REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, ONYANGO OTIENO & NYAMU, JJ.A.)

CRIMINAL APPEAL NO. 118 OF 2010

BETWEEN

SAMUEL WAITHAKA MBUGUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Warsame, J.) dated 30th September, 2009

in

H.C.CR.A. NO. 451 OF 2007)

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JUDGMENT OF THE COURT

The appellant in this appeal ***Samuel Waithaka Mbugua*** who conducted his second and last appeal before us in person, faced one charge of defilement contrary to ***section 8 (1) (2)*** of the Sexual Offences Act 2006, and alternative charge of indecent act with a child contrary to ***section 11 (1)*** of the Sexual Offences Act and one charge of attempted defilement contrary to ***section 9 (1)*** as read with ***section 3 (1)*** of the Sexual Offences Act 2006 and alternative charge of indecent act with a child contrary to ***section 11 (1)*** of the Sexual Offences Act 2006. The particulars of the offence of defilement were that:-

"On the 27th day of September, 2006 in Kiambu District within the Central Province, you committed an act which causes penetration and did penetrate the genital organs of A. K. M a girl aged 7 years."

The particulars of the alternative charge to that of attempted defilement read as follows:-

"On the 27th day of September, 2006 in Kiambu District within Central Province, you committed an indecent act with a child namely L.W.N by stripping her pants off, touching her genital organs and viewing her genital organs."

The appellant pleaded not guilty to both defilement and attempted defilement charges as well as to the alternative charge to each of those main charges. The prosecution called six witnesses at his trial before the Senior Resident Magistrate's Court at Githunguri. He also gave an unsworn statement. In a lengthy

judgment delivered on 3rd April 2007, the learned Senior Resident Magistrate found the appellant guilty of first count of defilement contrary to ***section 8 (1) (2)*** of the Sexual Offences Act 2006 and of the offence of Indecent Act with a child contrary to ***section 11 (1)*** of the Sexual Offences Act 2006, convicted him of the two charges and sentenced him to life imprisonment in respect of the offence of defilement contrary to ***section 8 (1) (2)*** and to serve ten (10) years imprisonment in respect of the offence of indecent act with a child. The learned Magistrate did not state whether the sentences were to run concurrently or consecutively. We will revisit that later herein. We have reproduced the particulars of those two offences above. In convicting the appellant, the learned Senior Resident Magistrate rendered himself thus,

"I carefully considered the accused unsworn defence evidence but I found the same a mere denial which evidence failed to discredit that of the prosecution and on both counts. On the contrary I found that the prosecution did prove beyond reasonable doubt that accused did penetrate the genitals of the 1st complainant K a minor an act that was unlawful. The prosecutions evidence I find was very clear and overwhelmingly credible.

I also find that the accused person did on the material date assault the modesty of L PW11 by stripping her naked and feeling her genitals with those of his an act which was unlawful.

I declare the accused person guilty as charged on the 1st main count and the 2nd alternative count to count 2 under section 215 CPC."

The appellant felt dissatisfied with the conviction and sentences. He appealed to the superior court vide Criminal Appeal No. 451 of 2007. That appeal was placed before Ojwang' J. who after full hearing, dismissed it saying in part as follows:-

"After considering all the evidence on record, I have come to the conclusion that all the critical evidence taken before the learned Magistrate, was in good form, and could not be challenged on the merits; and in this category, the testimonies of the complainants were truthful and compelling; such evidence also connected well with that of other witnesses. In my opinion, the appellant was rightly found guilty on both counts."

The learned Judge also confirmed the sentences. He too did not direct his mind as to whether the sentences as awarded were to run concurrently or not.

The appellant was still not satisfied and hence this appeal brought and argued by him in person. In arguing the appeal, he abandoned the original grounds which were filed in January 2010 and relied on supplementary memorandum of appeal filed on 15th March 2011 in which three grounds were raised. Those were:-

"1. That the 1st appellate court Judge erred in law and fact in convicting the appellant or upholding the appellants conviction and whereas the offences charged were not proved beyond reasonable doubt, that is, proof beyond all reasonable doubt.(sic)

2. That the 1st appellate court Judge erred in law and fact by upholding the appellant's conviction and whereas the appellant's right of fair hearing inshrined (sic) in section 77 (sic) and section 77 (2) (b) of the constitution were flouted and violated.

3. That the 1st appellate court Judge erred in law and fact in failing to give the appellant's defence adequate consideration."

In his address to us, he referred to written submissions filed together with supplementary grounds of Appeal and urged us to consider that he was implicated in the matter only because he refused to rent his house to somebody he did not name. In the written submissions, the appellant's thrust of argument is that the complainant's evidence was not corroborated and no conviction should have been based on the

evidence of both complainants. He also mentioned that his rights under ***section 72 (3)*** of the repealed constitution was violated as he was not produced before court within 24 hours of his arrest. We note that as the appellant abandoned the original memorandum of appeal which contained this ground of appeal, this complaint, not being in the supplementary grounds of appeal, that the appellant relied on, cannot be sustained as it is no longer one of his grounds of appeal. In any case it was never raised either in the trial court or in first appellate court and we cannot therefore, in law consider it. Mr. Monda, the learned Senior State Counsel opposed the appeal submitting that the two complainants were found to be truthful and their evidence was well corroborated. They identified the appellant whom they recognized well. The offences, he stated, had been proved beyond all reasonable doubt. As to sentences, Mr. Monda's views were that the sentences were lawful, sentences upon which this Court, by dint of the provision of ***section 361 (1)*** of the Criminal Procedure Code, cannot interfere. He urged us to dismiss the appeal in its entirety.

This is a second and last appeal. In law, only matters of law would be available for our consideration unless it is demonstrated that the trial court and or the first appellate court failed to consider matters of fact that should have been considered or considered matters that should not have been considered or that their decision on matters of fact were clearly perverse in which case it becomes a matter of law and we can decide on it. In this case A.K.M (PW1) a girl of 7 years, and a pupil in class 2 at C Primary School was from school at 5.00 p.m. on 27th September 2006. She was in company of another young girl L.W who was also in the same school and in the same class. As they were going home, they met the appellant whom they knew very well by his other name of Wa Jedida. The appellant, whose business was maize roasting, gave each a piece of roasted maize. Thereafter, he led them to a house still under construction and particularly to a room in that house which had a door and a bed. He undressed the two girls and told them to lie on the bed. A was the first to comply with that request by the appellant. The appellant then removed his trouser and pants and pushed *"his thing for urinating"* in A's *"part for urinating"*. A said in evidence that the appellant *"did pee"* in her and she cried. The appellant, having done with A, went to L and did the same to her also. He then put on his clothes and left the two children in the room still dressing themselves. Before he left, he warned each not to tell anybody what had happened to them. They left, and in obedience to the appellant's warning, they did not tell their parents. On 29th September 2006, they went to school and their teacher observed that they had difficulties walking and summoned their parents. A.K (PW3) A's mother and P.N.M (PW4) L's father reported to the teacher at the school on 29th September 2006. The teacher called the two girls and in the presence of their parents, they narrated that Wa Jedida, the appellant had defiled each of them. A.K took A to Kiambu District Hospital while P.N.M took L to Githunguri Health Centre for treatment. Later A was taken to Nairobi Women Hospital. A report was made by Peter to Githunguri Police Station. A was issued with P3 form whereas L though was also later taken to Kiambu District Hospital, and Nairobi Women's Hospital and was issued with P3 form by police, that form was not completed by the time the matter came up for hearing, hence the conviction for the lesser charge of indecent act with a child. PC Susan Mutisya (PW5) then attached to Githunguri Police Station received the report at the station. She booked the report, escorted complainants to Kiambu District Hospital for examination in the presence of their parents and issued P3 forms to the complainants and their parents. On the same date, 29th September 2006, Dr. Samson Gitonga (PW6) examined A and found a tear of her hymen. He formed the opinion that there was forced penetration of her hymen. The appellant was then arrested and charged with the offences as stated above. After the prosecutions case was closed, the appellant, on being put to his defence gave unsworn statement in which he said:-

"I am a maize roaster. I am familiar with the offence I am facing before court. I never committed the offence as charged. The case was fabricated against me."

The only point of law raised in the appellant's submissions worth considering is that according to him, the conviction proceeded upon uncorroborated evidence of A and L both of whom were minors and victims of a sexual offence. We have anxiously considered it. It cannot be sustained. First, the proviso to ***section 124*** of the Evidence Act states clearly that conviction on sexual offences can proceed on the evidence of a child victim even without corroboration so long as the court is certain that the evidence reflects the full truth of what took place. The trial court found, and the first appellate court also found on revisiting the evidence a fresh as was its duty, that indeed A and L were witnesses of truth and their evidence was credible. That being the case, the conviction could and did properly proceed on their evidence even if there had been no corroboration. In this case, however, there was medical evidence that confirmed

penetration of A's genital organ and her inability to walk properly which was easily observed by their teacher and necessitated summoning the parents, are matters that corroborated their evidence that they were sexually molested. Further they stated that the appellant is a maize roaster and gave them pieces of maize that fateful day before luring them into a room where they were sexually assaulted. It turned out that the appellant readily admitted being a maize roaster. In our view, the evidence of A and L was beyond reproach and was enough for a conviction, but notwithstanding that, the same evidence was fully corroborated on material aspects.

As to the claim that there was no fair hearing pursuant to ***section 77 (1)*** and ***77 (2) (b)*** the appellant has not stated in what way the trial was not fair. On our own analysis of the evidence that was before the trial court the procedure adopted by that court and the judgments of that court and of the superior court, we see no basis for that complaint. It cannot stand.

On the issue of sentence, we note that the sentence provided for the offence of defilement of girl aged of 11 years or less is life imprisonment. That is provided for under ***section 8 (2)*** of the Sexual Offences Act 2006. That sentence is mandatory. Again the sentence provided in respect of offence under ***section 11 (1)*** of the Sexual Offences Act 2006 is imprisonment for a term no less than ten (10) years. That again is the minimum provided. In any case, as we have stated, under ***section 361 (1)*** of the Criminal Procedure Code, we have no jurisdiction to interfere with the severity of sentence awarded if the same is lawful as this is a second appeal. We note however, as we have stated, that the learned Magistrate did not indicate whether the sentences were to run concurrently or consecutively, and the superior court also did not make any indication. Although it seems to us obvious and a matter of common sense that life sentence cannot run consecutively with another sentence of imprisonment as in Kenya the position is as yet that life sentence means the appellant stays in prison till his demise. Once he is dead, he cannot start serving another sentence, neither would it be appropriate that one starts with a shorter sentence such as 10 years in this case, and after clearing that, he then starts life imprisonment. However, these notwithstanding, the court should for clarity, specify where more than one sentence of imprisonment are pronounced, whether the same will be served concurrently or consecutively. In this case we order that the sentences of life imprisonment and of ten (10) years imprisonment are to run concurrently.

Those shall be our orders in the appeal.

To conclude, the appeal is dismissed. Sentences of life imprisonment and ten (10) years imprisonment are to be served concurrently.

Dated and delivered at Nairobi this 8th day of April, 2011.

P. N. WAKI
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JUDGE OF APPEAL

J. W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

J. G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR