainant's "**external genitalia were normal, the vulva and the vagina were normal**", then penetration was not proved beyond reasonable doubt. The appellant therefore besought us to accord him the benefit of doubt and set him at liberty.

Before us the appellant adopted those written submissions and added only that the charge of defilement could not possibly lie in the circumstances of the case as the victim was a full grown woman who was five months pregnant. On that score he faulted his conviction on a point of law.

Opposing this appeal, Mr. C. O. Orinda the learned Assistant Director of Public Prosecutions first reminded us that this being a second appeal, we are jurisdictionally constrained and limited to a consideration of matters of law only. In this he is right as this Court has stated in numerous cases including **NJOROGE VS R [1982] KLR 388**, that second appeals must be confined to matters of law. The Court is bound by concurrent findings of fact by the courts below unless shown to be based on no evidence.

By dint of **Section 361(1)** of the **Criminal Procedure Code** on a second appeal this Court "**shall not hear an appeal...**"

(a) **On a matter of fact and severity of sentence is a matter of fact."**

It follows that the appellant's complaint about the sentence being excessive is not open to our consideration. See **JOSEPH KIPLIMO –VS- R [2011] eKLR (Criminal Appeal No. 416 of 2010)**. Since the statute terms severity of sentence a question of fact, we find no substance in the appellant's challenge to the sentence on the basis that it is unlawful in light of **Section 8(4)** of the **Sexual Offence Act**. That provision sets the minimum sentence for the defilement of a child in the age bracket where the complainant fell as 15 years. The sentence of 23 years imprisonment meted on the appellant is compliant with that provision and the challenge on the learned Judge's decision on that score fails.

On the question of identification, Mr. Orinda submitted that the appellant was a close neighbor with whom the complainant was well acquainted, so that there was no possibility of mistaken identity. Upon our own consideration of the record, we cannot but agree with this submission. The evidence led by the prosecution and accepted by both the trial court and the learned Judge was that the complainant was home alone on the night of 12th April 2008, her cousin and roommate not having arrived. Some time past 9.00pm some young man named Njoroge forced himself into the complainant's house intent on having his way with her. Although she was four months pregnant at the time, PW1 fought Njoroge off and screamed. In answer to her cry for help, her next door neighbour, whom she referred to as "Mzee", arrived and the intruding Njoroge ran off.

The neighbour, who at first appeared to be PW1's knight in shining armour and rescuer turned out to be anything but noble or altruistic for he now demanded that PW1 go into his house to avoid the risk of the intruder's return. When PW1 declined the offer, the neighbour pulled her into his house and locked the door. He unleashed a whip and beat PW1 with it in forcing her to undress before raping her

at length. He was unmoved by PW1's pleas to be spared as she was with child. He was undeterred even by the arrival at 9.30p.m of PW1's cousin who called to him to enquire if he had seen her. He replied in the negative, hardly pausing in his rapacious undertaking. After nearly two hours PW1 convinced the neighbour-rapist that she needed to go out of the house for a call of nature and when he allowed her to get out, she locked his house from the outside and ran. She eventually reached the Dagoretti Police Station, clad in a tee-shirt only, where she reported her ordeal.

The neighbour she referred to as 'Mzee' she was emphatic in her statement to the police and in her examination in chief, was the appellant. His cross-examination of her clearly betrayed the close knowledge and association of the duo that dispelled any notion that there was any mistake as to identity. He asked her about other neighbours by name. And she repeatedly told the trial court that the appellant was her tormentor;

"I know you and you raped me ...

I am not lying, you raped me when I was pregnant ... You came like a rescuer but you pulled me to your house raped and sodomized me and also told me to put your penis in your mouth".

Even though PW1 provided the sole identification evidence against the appellant, it is clear to us that both courts below did caution themselves on the need to test such evidence with the greatest care before basing a conviction on it. The circumstances surrounding the commission of the offence including the proximity of the appellant's dwelling place to PW1's, the fact that they saw each other on an almost daily basis while PW1 lived next door and the fact that there was conversation and light during the entire episode. We are on our part satisfied that there was no misdirection on the part of the trial Court or the High Court. Their concurrent findings of fact were sound and evidence-based. The learned Judge properly appreciated and applied the decision of this Court in **OGETO -VS- REPUBLIC [2004] 2KLR 14**, in striking the balance between the trite principle that a fact is provable by the evidence of a single witness and the need for circumspection when dealing with identification. There was no danger of mistake in the instant case where the evidence was that of recognition which, as this Court stated in **ANJONONI & OTHERS -VS- R [1980] KLR 59**; "is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other".

The evidence against the appellant was bolstered by corroboration, even though by virtue of **Section 124** of the **Evidence Act** the trial court would have been entitled to convict him absent such corroboration. It is in fact provided by the medical evidence tendered by **DR KAMAU (PW3)** who testified that PW1 had bruises to her knees. He confirmed she was gestate. A rectal exam on her revealed tenderness. We are unable to accept the appellant's contention that the absence of visible injuries in PW's genitalia negatives forced or unlawful penetration. Injury is not an ingredient of the offence of defilement.

There was ample evidence tendered that the appellant did in fact defile and sodomize **his hapless and helpless** neighbour. That he was charged with defilement only in the main charge without the additional charge of sodomy did not render the charge defective and also occasioned the appellant no prejudice. If anything he suffered an advantage in not being charged with an additional offence that the evidence showed he committed.

The totality of our consideration of this appeal is that it is devoid of merit as conviction was proper and the sentence lawful. We shall disturb neither.

The appeal is accordingly dismissed.

Dated and delivered at Nairobi this 10th day of October 2014.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR