IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 349 of 2007

REUBEN GITONGA NDERITU……APPELLANT

AND

REPUBLIC ……RESPONDENT

(An appeal from a judgment of the High Court of Kenya at

Nyeri (Makhandia, J.) dated 30th November, 2007

in

H.C.CR.A. NO. 237 OF 005)

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JUDGMENT OF THE COURT

This is a second appeal, against both conviction and sentence.

The appellant, *Reuben Gitonga Nderitu*, was charged and convicted of the offence of defilement of a girl under the age of 16 years contrary to *section 145 (1)* of the *Penal Code*, and sentenced to 25 years imprisonment plus hard labour, by the Senior Resident Magistrate's Court at Nanyuki on 11th August, 2005. He appealed against both conviction and sentence to the High Court (Makhandia, J.) who dismissed the appeal against conviction but reduced the sentence to ten years' imprisonment with hard labour.

Aggrieved by that decision, the appellant, who is unrepresented, appealed to this Court on the following home-made grounds: -

"*That the High Court Judge misdirected himself in finding and maintaining conviction as safe where as the trial magistrate's mind lack consideration throughout the trial - thus words not spoken are featuring in the proceedings i.e irrelevant facts from the file of ADAN MURAGURI MUNGARA CR/CASE NO. 655 of 2005 were firm in the mind of the trial magistrate see trial's court judgment page I contravention of section 77 of the Constitution.*

That Justice M.S.A. Makhandia erred and misdirected himself in finding the credibility of the prosecution witnesses as correct and the trial magistrate as correct but failed to observe that the demeanour of witnesses cannot be true and relied upon the Court of Appeal as the magistrate did not record the demeanour of the witness which is a contravention of section 199 C.P.C.

That the learned High Court Judge erred and misdirected himself in analysing that medical evidence wasn't necessary on the appellant whilst the complainant wasn't cross-examined, or didn't testify upon penetration without discharge of semen.

That the High Court Judge erred and fatally misdirected himself in finding conviction as safe and not faulty where as I was detained in police cells contrary to section 713 (b) of the constitution by unknown arresting and investigating officers in unknown police station.

That the High Court Judge erred and misdirected himself in upholding the trial judgment where as the trial court erred in accepting the views of the court prosecutor that the accused needed a deterrent sentence.

That the High Court Judge erred and misdirected himself in accepting penetration as satisfactory to prove the chance but failed in not going a step further in perceiving that the complainant was up to her menses bringing rise to penetration whilst she inserted objects therein."

The particulars of the charge, as stated in the charge sheet, were that on 15th May, 2005 at N[.....]village in Laikipia District in the Rift Valley Province, the accused unlawfully had carnal knowledge of *FH*, a girl under the age of 16 years.

According to the prosecution case, on 15th May, 2005 the appellant went home and found the complainant (FH) there. *FH* is the sister of the appellant's wife. At that time she was under 16 years of age. He offered her some money to have her hair plaited. She agreed and accompanied him. On the way FH asked where they were going, and the appellant grabbed her and began to fondle her breasts. He then took her into the bush, forced her to the ground, and sexually assaulted her. When she tried to scream, he held her mouth. Once he was done, he left her in the bush and took off. FH ran back to her home, and immediately informed her mother, *D* (PW2) who took her first to the police station, where a report was filed, and then to Nanyuki Hospital where a clinical officer, *George Onserio* (PW3) examined her and completed the P3 form. PW3 gave evidence that her hymen was torn with rough edges and that it was hyperemic, a sign of recent rapture. He noted injuries also in the genitalia area. He concluded that *FH* had been sexually assaulted.

Those are the findings of facts made by the learned magistrate, and upon re-evaluation confirmed by the learned Judge of the superior court.

As we have stated, this is a second appeal. By *dint* of the provisions of *section 361* of the *Criminal Procedure Code*, we are enjoined to consider only matters of law and not matters of fact.

In our considered view, the only matters which could be considered as raising issues of law are:

(i) that because he was not subjected to a medical examination, there was no medical evidence to connect him to the crime; and

(ii) that the investigating officer was not called to testify.

On the first point, we are of the view that there was overwhelming medical evidence that *FH* had been sexually defiled. The clinical officer (PW3) was categorical that *FH* had been defiled; that immediately following the sexual assault, she reported to her mother and was taken to the Nanyuki Hospital. All that evidence has not been contradicted, nor is identification an issue. There was overwhelming evidence that it is the appellant who assaulted her. The fact that the appellant was not subjected to a medical examination is neither here nor there. In our view it would have added no further value to the prosecution case.

Secondly, with regard to the complaint that the investigating officer was not called to testify is also neither here nor there. It is not mandatory that he be called, unless there is an allegation that he would have said something adverse to the prosecution case. There is no such argument here, nor do we believe his evidence would have added value to the overwhelming evidence before the court. We are of the view that the learned magistrate came to the correct conclusion that the case against the appellant was proved beyond reasonable doubt. Similarly, the superior court, as the first appellate court, revisited the evidence, analysed and evaluated the same, and came to the same conclusion. We cannot fault the two courts on their findings on matters of facts, and that is why we say that only matters of law raised in the grounds of appeal would come for our consideration.

Accordingly, we are of the view that the conviction of the appellant was based on sound grounds. The superior court came to the right conclusion on the first appeal and we see no reason to interfere with the decision of the two courts on conviction. On sentence, as this is a second appeal, consideration of severity of sentence is not within our jurisdiction, unless the sentence given was unlawful. That is not the case here. The appeal has no merits, and the same is dismissed.

Dated and delivered at Nyeri this 15th day of May, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR