



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, MUSINGA & GATEMBU KAIRU, JJ.A.

CRIMINAL APPEAL NO. 152 OF 2012

BETWEEN

PAUL MUKOYA APPELLANT AND

REPUBLIC RESPONDENT

(Appeal from the conviction & sentence of the High Court of

Kenya at Nairobi (Khaminwa, J) dated 16th November, 2010

in

HCCR.A NO. 557 OF 2007)

JUDGMENT OF THE COURT

The appellant was tried and convicted for the offence of defilement of a mentally challenged person contrary to *section 146 of the Penal Code*. The particulars of the offence were that on the 1st day of June, 2006, at Sian Roses, Hardy Estate within Nairobi Province, the appellant had carnal knowledge of GI, the complainant, who is mentally retarded, without her consent. He was found guilty and sentenced to fourteen [14] years' imprisonment.

Being dissatisfied with that conviction and sentence, the appellant preferred an appeal to the High Court. The first appellate court, having carefully analyzed the evidence that was tendered before the trial court, was satisfied that the conviction and sentence passed were proper in law and

dismissed the appeal.

The appellant was again aggrieved by the High Court decision and filed yet another appeal to this Court. The homegrown memorandum of appeal raises two grounds of appeal which were drafted in a rather unconventional way. The same may be summarized as hereunder:

- (a) *The first appellate court erred in law in failing to realize that the investigating officer was not called as a prosecution witness and failure to do so renders the prosecution case unproved.*
- (b) *The first appellate court erred in law in holding that the prosecution had*

proved its case beyond all reasonable doubt.

The appellant filed supplementary grounds of appeal and stated:

“1. THAT, the High Court learned judge erred in law to hold that the sentence met was within the law:

(i) Without evidence from prosecution proving that appellant was aware of complainants mental retardness there before;

(ii) Without noting that complainant was not examined by a psychologist, thus left Ex. 7, inconclusive.

2. That the learned judge erred in law to affirm conviction without appreciating that circumstantial evidence on Ex-1 and Ex-2, was inconsistent and unreliable.

3. That the learned judge erred in law to hold that defence failed to dent prosecution case, without analyzing and reevaluating exhaustively, entire recorded evidence.

4. That the defence advanced was not duly considered thus a subject of error in law occasioned under section

169 (i) CPC.”

The brief facts of the case that was before the trial court were as follows. The complainant, aged twenty [20] years, is mentally retarded. She was

residing with her mother, PW 4, at Nairobi but on the material night, her mother had gone to visit her other children elsewhere. The appellant went to the house of PW 4, found the complainant alone and after enticing her with a soda, proceeded to forcefully defile her. The appellant was well known to the complainant as they were neighbours.

On the following day, the complainant informed one Benjamin Mogire, PW 2, what the appellant had done to her. That evidence was corroborated by David Nyangweno, PW 3, who was there when the complainant was narrating her ordeal to PW 2. The complainant was examined by Dr Ketra Muhombe, PW 6, at Nairobi Women’s Hospital and she confirmed that the complainant had indeed been defiled.

Albert Kathuri Mwaniki, PW 7, a Government chemist, examined, inter alia, blood and saliva samples of the appellant, a bedsheet of the appellant, a bed cover of the complainant and blood sample of the complainant. The bedcover was not stained with semen or spermatozoa but had blood stains of group “O”, the complainant’s blood group. The bed sheet had seminal stains of blood group “B” which is also the appellant’s blood group. The witness tendered his report as P. Exh. 4.

Police Constable Luke Muraya, PW 9, having carried out appropriate investigations, arrested the appellant and arraigned him in court for trial.

The appellant denied the charge. He alleged that PW 2, PW 3 and PW 4, whom he was working with, had lied to court because they were jealous of him

as their boss had severally advanced him loans but failed to do the same to the said witnesses.

We now turn to the first ground of appeal contained in the initial memorandum of appeal. The record reveals that the first appellate court discharged its duty as required of it by carefully evaluating the evidence

adduced before the trial court and arriving at its own conclusion, see OKENO V

REPUBLIC, [1972] EA 32. All the material witnesses were called, including

the investigating officer, PW 9. The investigating officer narrated to the trial court how he arrested the appellant and conducted investigations. He was the one who caused the Government chemist, PW 7, to examine the various items that had been forwarded to him. PW 9 also had the complainant examined at Mathari Hospital where it was ascertained that the complainant was mentally retarded. It is, therefore, baseless for the appellant to allege that the investigating officer was not called as a prosecution witness.

Turning to the supplementary grounds of appeal, we do not agree that the report by the Government Analyst, [P. Exh. 4] as far as the findings related to the bedsheet and the bedcover [*P. Exh. 1 and P. Exh. 2 respectively*] was inconsistent and unreliable. The complainant had told the court that following the harrowing experience, she bled and the bedcover she lay on was found to contain blood stains that matched her blood group. The bedsheet had seminal stains of blood group “B” secretor and many degenerated spermatozoa. The appellant’s blood group is “B”. Those findings, taken together with the rest of

the evidence on record, particularly that of PW 1, PW 2 and PW 3, led to the irresistible conclusion that the appellant had defiled the complainant.

The appellant’s defence was duly considered but rightly rejected by the trial court as well as the first appellate court. The appellant was well known to the complainant and we do not think that the latter would have had any reason to implicate the appellant in the commission of the offence. The judgment also complied with the requirements of *section 169 of the Criminal Procedure Code* in that it contains the points for determination, the decisions thereon as well as the reasons for the decision. We must, therefore, reject grounds 3 and

4 of the supplementary grounds of appeal. We are satisfied that the prosecution proved its case beyond any reasonable doubt.

Regarding the sentence that was handed down by the trial court and confirmed by the first appellate court, *section 146 of the Penal Code* states as follows:

“146. Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.”

The appellant was a close neighbour of the complainant and must have known that she was an imbecile. The medical report by Dr. Nelly Kitazi of Mathari Hospital [P. Exh. 7] confirmed that the complainant was mentally retarded but recommended psychometric testing by a child psychologist to determine the degree of her mental retardation. Whether that was done or not, could not in any way change the complainant’s mental status. The prosecution satisfied the trial court that the complainant was an imbecile.

Was the sentence to fourteen years’ imprisonment too harsh given that it was the maximum prescribed sentence? We do not think so. Sentence is essentially an issue left to the discretion of a trial court. An appellate court should not interfere with the discretion which a trial court has exercised in sentencing an offender unless it is shown that the trial overlooked some material factors, took into account some immaterial factors, acted on wrong

principles or where the sentence passed is manifestly excessive; see WANJEMA

V REPUBLIC, [1971] EA 493.

In this case, it has not been shown that the trial court exercised its discretion wrongly and consequently

we shall not interfere with the sentence.

All in all, we find no merit in this appeal and dismiss it in its entirety.

Dated and delivered at Nairobi this 18th day of October, 2013.

R. N. NAMBUYE

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR