



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MWERA, MWILU & GATEMBU, JJ.A.

CRIMINAL APPEAL NO. 364 OF 2007

BETWEEN

WILLIAM NG'ANG'A GITAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a sentence of the High Court of Kenya at Nairobi (Ojwang, J) dated 30th May, 2007

in

H.C.CR.A. NO. 198 OF 2005)

JUDGMENT OF THE COURT

1. This is an appeal from the decision of the High Court of Kenya (the Honourable Mr. Justice J. B. Ojwang, as he then was), given on 30th May 2007 upholding the appellant's conviction and sentence by the trial magistrate for the offence of defilement of a girl.

Background

2. The appellant, William Ng'ang'a Gitau, was charged with the offence of defilement of a girl contrary to Section 145(1) of the Penal Code and arraigned before the Chief Magistrate's Court at Thika on 6th August 2004.
3. The particulars of the charge were that on 3rd August 2004 at [Particulars Withheld] in Thika District of the Central Province the appellant had carnal knowledge of P W a girl under the age of sixteen years.
4. The appellant faced an alternative charge of indecent assault on female contrary to **Section 144(1)** of the Penal Code. The particulars of the offence under the alternative charge were that on the 3rd day of August 2004 at [Particulars Withheld] in Thika District of Central Province, unlawfully and indecently assaulted P W by touching her private parts.
5. The appellant pleaded not guilty to both charges. He was tried, and in a judgment dated 6th April, 2005

was found guilty for defiling a minor and convicted. Thereafter he was sentenced to serve 15 years imprisonment.

6. Being dissatisfied by the judgment of the magistrate's court, the appellant appealed to the High Court against the conviction and sentence. The grounds of appeal to the High Court were:-

- i. That his defence and mitigation was "totally ignored" by the trial court;*
- ii. That no medical examination was carried out on him, to establish that he committed the offence charged;*
- iii. That there was bad blood between himself and the complainant's mother, and the trial court did not take that into account;*
- iv. That the learned trial magistrate was biased when she passed sentence*
- v. That the sentence meted out by the trial court was "very harsh and excessive".*
- vi. That the prosecution witnesses gave contradictory evidence.*

The Appeal to this Court and submissions

7. The appellant is aggrieved by the decision of the High Court. In his appeal to this Court, the appellant has relied on the grounds set out in this memorandum of grounds of appeal that

- a. That the learned High Court Judge erred in law in upholding the conviction on evidence which was inconclusive.*
- b. That the learned High Court Judge further erred in law in upholding the conviction and failed to appreciate that the evidence by PW4 which was said to collaborate PW1's evidence was given in English language which was never interpreted to me the appellant.*
- c. That the learned High Court Judge as did the learned trial Magistrate shifted the burden of prove from the prosecution to the appellant.*
- d. That the learned High Court Judge failed to appreciate that no finding was made one way or the other to my strong and intact alibi defence.*
- e. That the case of prosecution was far from proved.*

8. Alongside his written submissions delivered to the Court during the hearing of the appeal on 11th April 2013, the appellant submitted "amended ground of appeal" in which he complains:-

- 1. That, the learned high court judge erred in law by upholding my conviction without proper finding that the evidence of pw-1(minor) was un procedurally recorded as no voir-dire was conducted to determine whether she understood the meaning of the oath.*
- 2. That, the learned High Court judge erred in law by upholding my conviction on a charge which is defective.*
- 3. That, the learned High Court judge erred in law by upholding my conviction without proper finding that the trial magistrate did not point out his reasons as to why he dismissed my defence hence violated the provisions of section 169(1) of the criminal Procedure Code."*

9. In his written address before us the appellant submitted that the evidence of PW-1, a minor, was erroneously and un-procedurally recorded and that the trial magistrate ought to have conducted a "voir-

dire” to determine whether she understood the meaning of an oath before recording her evidence; that the charge sheet was defective as, firstly it did not indicate that the appellant “unlawfully” had carnal knowledge and secondly because there were two complainants; that the court did not give reasons for dismissing the appellant’s defence.

10. Ms. F. N. Njeru, learned counsel for respondent submitted that the grounds relied upon by the appellant in the present appeal are the same grounds that were advanced by the appellant before the High Court; that the appellant’s complaint that he did not understand the language was addressed by the High Court and the appellant’s preferred language was used both before the trial magistrate and in the High Court; that the complaint that the prosecution did not prove its case was also raised and that the High Court did its own revaluation of evidence and came to the same conclusion as the trial magistrate.

11. Ms. Njeru further submitted that the appellant’s complaint regarding the evidence of PW1, a minor, has no substance as evidence of minors in sexual offences is admissible under the Evidence Act and that the appellant is now seeking to introduce new grounds of appeal that were never raised before the High Court. Ms Njeru urged us to uphold the decision of the High Court.

12. In his brief reply the appellant urged the Court to consider reducing the sentence.

Our decision

13. We have considered the appeal and the submissions. This is a second appeal. On a second appeal, this Court, is only concerned, with points of law and is bound by the concurrent findings of fact made by the lower courts unless those findings were shown not to be based on evidence. That is the position espoused by Court held that in **NJOROGE V REPUBLIC [1982] KLR 389.**

14. That position was reiterated in the case of **David Njoroge Macharia v Republic [2011] eKLR,** where this Court stated that on a second and final appeal to this Court 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.”

15. Are there matters of law on which the appellant’s present appeal is based? In answer to that question we echo the words of this Court in the case of **KARILE KIMANIKI V R, Criminal Appeal No. 239 of 2008** where the Court stated:

“The appellant has been unrepresented by counsel throughout and it is understandable therefore that the three grounds of appeal raised in his memorandum do not strictly raise issues of law, which are the ones open for consideration in a second appeal. As this Court has stated times without number, it will pay homage to concurrent findings of fact by the two courts below unless such findings are made on no evidence at all, or on a misapprehension or perversion of the evidence, or it is apparent on the evidence that no tribunal, properly directing itself, could have made such findings”

16. The concurrent facts established by the two courts below were that PW1, a girl aged 15 years of age was returning home from school when she met the appellant who was well known to her having previously worked on PW1’ family land. The appellant attempted to strike a conversation with PW1 by greeting her. She did not respond. The appellant then removed his shoes and sought to reassure PW1 that she had no reason to be apprehensive. PW1 became afraid and ran away. The appellant chased her, caught up with her, grabbed her and took her to the bush where he laid her down, removed her underwear and inserted his penis into her private parts as he choked her with a scarf and held a knife to her ear.

17. In the course of running away from the appellant, PW1 had dropped her school papers on the road. A

motorcyclist stopped to pick them up. As the learned Judge in the High Court summed it:-

“The motorcyclist’s proximity to the bush locus in quo now gave the appellant anxiety, and he got off his prey, and took off. The motorcyclist saw PW1, and she told the motorcyclist that she had been raped by somebody known to her”

18. Thereafter PW1 went home and found her sister to whom she narrated what had happened. Her sister took her to the Police Station from where she was referred to Thika District hospital, examined, treated and given medication.

19. Dr. John Kisiangani, PW 4, is the doctor who examined PW1 at Thika District Hospital. He found PW1’s clothes were soiled, there was tenderness in her neck region, abdomen, chest and ribs, her hymen was missing, there were numerous pus cells and spermatozoa and concluded that PW1 had been raped.

20. Evidence was led from the complainant’ mother who confirmed that she had employed the appellant at some point as a gardener. There was also evidence from the complainant’s sister and from police constable Irungu who investigated the matter.

21. In his defence, the appellant stated that he was falsely accused as on the day he was alleged to have committed the crime he was unwell and had stayed home.

22. On evaluation of the evidence the trial magistrate found that:-

“PW1 was able to clearly narrate what happened to her and by whom. The medical evidence... by the doctor corroborates her evidence.”

23. The trial magistrate proceeded to find the appellant guilty as charged for defiling a minor and convicted the appellant.

24. On appeal to the High Court and upon a re-evaluation of the evidence the High Court (the Honorable Mr. Justice J. B. Ojwang (as he then was)) upheld the conviction and reaffirmed the sentence by the learned trial magistrate. The learned judge expressed himself thus:

“I do not consider the defence proffered by the appellant to have been conscientious or weighty-enough (sic) defence which would shake the solid foundations of the prosecution case. Since the appellant had elected to make an unsworn statement, there was no way, under the law, of testing the veracity of his allegations. His two witnesses shed no light at all on his claims-and so the total defence evidence utterly failed to shake the prosecution case which stands on firm grounds, and would lead to a quite safe conviction, as the verdict. I do not agree that the trial court did not take into account the appellant’s mitigation statement.”

25. We totally agree with the High Court and we have no reason to disturb the concurrent findings of the two courts below. The complaint by the appellant that the learned judge of the High Court erred in upholding the conviction without evidence has no merit.

26. With regard to the question whether an inquiry was held to determine whether the complainant, PW 1, understood the oath, it is clear from the record that the trial magistrate satisfied himself, as required under proviso of section 124 of the Evidence Act, that the complainant was telling the truth.

27. The reasons for rejection of the appellant’s defence with which we also agree are evident from the judgments of the lower courts.

28. The appellant has also urged us to review the sentence. The import of **Section 361(1)(a)** of the Criminal Procedure Code, which declares a sentence a matter of fact, is that on a second appeal, this Court has no jurisdiction to re-examine a lawful sentence on the complaint of an appellant that it is harsh and excessive. There is no suggestion that the sentence is illegal so as to provide a basis for this Court to

intervene.

29. The result of the foregoing is that the appeal fails in its entirety and is dismissed for lacking in merit.

DATED at NAIROBI this 7th day of June 2013.

J.W. MWERA

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a Copy of the original.

DEPUTY REGISTRAR