



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 65 OF 2014

BETWEEN

TIMOTHY MWAI NDERITU APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court at Nyeri (Wakaiga, J.)

dated 4th May, 2012

in

H. C. CR. A. No. 139 of 2009)

JUDGMENT OF THE COURT

1. **Timothy Mwai Nderitu**, the appellant, was charged with the offence of defilement contrary to **Section 8(1)& (2)** of the **Sexual Offences Act No. 3 of 2006**. He also faced an alternative count of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** in the Chief Magistrate’s Court at Nyeri. The particulars of the offence of defilement were that on 21st February, 2007 at *[particulars withheld]* Village in Nyeri District within the then Central Province, the appellant intentionally and unlawfully committed an act of penetration to Eunice Wanja Gitonga, a girl under the age of 11 years. The particulars of the alternative count were that on the above mentioned date and place, the appellant intentionally and unlawfully committed an indecent act to E.W.G by causing his genital organs to touch her sexual organs.

2. The applicant pleaded not guilty to both counts. The prosecution called a total of five witnesses. After conducting a *voire dire* examination on PW1, E.W.G (W), who was then nine years old, the trial court found that she appreciated the need to tell the truth and affirmed her. It was the prosecution’s case that on 21st February, 2007 while W was in the company of her younger siblings she met the appellant at their gate; the appellant held W’s hand and led her to her elder brother’s (S’s) house which was in the compound. W’s brother was in Nairobi and his house was unlocked. While inside the house, the appellant placed W on the bed removed her underpants and held her mouth with his hands. The appellant removed his trousers and proceeded to defile W.

3. Meanwhile, while PW2, Eunice Nyambura (Eunice), was heading to W's home to collect a jericin from her mother, she met W's younger siblings who informed her that it was only W who was at home. When Eunice got to the compound she called out to W three times but W did not respond. After calling out for the fourth time, the appellant heard Eunice and released W. Eunice saw W coming out of S's house and she became suspicious as to why W had not answered to her calls earlier. Eunice went to the house and tried to open the door; she realized it was being pushed from the inside. Eunice pushed harder and managed to open the door; she entered the house and saw the appellant who was known to her putting on his trousers. Eunice was shocked, she came out of the house and called PW3, Joseph Mwangi (Joseph) who was nearby. Joseph testified that he saw the appellant who was also known to him come out of the house while buttoning his trouser and leave on his bicycle which had been left outside.

4. Thereafter, Eunice examined W and noticed the presence of blood stains and spermatozoa on her private parts. According to Eunice, W told her that it was the appellant that had defiled her. PW4, Dr. Betty Cherotich (Dr. Betty), stated that after examining W she observed that her genitalia was blood stained and her hymen was broken. Subsequently, the appellant was arrested and charged in court.

5. In his defence, the appellant gave a sworn statement. He testified that on the material day he went to fetch water in the river with his bicycle. On his way back he met a woman, Eunice, who bore a grudge against him. Eunice stopped him and pleaded with him to help her with a child who was sick. She took him to a nearby homestead and led him into a room where a child was sleeping. He asked the child what the problem was but the child did not respond. The appellant realized that Eunice had left so he also left the room. While outside the room, the appellant met a young boy who told him that Eunice had told him that the appellant was not clever than her. The appellant went to his house. An hour later a group of people came to his house alleging that he had defiled a young girl. He was arrested and charged. The appellant denied committing any of the offences.

6. After considering the case on merit, the trial court found that the prosecution had proved its case against the appellant. The appellant was convicted of the offence of defilement and sentenced to life imprisonment. Aggrieved with that decision, the appellant filed an appeal in the High Court which was dismissed vide a judgment dated 4th May, 2012. It is the decision of the High Court that has provoked this second appeal.

7. During the hearing of the appeal, the appellant appeared in person and relied on his written submissions. The appellant submitted that the prosecution's evidence was not sufficient to prove his guilt; the fact that Eunice and Joseph who allegedly saw the appellant in the compound watched as he got on his bicycle and leave without causing his arrest arose suspicion as to the appellant's guilt. According to the appellant, the prosecution had not proved W's age at the material time; her birth certificate was not produced. He submitted that both lower courts had failed to consider his defence. The appellant also faulted the sentence meted out against him. He urged us to allow the appeal.

8. Mr. Kaigai, Assistant Director of Public Prosecution, submitted that the case against the appellant was proved to the required standard; the evidence of the complainant was not shaken. The case was one of recognition and there was no possibility of a mistaken identity as to the person who defiled the complainant. He argued that the appellant's defence was considered and rejected; the two lower courts made concurrent findings of fact. Mr. Kaigai submitted that the sentence issued to the appellant was lawful. He urged us to dismiss the appeal.

9. We have considered the appeal, submissions by the parties and the law. By dint of **Section 361** of the **Criminal Procedure Code** we are restricted to only consider matters of law in this second appeal. 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. From the evidence on record, Wanja gave a detailed account of what transpired on the material day. She testified that the appellant took her to her brother's house, removed her underpants and undressed. He covered her mouth and defiled her. The trial court found W to be a credible witness. In ***Nelson Julius Karanja Irungu -vs- Republic- Criminal Appeal No. 24 of 2008*** this Court expressed itself as follows:-

“As this court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses.”

We see no reason for interfering with the trial court's finding that Wanja was a credible witness because it had the benefit of seeing her demeanour as she testified. Further, there is no evidence on record that suggests the said finding was erroneous.

11. We cannot help but note that Wanja identified the person who had defiled her as the appellant. The appellant was well known to her. We concur with the two lower courts that this was not a case of mistaken identity but of recognition. 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.”

12. W's evidence was further corroborated by the evidence of Eunice, Joseph and Dr. Betty. On the material day Eunice found the appellant putting on his trouser in the house that W had come out from; Joseph saw the appellant come out of the said house while buttoning his trouser. Further, upon examining W, Eunice noticed the presence of blood stains and spermatozoa on W's genitalia. Dr. Betty testified that W's hymen was broken which proved penetration and the offence of defilement. ***Section 8(1)*** of the ***Sexual Offences Act*** provides:-

“A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement.”

13. On the issue of W's age, we find that W gave uncontroverted evidence that she was nine years old at the time of the incident. Dr. Betty in her evidence confirmed that W was nine years old when she examined her on the material day. We note that the P3 form indicated W's age as nine years old. Based on the foregoing, we find that the prosecution had proved W's age.

14. Having perused the record, we are of the considered view that the appellant's defence that the charges were framed against him due to the grudge between him and Eunice was considered and rightfully rejected by the two lower courts.

15. Lastly, on the issue of the sentence, ***Section 8(2)*** of the ***Sexual Offences Act*** prescribes life imprisonment for a person convicted with the offence of defilement of a child aged 11 years and below. In this case, W was nine years old hence the sentence issued to the appellant is legal. ***Section 361(1)(a)*** of the ***Criminal Procedure Code*** 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. We see no reason to interfere with the concurrent findings of the two lower courts on the appellant's conviction and sentence. The upshot of the foregoing is that this appeal lacks merit and is hereby dismissed.

Dated and delivered at Nyeri this 19th day of November, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true
copy of the original

DEPUTY REGISTRAR