



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 272 OF 2012

BETWEEN

DAVID NDUMBA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J.) dated 27th September, 2011

in

H.C.CR.A NO. 111 OF 2009)

JUDGMENT OF THE COURT

1. **David Ndumba**, the appellant, was charged with one count of rape contrary to **Section 3(1) (a) & (c)** as read together with **Section 7** of the **Sexual Offences Act No. 3 of 2006** in the Senior Principal Magistrate's Court at Meru. The particulars of the offence were that on 21st November, 2007 at Isiolo District Hospital in Isiolo District within the then Eastern Province, the appellant intentionally and unlawfully had sexual intercourse with FK a person with mental disability with the consent of the said FK which consent was obtained by means of threats and force.
2. The appellant was also charged with an alternative count of indecent act with an adult contrary to **Section 11(6)** of the **Sexual Offences Act**. The particulars of the alternative charge were that on 21st November, 2007 at Isiolo District Hospital in Isiolo District within the then Eastern Province the appellant committed an act of indecency with an adult namely FK a person with mental disability by touching her private parts.
3. The prosecution called a total of six witnesses in support of its case. It was the prosecution's case that on 21st November, 2007 at around 6:00 a.m PW3, Grace Kuriko (Grace), a nurse at the Isiolo District Hospital woke up two mental patients, PW1, FK (F) and PW5, Paul Kathurimo (Kathurimo), to go and get porridge from the kitchen hospital. As Grace was escorting both F and Kathurimo to the kitchen she met another patient who needed her assistance and she directed F and Kathurimo to go to the kitchen and she would follow them. Upon reaching the Kitchen the appellant who was the cook directed F and Kathurimo to use the back door since the front door was closed. When F had entered the kitchen, the appellant blocked Kathurimo from entering the

- kitchen and threatened to stab him with a knife if he went in. Kathurimo waited outside the kitchen and saw the appellant pulling F by her hand.
4. F testified that the appellant dragged her into the inner room of the kitchen and he flung her to the ground. The appellant lifted her clothes up to her waist, tore her underpants and proceeded to rape her. While PW2, Geoffrey Kainga (Geoffrey), the hospital guard, was heading home after the end of his shift he saw Kathurimo standing outside the Kitchen and upon inquiring Kathurimo informed him that the appellant had taken F into the Kitchen. Geoffrey entered the kitchen and went into the inner room where he found the appellant having sexual intercourse with F. The appellant insulted Geoffrey and ordered him to leave the kitchen. Geoffrey left the Kitchen and went home.
 5. Thereafter, as Grace was heading to the Kitchen she met Kathurimo who informed her that F was in the kitchen with the appellant. Upon entering the kitchen Grace found the appellant stirring porridge while F was fidgeting and pulling on her clothes. After the appellant informed her that the porridge was not ready she took F and they headed back to the ward. When the porridge was ready F refused to go to the kitchen to get some and she finally told Grace that the appellant had raped her. Grace examined her and discovered that her underpants had been torn. PW4, Elias Muhidin (Elias), a clinical officer, examined F and found that her vulva was swollen and had a whitish discharge. He also found that she had contracted *Trichomonus vaginalis*. Elias also examined the appellant but did not find any sexually transmitted infection on him. Subsequently, the appellant was arrested and charged with the offence of rape.
 6. The appellant in his defence testified that on the material day that F and Kathurimo came to the kitchen, he gave them porridge and they left; and that at time he was in the company of Geoffrey and the hospital driver. Later in the evening he was directed not to work and he went home. He was later arrested the following day and charged. He denied committing the offence and contended that the charges were fabrications by his colleagues. He urged that the medical evidence supported his innocence since he had no sexual transmitted infection like F.
 7. Being convinced that the prosecution had proved its case, the trial court convicted the appellant for the offence of rape and sentenced him to imprisonment for seven years. The appellant appealed to the High Court against the conviction. The High Court in its judgment dated 27th September 2011 confirmed the appellant's conviction but enhanced his sentence from seven years to ten years imprisonment. It is against that decision that the appellant has filed this appeal based on the following grounds:-
 - ***The learned Judge erred in law in stating that she had re-evaluated the evidence of the trial Magistrate in that had she done so, she would have come to the conclusion that the plea had not been properly taken, and that the trial proceeded in a language which the appellant did not understand.***
 - ***The learned Judge erred in law in failing to hold that the trial Magistrate had heavily shifted the burden of proof on the appellant throughout her judgment which action greatly prejudiced the appellant in his defence.***
 - ***The learned Judge further erred in law in holding that upon her alleged evaluation of the prosecution's evidence in totality, the contradictions of the prosecution witnesses' evidence did not prejudice the appellant.***
 - ***The learned Judge further erred in law in failing to fault the trial magistrate's treatment and/or evaluation of the medical evidence and the extraneous findings of the trial magistrate in explaining away the discrepancies.***
 - ***The learned Judge further erred in law in holding that both PW1 and PW5 were competent witnesses for the prosecution and further erred in holding that their evidence had been sufficiently corroborated by other evidence.***
 - ***The learned Judge erred in law in not finding that failure by the trial court to decide or comment on the second count of the charge was unprocedural and fatal to the prosecution's***

case.

- ***The learned Judge further erred in law by failing to notice that the case against the appellant had not been proved to the required standard.***
 - ***The learned Judge further erred in law and in fact in failing to evaluate and/or consider the appellant's defence.***
8. Mr. B.G. Kariuki, learned counsel for the appellant, submitted that the learned Judge (Kasango, J.) did not properly evaluate the evidence that was adduced in the trial court. In that firstly, the language which the appellant understood was not stated; and secondly, that PW1, F, and PW5 Kathurimo were mental patients and therefore their evidence ought to have been treated with care. Mr. Kariuki submitted that trial court did not conduct a *voir dire* to support her finding that F's evidence was fairly clear. Thirdly, that the medical evidence adduced by the prosecution clearly exonerated him because unlike F he had no sexual transmitted infection. Fifthly, that his defence that the charge against him was fabricated by his colleagues was not considered by the lower courts.
 9. Mr. Kariuki submitted that the appeal before the High Court was on conviction of the appellant and not on sentence. Therefore, the High Court erred in enhancing the sentence.
 10. Mr. J. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal submitted that the prosecution's case was proved to the required standard. He argued that the appellant was found red handed by PW2, Geoffrey, having sexual intercourse with F; and that PW1, F, and PW5, Kathurimo, were lucid at the time of the incident and during the trial. Mr. Kaigai urged that there are concurrent findings of fact by the two lower courts hence this Court ought not to interfere with the said findings. He maintained that PW2, Geoffrey, was a competent witness.
 11. Mr. Kaigai submitted that any error in the charge sheet is curable under **Section 382** of the **Criminal Procedure Code**. He urged that the learned Judge was correct in enhancing the appellant's sentence since the one issued by the trial court was illegal under the **Sexual Offences Act**. He maintained that the sentence issued by the High Court was the minimum sentence for the offence of rape and therefore the sentence was not excessive. He further submitted that the two lower courts considered the appellant's defence.
 12. This being a second appeal and by dint of **Section 361(1)** of the **Criminal Procedure Code**, Chapter 75, laws of Kenya, this Court's jurisdiction is limited to matters of law only. In ***Chemagong vs. Republic (1984) KLR 213*** at page 219 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*)”.

13. We have considered the judgments from the two lower courts, the grounds of appeal, able submissions of counsel and the law. Mr. Kariuki submitted that the appellant did not understand the language used at the trial. Having perused the record we cannot help but note that the proceedings were translated in Kiswahili. Further from the cross examination which the appellant himself conducted at the trial it is quite evident that he understood the language used. Therefore, this ground of appeal must fail.
14. On the issue of discrepancies in the prosecution's evidence we do note that PW5, Kathurimo testified that as they were going to get porridge Grace was left behind to take care of a patient who wanted to break the door while PW3, Grace, testified that she was left taking care of a woman who wanted to go to the maternity as F and Kathurimo went to get porridge. We also note that Grace testified that she saw Kathurimo running away and she stopped him and upon inquiring Kathurimo informed her that F was in the kitchen with the appellant; and on the other hand Kathurimo testified that after the appellant blocked him from entering the kitchen he went looking for Grace to inform her what happened. We concur with the learned Judge that this discrepancies did not in any way prejudice the appellant or occasion a miscarriage of justice. We further find

that the said discrepancies were curable under **Section 382** of the **Criminal Procedure Code**, which provides;

“Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

In **Joseph Maina Mwangi- vs- Republic**, - **Criminal Appeal No. 73 of 1993**, this Court held:-

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.

15. Mr. Kariuki urged us to find that the evidence adduced by F was not credible by virtue of the fact that she was a medical patient and no *voir dire* was conducted by the trial court to establish her competency as witnesses. **Section 125** of the **Evidence Act** provides:-

“125(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether body or mind) or any similar cause.

2) A mentally disordered person or lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.”

Based on the foregoing we concur with the following findings by the High Court:-

“At page 2 of the judgment of the learned trial magistrate who took the evidence of the two witnesses, and therefore had the occasion to determine the level of the understanding of these two witnesses observed:

‘The complainant testified before me. The court could not gauge the extent of her mental illness. But she was fairly comprehensible.’

From the foregoing statement, the learned trial magistrate after observing the complainant, and considering the answers she gave to the questions put to her at the trial, formed the opinion that she understood the questions and gave rational answers to those questions, and therefore she was comprehensible. I am satisfied that the complainant was a competent witness and that her evidence was comprehensible and therefore should be considered.”

We therefore, find no reason to interfere with the concurrent finding of facts by the two lower courts on the competency of F.

16. We find that despite the medical evidence showing that the appellant did not suffer from the same sexual transmitted infection as F did not in any way exonerate him .This is because we are of the considered view that the evidence of F was corroborated by George who found the appellant red

handed having sexual intercourse with F. Grace also testified that when she found F in the kitchen she was fidgeting and was pulling on her clothes and that F told her that the appellant had raped her. Further, medical evidence which clearly showed that F had had sexual intercourse. We concur with the two lower court's that there was overwhelming evidence that the appellant had sexual intercourse with F who lacked the necessary mental capacity to grant her consent.

17. The appellant argued that the charge sheet was defective for including **Section 7** of the **Sexual Offences Act** which was not applicable in this case. We agree that the offence was not committed within the view of a family member, a child or a person with mental disability and therefore the particular section was not applicable. However, we are of the view that the inclusion of the said section is curable under **Section 385** of the **Criminal Procedure Code**. Furthermore we find that the appellant was aware of the nature of the offence he was charged with and he suffered no prejudice. Therefore, this ground fails.
18. Having perused the record we cannot help but note that the appellant's defence was considered by the trial court which found that there was no reason for Grace and Geoffrey to give false testimony against him. On the issue of the alternative charge we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In ***M.B.O. -vs- Republic, - Criminal Appeal No. 342 of 2008***, this Court held,

'The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge.'

19. Lastly, we wish to consider whether enhancement of the appellant's sentence by the High Court was legal. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of ***Ogolla s/o Owuor, (1954) EACA 270*** wherein the predecessor of this court stated:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also In Omuse - v- R (Supra) while in the case of Shadrack Kipkoech Kogo -vs- R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:- " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so harsh and excessive and therefore an error of principle must be interfered (see also Sayeka -vs- R. (1989 KLR 306)"

20. In the case of ***Keneth Kimani Kamunyu -vs- R. (2006) EKLR*** it is stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful. In the instant case, it is not in dispute that the appellant was charged under **Section 3(1) (a) & (c)** of the **Sexual Offences Act** wherein **Section 3(3)** prescribes upon conviction a minimum sentence of ten years imprisonment and a maximum sentence of life imprisonment. The trial court sentenced the appellant to seven years imprisonment which in our view was an illegal sentence. We find that the High Court was correct in setting aside the illegal sentence of seven years imprisonment and substituting it with the legal sentence of ten years under the **Sexual Offences Act**. See this Court's decision in ***Stanley Nkunja -vs- Republic, - Criminal Appeal No. 280 of 2012***.
21. The upshot of the foregoing is that we uphold the appellant's conviction and sentence issued by the High Court. Accordingly, the appeal herein is dismissed.

Dated and delivered at Nyeri this 3rd day of October. 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR