



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

(CORAM: GITHINJI, KARANJA & MARAGA, JJ.A.)

CRIMINAL APPEAL NO. 293 OF 2009

BETWEEN

R. O. M.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Kericho (Ang'awa & Mugo JJ) dated 3rd December 2009

in

HC.CR.A NO.47 OF 2009)

JUDGMENT OF THE COURT

ROBERT OMBUI MAGERO (herein after referred to as the appellant) was originally charged before the Principal Magistrate's Court at Kericho with two counts of defilement contrary to **Section 145(1)** of the **Penal Code**. He also faced two alternative counts of indecent assault of a girl aged below sixteen years. He denied the main as well as the alternative charges. The matter went to full hearing with the prosecution calling a total of six witnesses. On his part, the appellant made an unsworn statement of defence and called no witnesses. He was found guilty and convicted on both principal counts and sentenced to life imprisonment on each count with the sentences running concurrently. Being aggrieved by the conviction and sentence, he filed an appeal before the High Court. The High Court (Ang'awa & Mugo JJ) heard the appeal but dismissed the same. They affirmed the conviction and sentence of the trial court but added another order to the following effect:

“We order that the appellant's name be registered in the sexual offences register held at the High Court Law Courts at Kericho as it is required in all courts all over Kenya duly maintained by the Deputy Registrar or the in charge of the station that the appellant's name be entered into the register as a ‘dangerous person’.”

This order was ostensibly made under the Sexual Offences Act, 2006 which had become operational during the pendency of the Appeal. It must however, be noted that the proceedings and even the sentence before trial court proceeded and were concluded under the provisions of the Penal Code in 2004 two years before the Sexual Offences Act was enacted. We shall revisit this issue later on.

The appellant was aggrieved by the dismissal of his appeal by the High Court and moved to this Court on

second appeal. He proffered five grounds of appeal as hereunder:

- (1) That the learned Judge erred in law and facts by failing to appreciate that the prosecution case was insufficient and fabricate in particulars and lacked probative value.(sic)**
- (2) That the learned Judge erred in law and facts by failing to find the case against the appellant was not proved to the standard required in law and was riddled with a lot of contradictions.**
- (3) That the learned Judge erred in law and facts by failing to consider that the evidence adduced was a frame up thoughts planned to make a case.(sic)**
- (4) That the learned Judge erred in law and facts by failing to appreciate that there was no conclusive investigation to link the appellant in the said offence.**
- (5) That the learned Judge erred in law and facts by only putting in mind that it's a common situation in Kenya (Sic).**

At the hearing of his appeal which he conducted in person, the appellant with the leave of the Court submitted a copy of written submissions and stated that he was relying on the above grounds of appeal. In his submissions, he stated that the proper age of the complainants was not established but does not deny that both complainants were below the age of sixteen (16) years. We wish to observe here that the charges against the appellant were based on the Penal Code where the only requirement in a charge of defilement was for the child to be below the age of sixteen (16) years unlike the Sexual Offences Act which prescribes different sentences for different age brackets. Unlike the Sexual Offences Act, 2006, the Penal Code had one uniform sentence for the charge of defilement as long as the complainant was under the age of sixteen (16) years. The lack of certainty in the actual ages of the complainants cannot therefore be an issue in this appeal as they were clearly below sixteen (16) years of age.

Having said so, we now revisit the evidence adduced before the trial court which was also re-analysed by the High Court as provided for by law.

The brief circumstances of this case are that the two children in this matter i.e **I. O.** and **C. B.** are sisters. The appellant was living as husband and wife with their mother **F. N. (PW3)**. According to PW3, she went to her rural home in Kisii leaving the two children under the appellant's care. According to **PW2 (I. O.)** who testified that she was ten (10) years old, she was called by the appellant on 8th January, 2004 at about 5.00 pm. and asked to accompany him to the Tea Factory to collect some items. She obliged and as they were walking through the bush, he stopped her and asked her to undress. She declined but the appellant is said to have pulled off her underpants and pushed her onto the ground. He dropped his trousers and then forced himself onto her and defiled her. They then returned to the house and slept. The following day, the appellant is said to have given an alcoholic beverage to **C. B.** (complainant in count 1). She told the court that she felt dizzy and went to bed. The appellant followed her there and defiled her. He also defiled the second complainant.

According to a neighbour **Agnes Cheronno (PW4)**, she heard the children crying at about 2.00 am but she did not know what was happening. The following morning, PW2 went and told her what the appellant had done to her and her sister at night. PW4 reported the matter to their supervisor at the tea factory who in turn reported the matter to the Police Station.

The children were taken to the Health Center where they were examined by **Yego Kirwa (PW6)** a Clinical Officer. According to the P3 forms in respect of the two complainants which were completed and produced in evidence by PW6, the two children had indeed been defiled.

In his defence, the appellant told the court that he was just arrested and taken to the Police Station where he was accused of having defiled the two children which he denied. The learned trial Magistrate who had the advantage of seeing the witnesses as they testified and thus assessed their demeanor considered the evidence adduced before the court in its totality. He found the prosecution witnesses credible and

believed their evidence. He found the charges proved and proceeded to convict the appellant.

The first appellate court in similar manner re-analysed and re-evaluated the evidence tendered before the trial court, found it credible and upheld both conviction and sentence.

On our part, we have considered the evidence tendered. We find that the two children were indeed defiled. Their evidence which was corroborative and consistent also found corroboration in the medical evidence presented to the court vide the P3 forms. We also appreciate the fact that PW4 who was a neighbour and thus an independent witness heard the girls crying at night and they confided in her the following morning that they had been defiled by the appellant. She had no reason to bear false testimony against the appellant. We further note that indeed PW3 the children's mother was not even at home when the incident happened and she could not therefore have connived with the children to frame up the appellant. There was no evidence of any quarrel or disagreement between the appellant and PW3 that would have motivated her to set him up. The submission by the appellant that the case was a frame up against him has therefore no basis at all.

Having reconsidered the evidence presented before the two courts below, along with the grounds of appeal filed by the appellant and his submissions, we find no basis for us to arrive at a different outcome. We agree with the concurrent findings of the two courts below. We are satisfied that this appeal lacks merit and it calls for dismissal.

As stated earlier on, however, the trial before the magistrate's court commenced and proceeded to conclusion before the enactment of the Sexual Offences Act, 2006. The additional order that the name of the appellant be registered in Sexual Offences Register as a "dangerous person" had no legal basis. That part of the sentence is contrary to the law. We therefore expunge the order from the judgment of the High Court but affirm the conviction on both counts and the sentence of life imprisonment. This appeal is otherwise dismissed.

Dated and delivered at Nakuru this 27th day of September, 2012.

E. M. GITHINJI
.....
JUDGE OF APPEAL

W. KARANJA
.....
JUDGE OF APPEAL

D. K. MARAGA
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR