



IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 130 OF 2007

FRED MICHAEL BWAYO .....APPELLANT

AND

REPUBLIC .....RESPONDENT

*(An appeal from a judgment of the High Court of Kenya at Kitale (Ochieng, J.) dated 27<sup>th</sup> September, 2007*

in

H.C.CR.A. NO. 105 OF 2006)

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**JUDGMENT OF THE COURT**

The appellant, ***Fred Michael Bwayo***, was convicted by Kitale Resident Magistrate, Wandere H.M., 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 26<sup>th</sup> day of July, 2005 at W. farm in Transzoia District of Rift Valley Province, he unlawfully had carnal knowledge of **EN**, a girl under the age of sixteen years. Upon his conviction he was sentenced to serve 20 years imprisonment. His appeal to the superior court (Ochieng, J.) against conviction and sentence was dismissed, hence this second and last appeal.

As the law requires in **Section 361** of the Criminal Procedure Code, only issues of law may be raised and considered in the appeal. This Court has also stated on numerous occasions, that it will not interfere with concurrent findings of fact in 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, for example, **M’Riungu v Republic [1983] KLR 455**.

The appellant appeared before us in person, as he did in his trial and first appeal. He drew up the memorandum of appeal raising three grounds which may be summarized thus:-

“Both court’s below erred in:-

§ **Relying on a prosecution case which was not conducted by the learned trial magistrate as by the laid down procedure in the Criminal Procedure Code resulting in a mistrial.**

§ **holding that the prosecution had proved their case beyond all reasonable doubts.**

§ **relying on a prosecution case which was defective in form.”**

We shall revert to those grounds later in this judgment.

The facts as established by the two courts below are fairly straightforward. **EN** (PW1) was a seven year old girl in standard one at Kamachui Primary School within W. Farm in Trans Nzoia. At about 12 noon on 26<sup>th</sup> July, 2005 her mother, **JN** (PW2) sent her to buy some “vegetable oils” from one Mama Wanja’s place. **EN** was accompanied by another little girl. Along the way, they found the appellant who was cutting grass by the wayside. **EN** knew the appellant as a herdsboy in one “M’s” farm in the neighbourhood. The appellant invited her to go for some sugar food called “kaa ngumu”. When **EN** went to where the appellant was, he carried her on his shoulders into a nearby maize plantation. There he placed her on the ground, removed her pants and proceeded to do “bad things” to her after removing his trouser. Demonstrating the “bad things”, **EN** pointed at her genitals and the appellants genitals, prompting the trial Magistrate to remark: “*She does not hesitate to tell it all*”. Before the appellant lay on top of **EN**, he covered her mouth to prevent her from screaming and he hit her severally as he inserted his ‘thing’ into her private parts. One Mama Wanja then appeared on the scene and the appellant got up and ran away. Mama Wanja was crying out loud calling out the appellant but he did not stop.

In the meantime, the little girl who had accompanied **EN** had run back to **JN** crying out “*Mtu, mtu*”. **JN** followed her, then found **EN** emerging out of the maize plantation crying. She was not able to walk well. **EN** told her that the person who worked at M’s farm had done bad things to her. **JN** examined her and found her private parts had been injured.

She was taken to the scene and found the maize was disturbed. She saw some sperm on the ground and collected **EN**’ pants which had some blood stains and sperms on it. She was also shown the long grass for feeding animals which the appellant had cut.

**JN** then sought the assistance of **Benson Mwaura Karu** (PW3) (Ben), a small scale farmer who doubled up as a vigilante in the area. Together with one Sammy, they headed for Mo’s home and found the appellant. According to **JN**, on asking the appellant what he had done, he said “*the devil led him to defile your daughter.*” With the assistance of other members of the public, the appellant was arrested but not without some resistance. He took an iron bar and assaulted Ben on the mouth, but he was overpowered. He was taken to Nyayo Police Patrol base where **PC Cleophas Masinde** (PW4) rearrested him and locked him up. **EN** was also taken to the station and Pc Masinde saw her muddy clothes, and her slow, painful movement. He advised treatment at the hospital. He also issued out a P3 form which was completed by **Linus Ligale** (PW5) a clinical officer at Kitale District Hospital. The medical report confirmed that **EN**’ private parts had been interfered with and her hymen was torn. Laboratory tests however confirmed that **EN** did not have spermatozoa, Syphilis or H.I.V. The Clinical Officer concluded that **EN** had been sexually assaulted. The appellant was also medically examined by Dr. **Chrisantus Masinde** (PW6) three days after the incident and the doctor confirmed that he was H.I.V. negative, and had no venereal diseases.

In his unsworn defence, the appellant confirmed that he lived in W. farm but hailed from Kakamega. He denied ever committing the offence and blamed his false arrest on Jacinta. He stated that Jacinta had his money which he demanded to enable him to travel to Kakamega to see his ailing mother, but instead of paying him, she called police reservists who beat him up and took him to Opengele Police Station for framed up charges.

In assessing the credibility of **EN**, the trial magistrate who had the advantage of seeing and hearing her testify, found:-

**“She had no grudge with the accused and identified him in court, as a worker of “M’. She maintained her testimony and gave a sufficient account of the events at the material time,**

**was consistently firm and was not shaken as to the identity of accused in her testimony. In the end I thought her to be a truthful witness despite her tender age.”**

The learned magistrate also examined the appellant's defence and dismissed it as an afterthought which had no relevance and could not give any lawful excuse for doing what he did to an innocent little girl.

The superior court re-evaluated and analysed the evidence on record and came to the conclusion that:-

**“the identification of the appellant was never in doubt. The incident occurred in broad day light, shortly after 12.00 noon. PW1 was called by a person she knew well, as an employee of M. PW1 gave detailed information of precisely the actions taken by the offender. She pointed at the appellant's genitals, which she said, were inserted into her private parts.**

**As the learned trial magistrate observed, at that stage of trial;**

*“she does not hesitate to tell it all.”*

**Her mother examined the complainant and found her private parts to have been injured. That corroborates the testimony of PW1, if any corroboration was required.**

**Further corroboration was provided by PW5, the clinical officer, who found PW1's hymen torn. PW5 concluded that PW1 had been sexually assaulted.”**

As stated earlier, the appellant laid out three grounds of appeal to challenge his conviction. The appellant, however, did not address us on those grounds as laid out. Instead, he briefly addressed us generally on insufficiency of the evidence and asked us to go by the record and find that the prosecution evidence did not prove the case beyond reasonable doubts. He pointed out in particular, that the medical evidence of the clinical officer was not probative of the offence; that the failure to call one **Mama Wanja** who is alleged to have arrived at the scene first, and also the little girl who is alleged to have accompanied **EN**, was fatal to the prosecution case; that the failure to produce as exhibits the soiled pants allegedly worn by **EN** and collected from the scene, was also fatal to the prosecution case.

No material was laid before us to support ground (1) in the memorandum of appeal that the trial was contrary to any provisions of the Criminal Procedure Code and we find no substance in that ground. Similarly, we find no *“defect in form”* as stated in ground (3) of the memorandum of appeal. As regards the issues raised which, in the appellant's view, render the prosecution case unproved, we note that they were also raised before the superior court and were specifically dealt with. In rejecting the submission that the omission on the evidence of **Mama W** and the little girl was fatal to the prosecution case, the learned judge had this say:-

**“The findings of PW5 were that PW1 was about 7 years old. He also found her hymen torn. That evidence, coupled with PW2's evidence of injury to PW1's private parts; and the evidence of PW3 and PW4, that PW1 was walking slowly, with difficulty, and with her legs apart; and that PW1 was obviously in pain on 26/7/2005, is in my considered opinion sufficient to prove the offence of defilement of a young girl, under the age of 16 years.**

**And once PW1 had positively identified the appellant as the offender, I hold that there was no need for either Mama Wanja or for the little girl who had been sent along with PW1, testifying.”**

We respectfully agree with that assessment and add that the evidence of **EN** need not necessarily have been corroborated once the trial magistrate found, as he did in no uncertain

terms, that she was a truthful witness. The offence was committed long after the amendment to **section 124** of the Evidence Act by the Criminal Law (amendment) **Act 2003** in **Legal Notice No. 5 of 2003**. The proviso to that section now states:

**“Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”**

The finding was that **EN** was truthful and that finding was made on sound basis. We find no merit in that ground of appeal either.

On the whole we agree with learned Senior Principal State Counsel Mr. Omutelema, that the prosecution evidence was overwhelming and clearly displaced the defence put forward by the appellant. There never was a frame up, and the conviction was well merited. We dismiss the appeal wholly in that respect.

That would have been the end of this judgment but for one issue which has caused us some anxiety and concern. It is the issue of sentence. The court raised it *suo motu*, and learned Senior Principal State Counsel *Mr. Omutelema*, submitted that the sentence was lawful and ought not to be interfered with at this stage.

It is certainly not in the province of this Court to interfere with the severity of sentence by *dint* of section **361(1)(a)** of the Criminal Procedure Code. The offence of defilement under **section 145(1)** of the Penal Code as amended by **Legal Notice No. 5/2003** attracts a maximum sentence of life imprisonment with hard labour. That is the same sentence (save for hard labour) provided for committing the offence “*with a child aged eleven years or less*” under **section 8(2)** of the **Sexual Offences Act 2006** which came into effect on 21<sup>st</sup> July, 2006. The section states as follows:-

**“8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”**

The tenor of section is mandatory and therefore provides for life imprisonment as the minimum sentence. That must logically be so since the succeeding **subsections (3) and (4)** which provide for punishment for defiling much older children of “*between the age of twelve and fifteen years*” and “*between the age of sixteen and eighteen years*” respectively provide for minimum sentences of imprisonment for a term of “*not less than twenty years*” and “*not less than fifteen years*”, respectively. In our view, Parliament intended that the defilement of a younger child was a more serious offence and did not envisage the punishment under **section 8(2)** of the Act to be other than life imprisonment. Those provisions would be consonant with the prime objective of the Act which is “*prevention and protection of all persons from harm from sexual acts*”.

The provisions of the Sexual Offences Act however, do not apply to the matter before us. The offence here was committed one year before the **Sexual Offences Act 2006** came into force. The law governing the offence was in **section 145(1)** of the Penal Code as amended by the **Criminal Law (Amendment) Act, NO. 5/2003** to read as follows:-

**“145. (1) Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life.”**

The difference between the original section and the amendment is that the age of the girl was increased from 14 to 16 and the sentence was increased from 14 years imprisonment to life. It should be noted, however, that the punishment provided for the offence is not mandatory and there is clear discretion for the court to consider the appropriate sentence depending on the

circumstances and antecedents of each case and accused person. The appellant in this case was thus “**liable to imprisonment with hard labour for life.**”

There is, of course, a whole debate about what “*life imprisonment*” is about although it is less of a debate where the sentence is a minimum one as in the Sexual Offences Act. The prisoner will simply spend the whole of his/her natural life in prison. There is no prospect of release in the future, no matter how distant. A life imprisonment and then a release while still alive would be a contradiction, and the released prisoner would be deemed to be on license while on release – see **R V Foy (1962) WLR 609**. It would also be an absurdity to sentence one to life imprisonment to run consecutively with a number of years thereafter. In Kenya by an amendment inserted in 1986 to **section 46 (1) (ii)** of the **Prisons Act (Cap 90)**, there is no remission for a prisoner sentenced to life imprisonment.

The challenge is the substitution of a number of year’s imprisonment for life imprisonment where, as in this case, the law allows for discretion. As far as our limited research goes, there are variations in approach in different countries of the world. A few examples will suffice: In Uganda, life imprisonment is taken to mean 20 years maximum, although the debate continues after a recent constitutional court decision that it should mean “*the whole of a persons life*”. In Australia it would be between 10 to 20 years followed by parole depending on the degree of the offence. In Argentina it is between 13 to 25 years while in Belgium it is 10 to 16 years pending parole. In England and Wales, the term is indeterminate but until the year 2002, the Home Secretary reserved the right to set the minimum length before that power was reposed on the courts; while in Congo (DRC) the maximum penalty is 30 years imprisonment. Generally in many countries there will be a number of years followed by parole.

As far as we can tell, Kenya’s highest court has not defined “*life imprisonment.*” There is also considerable inconsistency on the term of imprisonment meted out in substitution for “*life sentence*”. Nevertheless, what is exceedingly rare, as we are unable to find any, is a sentence of twenty years or more in substitution for life imprisonment even in sexual offences as the law stood before July 2006. If the ends of justice were served by imposing lesser sentences at the time, it would be unjust to the appellant in this case to depart so fundamentally from the principles of sentencing which obtained when the offence was committed. That view in no way diminishes the gravity of such offences but pays homage to certainty and consistency in the law. We think the learned trial magistrate and the Judge of the superior court were unduly influenced by the new Act and applied sentencing standards which did not apply to the case before them. This reflects on the lawful nature of the sentence and thus entitles this court to intervene.

In the event, we set aside the sentence of 20 years imprisonment imposed on the appellant and substitute therefor a term of imprisonment for fifteen (15) years with hard labour from the date of his conviction by the trial court on 3<sup>rd</sup> November, 2006. To that extent only shall this appeal succeed. It is otherwise dismissed.

***Dated and delivered at Eldoret this 29<sup>th</sup> day of May, 2009.***

**J.E. GICHERU**

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**CHIEF JUSTICE**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**