



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 13 OF 2012

BETWEEN

NELSON NJURURI IRERI APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri

(Wakiaga J.) delivered on 17th February 2012

in

H.C.CR.A. No. 327 of 2008)

JUDGMENT OF THE COURT

1. Nelson Njururi Ileri was charged with defilement contrary to **Section 8 (1) and (2) of the Sexual Offences Act No. 3 of 2006**. The Information is that on 8th July 2007 in Nyeri District within the then Central Province, the appellant did an act of penetration of defilement to TWN, a girl under the age of 11 years. He pleaded not guilty to the offence and was tried, convicted and sentenced to life imprisonment. His appeal to the High Court was dismissed and this is a second appeal.
2. In a home-made memorandum, the appellant cites three grounds of appeal:
 - i. *That honourable Judge erred in law in upholding the verdict of the trial magistrate and failing to find that his constitutional rights under Section 72 (3) of the old constitution were violated as he was held in cells for 16 days prior to being arraigned before court.*
 - ii. *That the honourable Judge erred in law in sustaining the trial court's decision yet he was not accorded a fair and just hearing under Section 77 (1) of the old constitution and Section 150 of the Criminal Procedure Code.*
 - iii. *That the honourable Judge erred in failing to consider the defence evidence.*
3. At the hearing of the appeal, the appellant appeared in person while the Assistant Director of Public Prosecution Mr. Kaigai appeared for the state. The appellant elaborated the grounds of appeal and submitted that the evidence of the complainant, a child of 7 years, was inconsistent and

- not credible; that the complainant testified she had two fathers which is not possible and this demonstrated that the complainant did not comprehend the facts. The appellant submitted that the medical report prepared upon examination of the complainant did not implicate or connect him with the offence charged; that the report showed the complainant had a bacterial infection and it was not clear who infected the complainant; he submitted that since he was not medically examined, there is no connexion between him and the infection of the complainant and consequently there is no proof that he defiled the complainant. He submitted that there was a grudge between him and PW 1 (JNN) as well as with PW2 (SGN) which led to the charge against him. The appellant urged this court to re-evaluate the evidence and allow the appeal.
4. The state opposed the appeal submitting that the complainant gave a detailed testimony of how she was defiled by the appellant; the trial court conducted a *voire dire* examination of the complainant and the court was satisfied as to the competence of the complainant to give evidence. The state submitted that although there were no eye witnesses to the offence, PW 2 (S G N) and PW 3 (Dr. L W N) gave evidence which showed consistency on the part of the complainant. It was submitted that the prosecution had proved its case beyond reasonable doubt and the life sentence meted out on the appellant was the only legal sentence. He urged the court to dismiss the appeal.
 5. This is a second appeal which must be confined to points of law. As was stated in **Kavingo – v – R. (1982) KLR 214**, a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on no evidence. This was further emphasized in **Chemagong vs. Republic (1984) KLR 213** at page 219 where 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)”

6. We have taken into account the submissions made by the appellant and the state; we have also considered the record of appeal and the judgement by the two courts below.
7. During the hearing of the appeal, the appellant made oral submissions challenging his conviction. He submitted that he had not committed the offence and that the complainant had told untruths. He submitted that there was a grudge between himself and PW1 as well as with PW2 who conspired to bring the charge against him. The Assistant Director of Public Prosecution, Mr. Kaigai, supported the conviction and sentence meted out on the appellant. The doctor who examined the complainant confirmed that indeed the complainant had been repeatedly defiled.
8. In this appeal, the issue for determination is whether the judge re-evaluated the evidence and properly arrived at the conclusion that the prosecution had proved the charge of defilement against the appellant beyond reasonable doubt. The second issue is whether the two courts below considered the defence raised by the appellant which as he contends should have exonerated him from the charge of defilement facing him. To prove its case, the prosecution called three crucial witnesses.
9. The complainant PW4 (TW) then a child aged 7 years testified that she knew the appellant who was the one who did a bad thing to her; he did “*tabia mbofu*”; he slept on her in his house. She testified that the appellant is a neighbour who often comes to their house. That on the material day which was a Sunday, the appellant called her to his house and after “*tabia mbofu*” she left his house leaving him in the house. On her way she met Mama N (PW1 J N N).
10. PW1 J N N testified that on 8th July 2007 she was seated beside the road at her home with two other women. That a sister to the complainant came and asked if they had seen the complainant and they answered in the negative. That shortly, she saw the complainant emerging from the tea bushes alone and asked her where she was coming from; the complainant replied that she was coming from the appellant’s place where she had been given milk and fruits by the appellant and they did a bad thing. PW1 inquired from the complainant what the bad thing was and the complainant demonstrated how she was told to lie down and the appellant undressed her and then removed his organ that was long and hairy and he then lay on her. PW 1 further testified that the complainant’s aunt called JW came and heard what the complainant was saying. Together with

- JW, PW1 went to the village elder (PW2 S G U) who called the complainants father; the complainant repeated what she had said and the police were called to arrest the appellant.
11. PW 2 S G U testified that on 8th July 2007 at about 4.00 pm, two women PW1 and JW informed him that a child (complainant) had been defiled by the appellant. He went and picked the appellant and the child's father. That they all sat by the road side and asked the complainant to state what happened. The complainant stated that she had been to the appellant's house and ate fruits, eggs and bread and the appellant promised to do something to her; the appellant spread a mattress on the floor and told her to remove her pants and put it on a stool; he then laid on her. PW2 denied having a grudge with the appellant.
 12. PW3 Dr. L W N testified that on 10th July 2007 she examined the complainant and filled a P3 Form which she produced in evidence. She testified that the complainant gave a history of repeated sexual abuse by her mother's distant cousin which was repeated often and that the latest episode was the day before the examination. The medical examination report showed that the complainant had normal genitalia, no tears or bruising and no oedema but her hymen was widened and this was not in conformity with the age of the complainant; she had a creamy discharge in the vagina and had *T vaginalis* infectious bacteria showing a sexually transmitted disease. She formed the opinion that sexual activity had been taking place concerning the complainant.
 13. We have re-counted the evidence to enable us evaluate and appraise if any error or misdirection of law took place. Although the appellant denies he had defiled the complainant, the issue for determination by this court is whether the evidence adduced by the prosecution proves beyond reasonable doubt that it is the appellant and no one else who defiled the complainant. The fact that the complainant was defiled is not in dispute. This was proved by the evidence of the doctor who examined her and testified in this case. The identity of the defiler was established by the evidence of the complainant. Nobody saw the appellant defile the complainant. However, the complainant in her evidence testified that it was the appellant who called her into his house and removed her pants and lay on her. She testified that after she emerged from the appellant's house, she met PW1 and informed her what had happened and that she had been defiled by the appellant. From the testimony, it is apparent that the complainant knew the appellant.
 14. As per the proviso in **Section 124 of the Evidence Act** stipulates, although no corroboration is required in sexual offences, nonetheless as was stated in the case of *Maina Mwenja – v- R {2006} eKLR*, this court is aware that the evidence of a child in most cases has to be corroborated. In the instant case, the circumstantial evidence adduced by the prosecution corroborates the complainant's evidence. When the complainant was medically examined, the medical report confirms that indeed the complainant had been sexually assaulted. When the appellant was put on his defence, he denied that he had defiled the complainant. The only evidence that the appellant adduced in detail related to the circumstances of his arrest and an allegation that he had a grudge with PW1 and PW2. The appellant did not discharge the onus placed on him to at least explain what he was doing with the complainant in his house. The facts in the case of *Maina Mwenja – v- R, {2006} eKLR*, are parallel to the present case where it was held that it was incumbent for the appellant to give an explanation on the evidence pointing at him as adduced by the prosecution witnesses and this does not imply that the burden of proof was shifted to him. On the contrary, if the complainant innocently emerged from his house, then he would be in a position to give reasonable explanation.
 15. The other ground of appeal is that the appellant contends that his fundamental rights under **Section 72 (3) (b)** of the old **Constitution** were violated in that he was held in police cells for 16 days before being arraigned in a court of law. This is not a novel point taken in appeal and we find it has no merit. There are many instances in which courts have held that a delay in arraigning a suspect in court does not necessarily entitle the suspect to an acquittal. (See *Domitic Mutie Mwalimu - v- R, Crim. Appeal No. 217 of 2005*; and *Evanson K. Chege - v – R, Crim. Appeal No. 722 of 2007*). This Court has stated that if any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages. In *Julius Kamau Mbugua – v- R, Criminal Appeal No. 50 of 2008*, this Court stated that:

“A trial court can take cognizance of pre-charge violation of personal liberty, if the violation is linked to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the

fairness of the ensuing trial e.g where an accused has suffered trial related prejudice as a result of death of an important witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages.

16. After careful re-evaluation of the evidence on record and also considering the defence offered by the appellant, we are of the view that the prosecution established its case against the appellant on the charge of defilement to the required standard of proof beyond reasonable doubt. We have also considered the submissions made by the appellant and the home-made grounds of appeal. We find that the said submissions do not raise any issues that would dent the otherwise strong case by the prosecution. The allegation that there existed a grudge between the appellant and the prosecution witnesses was not proved; the allegation that a fair and just trial was not conducted was not proved and how **Section 150 of the Criminal Procedure Code** was violated was not demonstrated. In the circumstances, the appeal has no merit and is dismissed.

Dated and delivered at Nyeri this 25th day of July, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

copy of the original.

DEPUTY REGISTRAR