



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI (PCA), MUSINGA & GATEMBU, JJ.A)**

**CRIMINAL APPEAL NO. 285 OF 2012**

**BETWEEN**

**P M M ..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Nairobi (Msagha, J delivered on 26<sup>th</sup> June, 2010*

*in*

***HC.CR.A. 570 OF 2010)***

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**JUDGMENT OF THE COURT**

1. The appellant, P M M, was charged and convicted by the Principal Magistrate’s court at Githunguri, Kiambu with the offence of defilement contrary to section 8(1) of the Sexual Offences Act. He was sentenced to serve life imprisonment. His appeal against the conviction and sentence to the High Court was dismissed on 26<sup>th</sup> June 2010. He has appealed to this Court complaining that the offence was not proved as required by law; that the evidence presented before the trial court was contradictory; that the trial court shifted the burden of proof to him; that his mitigation was not considered and that the sentence meted out to him is manifestly excessive.

**Background**

2. On 8<sup>th</sup> September 2009 at about 6.00 p.m M. N. M. (PW2) was at her home. She asked her daughter RW (PW1) to fetch tomatoes from a drawer. As her daughter walked back with the tomatoes, PW 2 noticed that her daughter was walking rather slowly and that she was walking with her legs apart. On enquiring from her why she was not walking normally, PW 1 said that nothing was the matter. Concerned, PW 2 pressed on and escorted her daughter to the bedroom, where the daughter maintained that there was nothing wrong. Upon removing her clothes, PW 1 checked her daughter’s private parts and noticed unusual whitish discharge. Upon being cajoled and reassured by her mother, RW 1 finally opened up and narrated to her mother what she was later to narrate to the trial court that she had been defiled by the appellant days earlier but was afraid to tell her mother. PW 2 then took RW to Githunguri Health

Centre where PW 1 was examined and referred to Githunguri Police Station. According to PW2, the appellant was well known to her, being a neighbour and a relative.

3. PW1 testified before the trial court on 15<sup>th</sup> February 2010. She was aged 10 years and in standard 5 at the time. After examining her, the trial magistrate formed the view that she did not appreciate the nature and meaning of an oath but that she understood the difference between truth and lying and the importance of speaking the truth. PW then testified that on 1<sup>st</sup> September 2009 at about 2.00 pm she left her home to collect her younger brother, B. C. (PW4) from a neighboring farm; that on the way she went past the appellant who was cutting nappier grass; that she found PW 4 and embarked on the journey back home travelling the same route she had used; that on their way someone covered her eyes with a piece of cloth and dragged her to a coffee farm, removed her clothes and defiled her; that as her attacker left the scene, she removed the cloth from her eyes and saw the appellant run away; that she then proceeded home to feed her brother PW 4.

4. According to PW 1, the appellant was no stranger to her. She had known him for a long time. His home was close to their home. Out of fear she did not tell her mother what had transpired until the time when her mother noticed that she was not walking properly. After learning what had transpired, her mother took her to Githunguri Health Center and thereafter to Githunguri Police station. The appellant was subsequently arrested.

5. PW 4 then aged four years stated that he was with his sister PW 1 as she went through the ordeal at the hands of the defiler. He told the trial court that he accompanied his sister home on the material day when the appellant covered his sister's face with a cloth; removed her clothes and "did something bad to her" (her) and then ran away.

6. Dr. Caroline Ngunu, a medical officer in charge at Githunguri Health Center produced the medical examination report (P3) with respect to PW1 before the trial court. She stated that PW1 was examined at the health center eight days later following a report that she had been defiled on 1<sup>st</sup> September 2009; that the examination revealed that PW1's hymen was perforated and a fowl smelling white vaginal discharge noted. The examination also revealed that there had been penal-vaginal penetration.

7. Police constable Rogers Nalianya (PW5) was at Githunguri Police Station on 8<sup>th</sup> September 2009 when PW2 and PW1 reported the defilement. He recorded statements from them, visited the scene of crime and subsequently arrested the appellant on 16<sup>th</sup> September 2009 after which the appellant was charged.

8. In his defence the appellant stated that on the date of the alleged crime he was at work all day; that PW2 subsequently accused him of having defiled her daughter and that he was then arrested and charged with an offence he did not know anything about.

9. Satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt, the trial court convicted him for the offence of defilement and sentenced him to life imprisonment.

10. On appeal to the High Court on grounds that the charges against him were fabricated and that he was framed; that no reasons were given by the trial court for rejecting his defence and that the life sentence imposed is harsh and excessive, the learned judge, after reviewing the evidence, concluded "*that sufficient evidence was adduced against the appellant and that the conviction cannot be faulted.*" Regarding the sentence, the learned judge held that "*the penalty for this offence is mandatory and the learned trial magistrate having reached the conclusion that she did, she had no alternative but to impose the same.*" With that the appellant's appeal to the High Court was dismissed. Hence, the present appeal.

### **The appeal and submissions by counsel**

11. At the hearing of the appeal before us, learned counsel Mr. Wandugi appeared for the appellant while Mr. Njagi Nderitu, Senior Assistant Deputy Public Prosecutor, appeared for the respondent. In support of

the appeal, Mr. Wandugi submitted that the proceedings and the judgment of the High Court are a nullity due to non compliance with Section 359 of the Criminal Procedure Code which requires appeals to be heard by two judges unless the Chief Justice authorizes otherwise and that there is nothing on record to show that Msagha, J. who heard the appeal in the High Court was duly authorized to hear the matter as a single judge. To support that argument he referred us to the case of **John Maina Kanyi & 2 others v Republic [2007] eKLR.**

12.Next, the appellant complained that the judgments by both lower courts should be set aside because they do not contain the issues for determination as required under section 169 of the Criminal Procedure Code.

13.Mr. Wandugi further submitted that the lower courts erred in relying on the evidence of minors, namely PW1 and PW4, and that it was unsafe to do so. He argued that the delay of eight days between the date when the offence was committed on 1<sup>st</sup> September 2009 and 8<sup>th</sup> September 2009 when PW 1 reported to her mother and to the police was prejudicial in that the opportunity to test vital evidence, for instance blood on the clothes, was lost. In the same vein, counsel took issue with the finding by the trial court that PW 1 was candid in her testimony pointing out that the failure by PW 1 to report the incident in good time and her failure to disclose to the Police what had happened to her rendered her evidence unreliable; that the testimony of PW4 contradicted that of PW1; and that the evidence tendered was generally inconsistent.

14.Mr. Wandugi then drew our attention to a statement contained in the judgment of the trial court to the effect that the defence by the appellant was vague because the appellant did not specify the date on which he claimed to have been at work all day and that neither did the appellant explain his whereabouts on 1<sup>st</sup> September 2009 and submitted that those statements by the trial court manifested that the court shifted the burden of proof to the appellant and that the appellant was thereby prejudiced. Counsel submitted that the appellant was not under any duty to prove his innocence.

15.Referring us to the evidence of PW 3 and the medical report produced by that witness, Mr. Wandugi submitted that having regard to the fact that the medical examination of PW 1 was done many days after the alleged defilement, the fact that the examination of PW 1 revealed that her hymen was perforated did not bolster the prosecution case. Counsel submitted that there are many other factors that could have caused perforation of the hymen and that no spermatozoa was found or linked to the appellant. In support of that argument, counsel referred us to the case of **Peter Kariuki Wachira v Republic, Criminal Appeal No. 186 of 2010** and to **Charles Mwita v Republic, Criminal Appeal 248 of 2003.**

16.Counsel concluded his submissions on behalf of the appellant with the contention that the High Court failed to discharge its duty to re-evaluate the evidence. If it had done so, Mr. Wandugi argued, it would have been clear as day light to the learned judge that the conviction was improper; that the evidence tendered was insufficient to sustain the conviction and that the case was not proved to the required standard of proof.

17.Whilst conceding that breach of section 359 of the Criminal Procedure Code may render proceedings and judgment of the High Court void, Mr. N. Nderitu for the respondent submitted that the complaint that section 359 of the Criminal Procedure Code was breached should have been raised earlier in order for inquiries to be made to confirm whether indeed Msagha, J. had the requisite authority to hear the appeal as a single judge and that the issue should not be raised for the first time at this stage.

18.As to the complaint that the lower courts did not comply with section 169 of the Criminal Procedure Code, counsel submitted that there was substantial compliance with that provision as the issues for determination though not specifically listed in the judgments, were addressed in the respective judgments of the lower courts.

19.Counsel argued that there is no merit in the contention that the High Court did not discharge its duty of re-evaluating and re-examining the evidence; that it is manifest from the judgment of the the High Court that the learned Judge was alive to and discharged that duty; that contrary to the assertion by the appellant

that the evidence against him was scanty and insufficient, the evidence of PW1 and PW4, though minors, was credible and was sufficient and that the delay of eight days between the date of the occurrence of the offence and the date when the PW1 reported the same was satisfactorily explained as having been attributable to PW1's fear.

20. Counsel submitted that the observation by the learned judge of the High Court in his judgment that "it would appear the burden of proof was shifted to the appellant" was a misdirection considering that what the appellant offered in his defence was a mere denial which did not at all shake the prosecution case.

21. Adverting to the evidence of PW 3 and the medical report produced before the trial court, counsel submitted that the same fortified the prosecution case as it confirmed penal penetration. Counsel distinguished the circumstances in this case from those in case of **Peter Kariuki Wachira v Republic (Supra)** relied upon by the appellant.

### **Determination**

22. We have considered the appeal and submissions by learned counsel. In a second appeal such as this our mandate is restricted by virtue of (under) Section 361(1) of the Criminal Procedure Code to matters of law. In **Dzombo Mataza V Republic, [2014] eKLR**, this Court stated:

***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see Okeno v Republic (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."***

23. What then are the issues for our determination in this appeal? First, is whether section 359 of the Criminal Procedure Code was complied with. Second is whether the judgments of the lower court are compliant with section 169 of the Criminal Procedure Code. Third is whether the lower courts erred in believing and acting on the evidence of minors and whether the offence was proved to the required standard. Fourth is the question whether the High Court as the first appellate court discharged its duty.

24. We start with the complaint under section 359 of Criminal Procedure Code that two judges as opposed to one should have heard the appeal in the High Court. Section 359(1) of the Criminal Procedure Code provides that:

***"Appeals from subordinate courts shall be heard by two judges of the High Court, except when in any particular case the Chief Justice, or a judge to whom the Chief Justice has given authority in writing, directs that the appeal be heard by one judge of the High Court."***

25. We have perused the original file of the record of the appeal before the High Court and noted that a direction was indeed made for the appeal to be heard by one judge. Based on our enquiries, we have established and taken judicial notice that the practice of the office of the Chief Justice is to administratively confer authority on some judges of the High Court under 359(1) of the Criminal Procedure Code and that such authority was indeed conferred on Msagha, J. on 3<sup>rd</sup> June, 2008. To the extent that the authority is personal to a particular judge, it is hardly surprising therefore that it does not form part of the record of proceedings of the Court. There is therefore no merit in the complaint that the proceedings and the judgment of the High Court are a nullity for want of authority under 359(1) of the Criminal Procedure Code.

26. Next is the question whether the lower courts complied with section 169 of the Criminal Procedure Code Cap 75 Laws of Kenya that provides that:

***"Every such judgment shall, except as otherwise expressly provided by this Code, be written by***

***or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.”*** (emphasis added)

27. We have carefully reviewed the judgment of the trial court as well as that of the High Court. Whereas the points for determination are not distinctly and separately enumerated or isolated in both judgments as the appellant might have wished, the issues for determination are clearly discernible from the analysis in the body of the respective judgments. For instance, after reviewing the evidence, the trial court in its judgment posed the question; *“Did the accused person defile the complainant as charged or in the alternative commit an indecent act with her?”* It is also abundantly clear that the learned trial magistrate carefully considered the question whether the evidence on identification was watertight without saying so expressly. Similarly the learned judge of the High Court addressed, in a composite manner, all the issues raised in the first appeal. There is therefore no merit, in our view, in the complaint that Section 169 of the Criminal Procedure Code was breached.

28. We turn now to the question whether the offence was proved to the required standard and whether the lower courts erred in believing and acting on the evidence of minors. According to the appellant, the prosecution failed to discharge its burden of proof and his conviction was founded on insufficient evidence particularly because, according to the appellant, the evidence of the minors was very shaky and unreliable.

29. As a matter of law, it is common place that we can only interfere with the concurrent findings of facts by the two courts below if we are persuaded that such findings are not based on evidence or the evidence is of such a nature that no reasonable tribunal can reasonably be expected to base its decision on it. In **Boniface Kamande & 2 others v Republic [2010] eKLR (Criminal Appeal 166 of 2004)** this Court stated:

***“On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two Courts below and we would only be entitled to interfere if and only if, we are satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such nature that no reasonable tribunal could be expected to base any decision upon.”***

30. The onus is always on the prosecution to prove the case against the accused person on a standard beyond reasonable doubt. Lord Sankey expressed that fundamental principle many years ago in his famous speech in **Woolmington V DPP [1935] UKHL 1** where he said:

***“Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”***

31. That principle applies here and has underpinning in our Constitution. See: **Festus Mukati Murwa v Republic [2013] eKLR**. The thrust of the appellant's grievance is that both lower courts relied heavily on the evidence of minors to support the conviction. It is important to bear in mind that in sexual offences the evidence from one witness, even from a minor, would be sufficient to sustain a conviction as long as the court is satisfied with the veracity of the testimony of the complainant. Section 124 of the Evidence Act Cap 80 Laws of Kenya, on the evidence of children, provides:

***“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in***

***accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth .***” (emphasis added).

32. Section 19 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya makes the following provision:

***1. “Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.”***

33. Based on the record, it is evident that the trial court carried out an examination of the minors in order to ascertain whether or not PW1 and PW4, who were aged 10 years and 4 years respectively at the time, understood the nature of an oath and to ascertain whether their evidence may be received. The trial court was satisfied that the minors understood the difference between truth and a lie and proceeded to record their unsworn evidence. The trial court in its judgment was satisfied that PW 1 gave a candid account of what transpired on the 1/9/2009 when she was defiled. Further the trial court found that the identification evidence of the appellant by PW1 was corroborated by the evidence of PW4 whom they both knew as a relative and a neighbour. The trial court found the prosecution witnesses to be “*reliable and convincing*”. In our view, the evidence of PW 1 and PW 4 was not only sufficient but was further fortified by the medical evidence adduced by PW3 to the effect that the complainant’s hymen was perforated and that there was penile-vaginal penetration.

34. The trial Court rejected the defence of the appellant, stating:

***“...the defence by the accused person was vague, he did not state which date he was referring to when he alleged he worked the whole day. If it was on the day that the complainant’s mother learnt of the incident then it was said to be 8 days after it happened. He did not explain his where about (sic) on 1/9/09. I find his defence that he knew he had done nothing wrong simplistic and merely evasive and I dismiss it.”***

35. It is not clear whether the appellant’s assertion that he was at work was in relation to the 1/9/2009, the date the offence was committed or eight days later, when PW2 became aware of the offence and confronted the appellant. The High Court in turn, re-evaluated the facts before it. In agreeing with the findings of the trial court the High Court determined:

***“It is true that PW1, PW2 and PW4 are closely related but that does not mean that their evidence was compromised at all. If anything, the evidence was corroborative in all material particulars. The graphic details given by the complainant cannot be faulted even though she was of tender age. This also can be said of the evidence of PW4, the brother. The doctor who examined the complainant did not have to be a “Government Police Medical Officer” as stated by the appellant. In any case, this was not put to her by the appellant under cross-examination.”***

36. In those circumstances, we are satisfied that there was concrete evidence on which the two lower

courts based their conclusions as to the guilt of the appellant. We hold that the prosecution did discharge its burden of proof and the appellant's defence failed to introduce 'reasonable doubt' to shake the prosecution's case. We are in agreement with the submissions by counsel for the respondent that the determination by the trial court to dismiss the defence of the appellant did not in any way shift the burden of proof. The defence offered by the appellant was simply not enough to displace the prosecution evidence against the appellant.

37. On the question whether the High Court discharged its duty to review and analyze the evidence and draw its own conclusions, it is clear from what we have said above that we hold that it did. Having reviewed all the evidence on record, the learned Judge had this to say:

*“The alleged offence took place at about 2 p.m. The appellant was known to both the complainant and her brother. Other than being a neighbour he was a close relative according to the evidence of P.W. 1 and P.W. 2. Both P.W. 1 and P.W. 4 saw the appellant at the scene. The complainant removed the cloth which was used to blindfold her immediately after the act. She saw the appellant running away and confirmed that it was the same person she had seen on the way to get her brother. There was therefore no question of mistaken identity.”*

38. In **Simon Kariuki Muriithi v Republic, [2006] eKLR**, this Court held that there is no yard stick for measuring the manner in which the first appellate court ought to carry out the duty of re-evaluation or fresh scrutiny of evidence. The extent and manner in which the re-evaluation may be done depends on the circumstances of each case and the style adopted by the judge(s).

39. As for the sentence, the same is legal. As the question of severity is by reason of section 361 (1) of the Criminal Procedure Code a question of fact and outside our mandate, we cannot go into it. **(See Kiplimo v Republic [2011] eKLR)**

40. For all those reasons, there is no merit in the appeal. It is dismissed in its entirety.

**Dated and delivered at Nairobi this 7th day of November, 2014.**

**P. KIHARA KARIUKI (P.C.A.)**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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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**

