



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 350 OF 2012

BETWEEN

JOHN NDWIGA MACHAKIAPPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Ongudi, J.)

dated 14th June, 2012

in

H.C.CR. A No. 203 of 2010)

JUDGMENT OF THE COURT

1. John Ndwiga Machaki, the appellant, was charged with the offence of defilement contrary to **Section 8 (1) & (2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars are that on 22nd January, 2009 at [Particulars Withheld] Village, Ishiara Location within Mbeere District of the then Eastern Province, the appellant defiled P W a pupil in standard three at [Particulars Withheld] Primary School, a child aged 9 years. He was tried, convicted and sentenced to 20 years imprisonment by the trial magistrate's court. His first appeal to the High Court (**Ogundi, J.**) was dismissed. Aggrieved by the dismissal, the appellant has lodged a second appeal to this Court.
2. The prosecution's case was based on the evidence of PW1 P W, PW2 I N K and PW5 Dr. Ndegwa Wanjuki of Ishiara Sub-District hospital. PW1, P W, a minor after *voire dire* examination gave unsworn statement as follows:

“I go to school. I am a pupil at [Particulars Withheld] in Standard 3. I go to church and if one speaks the truth he will not be locked up. If one lies, he will be locked up. I do not know the meaning of an oath. I am aged 9 years now. On 18th January 2009, the accused came up to the house. He took me up to the bed and had sexual intercourse with me. I was all alone in the house. The accused had been given work by my mother. He used to fetch water from the river to our house. I knew him well prior to the incident. My father is a driver and at some point the accused used to work with my father. The

accused told me that he will kill me in the event I mentioned what he did to me. The accused removed my panties and thereafter removed his and had sexual intercourse. The accused penetrated me with his penis. He inserted it into my vagina. The accused threatened me so I did not scream. All the family members had gone to Ishiara. After the discourse, the accused left. I feared to inform my mother regarding the incident. On 20th January 2009, my mother found us, the accused was having sexual intercourse in my sister's bed. My mother beat me up and I informed her that the accused had had sexual intercourse with me. My mother checked my private parts. She thereafter took me to Ishiara police post and a police officer escorted us to Ishiara sub-district hospital. I later got the police to record my statement."

3. PW2, I N K testified as follows:

"I come from Ishiara where I am a business lady. On 22nd January, 2009 at 6.00 pm I arrived home from the market. I found two pairs of shoes by my door, for my daughter and accused. While at the door I saw the accused emerging from the bedroom. I knew the accused. He used to work with my husband. In the month of July, 2008, I had employed the accused. When I saw the accused, he was not putting on his shirt. I inquired from the accused as to what he was doing with PW1. The accused did not talk to me. I found PW1 in one of the bedrooms. She informed me that the accused had asked her to play sex with him. I checked on her private parts and saw sperms on the vagina. The complainant did not have her panties on. I got hold of my sister and we went to Ishiara police post and two police officers escorted us to Ishiara sub-district hospital. The victim was examined and given medication.... A P3 Form was filled and I recorded my statement. I identified the place where the accused was residing. Police officers from Ishiara went and arrested the appellant."

4. PW5, Dr. Ndegwa Wanjuki produced a P3 Form medical report prepared by Dr. Oduor after examining PW1, P W a minor girl aged 9 years. The report shows that the victim was defiled by a person known to her; that on examination, there were no injuries and the genitalia –libia manora had reddened; the hymen was broken; the complainant had taken a shower and Dr. Oduor concluded that PW1 had been defiled. That lab reports of the appellant showed that he was also examined.
5. In his defence, the appellant gave sworn testimony stating that he is a casual worker and used to work for PW2 and when he went to ask for his money he was threatened that if he continued pursuing the issue of money, he will end up in prison.
6. Upon hearing the evidence, the trial magistrate convicted the appellant and sentenced him to 20 years imprisonment. In convicting the appellant, the trial court expressed as follows:

"I have carefully analysed the evidence herein. It is clear that the alleged incident took place during day time. Though the complainant gave unsworn statement, she was straightforward particularly on what the attacker did to her. PW2 got home and based on the state of affairs she suspected an offence having been committed. She examined the complainant's private parts and saw sperms. The complainant was examined without delay....The complainants mother was categorical that immediately she got to her house, the accused who was her employee emerged from the bedroom. This was the same bedroom she found the complainant in suspicious circumstances. She confirmed what the complainant told her. That she had had sex with the accused. Foremost, the accused was well known by the complainant. There is no mistake on identification. The finding by the medic counters the allegation that the accused was being framed up. What the accused stated...amounts to an afterthought. It does not water down the prosecution testimony in any way....The end result is that the prosecution case is watertight and the perpetrator herein is none other than the accused and that the prosecution has proved their case beyond reasonable doubt. The accused if found guilty and convicted of the offence contrary to Section 8 (1) (2) of the Sexual Offences Act."

7. The appellant's first appeal to the High Court was dismissed prompting the instant appeal before this Court. In his home made supplementary ground of appeal, the appellant raises four grounds to wit:
 - i. ***That the learned Judge erred in law in upholding conviction in reliance on prosecution evidence which was riddled with doubts and in contravention of Sections 163 (1) and 165 of the Evidence Act, Cap 80, Laws of Kenya.***
 - ii. ***That the learned Judge erred in upholding conviction on charges that were not proved to meet the needs of justice.***
 - iii. ***The learned Judge erred in law in failing to fully evaluate and analyze the entire evidence on record as he was duty bound to do.***
 - iv. ***That the learned Judge erred in law in upholding conviction while not complying with Section 169 (1) of the Criminal Procedure Code, Cap 75 of the Laws of Kenya.***
8. At the hearing of the appeal, the appellant was unrepresented and acted in person. The State was represented by **Mr. Job Kaigai**, the Assistant Director of Public Prosecution. The appellant gave written submissions explaining the grounds of appeal. He stated that the testimonies of PW1, PW2 and PW3 were riddled with lots of doubt and inconsistencies; that PW1 was not certain about the date the alleged crime took place as she never mentioned about it nor the time at which the offence took place and this raises doubt as to whether the crime actually occurred; that the testimony of PW2 was a fabrication aimed at implicating the appellant since the appellant had demanded payment being his salary; that PW1 stated she had been defiled on two diverse dates and this was not within the knowledge of PW2 PW3 and PW5; that there was no investigation report or evidence linking the appellant to the crime.
9. The State in opposing the appeal, submitted that there was clear evidence that the appellant committed the offence as charged; that the prosecution had proved its case to the required standard and there were concurrent findings of fact by the two lower courts that the appellant committed the offence. The State submitted that the complainant had laid a solid foundation for the prosecution's case; she testified that the appellant was a shamba boy at their home and there was no possibility of mistaken identity. That PW2 caught the appellant red handed and she took PW1 to hospital where the fact of defilement was confirmed through the medical report produced in evidence.
10. On our part, we note that the appellant is unrepresented and it is the duty of this Court to consider all the issues in his written submission. This is a second appeal which must be confined to points of law. In ***David Njoroge Macharia – v- R [2011] eKLR*** it was stated that under ***Section 361 of the Criminal Procedure Code***:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings.”

11. The appellant in his submission contends that he did not commit the offence. The critical evidence relating to the identity of the person who defiled the complainant is the testimony of PW1 and PW2. In a case involving a sexual offence, ***Section 124 of the Evidence Act*** is relevant. The Section provides as follows:

“124. Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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 if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

12. The appellant was a person well known to PW1 and PW2. We have gone through the evidence on record and the judgment by the trial court and the High Court. It is our considered opinion that there is no possibility of mistaken identity. We find there was no error on the part of the High Court in upholding the conviction of the appellant and stating that the defence evidence did not dislodge the evidence of the prosecution witnesses. We agree with the finding that if it was true there were any money issues upon which threats had been issued, nothing stopped the appellant from putting this issue to PW2 in cross-examination. We concur with the trial magistrate's finding that the issue of salary and threats was an afterthought. We are satisfied in the instant case, as correctly pointed out by the learned Judge of the High Court, that there is overwhelming evidence on record to support the conviction of the appellant.

13. On our part we have been unable to decipher any inconsistency and contradictions on the evidence on record that can be said to have led to an error of law or miscarriage of justice on the appellant. We concur with the concurrent findings of fact by the two lower courts. As was emphasized in *Chemagong vs. Republic, (1984) KLR 213* at page 219:

“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)”

14. We observe that the credibility of PW1, PW2 and PW5 was not impugned; we have considered the grounds of appeal on alleged contravention of the provisions of the ***Criminal Procedure Code*** and find they have no merit. In totality, this appeal has no merit and is hereby dismissed.

Dated and delivered at Nyeri this 17th day of December, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR