



IN THE COURT OF APPEAL
AT NAKURU

CORAM: TUNOI, O’KUBASU & NYAMU, J.J.A.

CRIMINAL APPEAL NO. 242 OF 2008

BETWEEN

JOHN SADERA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Koome, J) dated 21st November, 2008

in

HCCRA NO. 13 OF 2007)

JUDGMENT OF THE COURT

The appellant, **JOHN SADERA**, was convicted by Narok Principal Magistrate, (S M Githinji) for the offence of defilement of a girl contrary to **Section 145 (1) of the Penal Code**. It had been alleged in the charge sheet that on the 27th day of July, 2005 in Narok District within the Rift Valley Province he unlawfully had carnal knowledge of **S.W.P**, a girl under the age of sixteen years. Upon his conviction the appellant was sentenced to serve 16 years’ imprisonment. His appeal to the superior court (Maraga J) against conviction and sentence was dismissed, hence this second and last appeal.

As the law provides under **Section 361 of the Criminal Procedure Code**, only issues of law may be raised and considered in the appeal. This Court has on numerous occasions said that it will not interfere with concurrent findings of fact by the two courts below unless such findings were made on no evidence at all or on a misapprehension of it or no tribunal properly directing itself to the evidence would make such findings – see **M’RIUNGU VS R [1983] KLR 455**.

The facts as established by the two courts below are fairly straightforward. On the material day (27th July, 2005) at about 6pm, the complainant (PW 1) who was aged 12 years was on her way to collect milk from her grandmother’s house when the appellant suddenly emerged from the bush armed with a panga. He knocked down the little girl, removed her underpants and defiled her. The complainant knew the appellant. In her own words, the complainant testified before the trial court as follows:

“I am called S.W.P. I live at O. I stay at home, taking care of the other children. We are 3 at home. I am 13 years old. I remember on 27/7/05. At 6.00pm I was at home. I went for milk at my grandmother’s

place. She is called R.P. I followed a walking path. Beside it there was just bush. The accused person emerged from the bush. He held my hand and pulled me into the bush. He never spoke to me. I knew him before (sic) then as he was living in the boma of S. It's about a kilometre away from our home. He held my left hand. In the bush he held my legs and tripped me to the ground. I was resisting, telling him to set me free. He tore my dress on the lower side and did likewise to my pant. He then opened the zip to his trouser. He was not in an inner pant. He then came to me. He drew out his penis and inserted it in my vagina. I screamed as I felt pain. He did it for about 2 or 1 minute(s). My father came. He had ejaculated once, a substance which was in liquid form. When accused saw my father he rose and chased after him while armed with a panga."

The complainant's father was attracted by the screams and on rushing to the scene found the appellant with the complainant. The appellant who had a *panga* started chasing the complainant's father S Ole P (PW 2). The incident was reported to the police as the young girl was taken to Narok District Hospital for treatment. She was seen by a clinical officer Hoseah Kemei (PW 5). In his evidence in chief, the clinical officer stated *inter alia*:

"She came to me on 29/7/05. She had a history of having been defiled by someone very well known to her on 27/7/05. I examined her. She was well oriented with time and place. On the head she had tenderness. There were also tenderness on the elbow joints. There were slight tenderness on both knees. The injuries were two days old. The injuries could have been caused by a blunt object. She had been seen before in the hospital but had not been put on treatment. The degree of injuries was harm.

On the labia majora there mild inflammation. There were no bruises or tears. There was also no abnormal discharge. That is all I found. This is the P3 form I filled. I wish to produce it in court as exhibit – exhibit 3. The girl was said to be 12 years old. I found she was under 12 years. I had not known her before then."

In defending himself the appellant stated that he had nothing to do with the complainant and that PW 3 had asked for some money so that the case could be terminated.

The learned trial magistrate considered the evidence adduced by the prosecution and the appellant's defence and came to the conclusion that the appellant had indeed defiled the young girl. In concluding his judgment delivered on 13th January, 2007, the learned trial magistrate said:

"The evidence of PW1 shows that the accused penetrated her, and ejaculated once. Her dress and pant had been torn by the accused so as to reach her for the purpose. The pant and dress were produced in court as exhibits. PW5's evidence at least confirms that the complainant was engaged in a struggle. Such can be construed out of the stated bruised areas. The inflammation of labia majora suggests penetration. All these evidence, when weighed together leaves no doubt that the accused had carnal knowledge of the complainant without her consent.

The accused defence is of mere denial. He raised an alibi which was not corroborated. There is weighty evidence that on the material day and hour he was with the complainant in the bush. His defence can't therefore be true. It's thus dismissed.

The upshot is that the main count against the accused is proved by the prosecution beyond reasonable doubt and the accused is convicted of it under section 21 of the cpc."

As we have already stated, the appellant's appeal to the High Court was dismissed. In dismissing the appellant's appeal the learned judge in his judgment delivered on 21st November, 2008, said:

"Having considered these submissions and carefully read the lower court record I find that this is a completely hopeless appeal. The offence was committed at about 6.00 p.m. when it was not yet dark. Both the complainant and her father knew the Appellant very well as they live in the same village and their homes are only about 1 kilometre apart. When the complainant's father was attracted by her screams and ran to the scene he saw the Appellant with the complainant and ran to the scene he saw the

Appellant with the complainant and on noticing him the Appellant started chasing him with a panga. That is in the father's evidence and that of the complainant.

Besides being identified at the scene the Appellant assembled elders and went to the complainant's home the following day seeking to have the matter discussed and resolved by the elders but PW3 advised against it. Taking all these factors into account I find that Appellant's identity is not in issue. He was properly identified. I also find that the learned trial magistrate considered the Appellant's defence at length and in my view rightly rejected it. I therefore find that the Appellant's conviction was proper and I accordingly dismiss the appeal against conviction.

The appeal against sentence has also no merit. The offence the appellant committed carries a life sentence but he was sentenced to 16 years imprisonment. I therefore dismiss the appeal against sentence also.

In the circumstances I find no merit in this appeal and it is hereby dismissed in its entirety."

Still dissatisfied with the judgment of the High Court, the appellant now comes to this Court by way of second appeal. This is the appeal that came up for hearing before us on 18th April, 2011, when the appellant appeared in person while the State was represented by Mr V. O. Nyakundi (State Counsel).

In addressing us, the appellant pointed out that the complainant did not mention the incident to her grandmother and that it was not until the following day that the girl was treated. On the issue of the elders dealing with the matter, the appellant complained that the elders should have come to give evidence. According to the appellant he never called the elders to deliberate on this matter.

On his part Mr Nyakundi supported the conviction of the appellant on the ground that the appellant was caught red handed and that both the complainant and her father knew the appellant. Mr Nyakundi further submitted that the clinical officer who examined the complainant confirmed that the complainant had been sexually assaulted. Finally, Mr Nyakundi submitted that the appellant had initiated reconciliation proceedings where he wanted the elders to arbitrate but some elders thought that this was a matter for a court of law.

In this appeal we have set out the genesis of the appellant's tribulations right from the date of the incident – 27th July, 2005. We reproduced portions of the evidence given during the appellant's trial and the findings of the learned trial magistrate. We have also reproduced the findings and conclusions of the first appellate court (Maraga J). The two courts below reached the same conclusion that the appellant had indeed defiled the little girl on the material day. The time of the incident was given as 6pm. It has not been denied that both the complainant and her father knew the appellant. The complainant gave the details of what took place and her father heard her screams and on rushing to the scene found the appellant at the scene together with the complainant. The appellant who was armed with a *panga* chased away the complainant's father.

The two courts below were satisfied that both the complainant and her father were witnesses of truth and that the appellant's defence was for rejecting.

We respectfully agree with the concurrent findings of the two court's below and we are of the view that this was a case in which the appellant was caught red handed in the act of defiling the complainant. Indeed, the prosecution evidence was overwhelming and clearly displaced the defence put forward by the appellant.

In view of the foregoing we find no merit in this appeal and order that the same be and is hereby dismissed in its entirety.

Dated and delivered at Nakuru this 9th day of June, 2011.

P. K. TUNOI

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

J. G. NYAMU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR