



IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 351 of 2007

ANTHONY MWANGI MIGWI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nyeri (Makhandia, J.)

dated 30th November, 2007

in

H.C.CR.A. NO. 220 OF 2005)

JUDGMENT OF THE COURT

The appellant was convicted of three offences by the Senior Resident Magistrate, Nanyuki, namely, Abduction of a girl under 16 years of age contrary to **Section 143** of the Penal Code; Unnatural offence contrary to **Section 162 (a)** of the Penal Code and Defilement of a girl under 16 years of age contrary to **Section 114 (1)** of the Penal Code and sentenced to 2 years; 8 years and life imprisonment, respectively. His first appeal to the superior court against conviction and sentence for Abduction and Unnatural offences was dismissed. So was his appeal against conviction for defilement. However, his appeal against the sentence of life imprisonment for the offence of defilement was allowed to the extent that the sentence was reduced to 15 years imprisonment and all the three prison terms ordered to run concurrently.

He appeals to this Court on five grounds, namely; that he was denied his right to be represented by a lawyer during the conduct of the identification parades; that the superior court erred in upholding the conviction when the alleged blood stained T-shirt worn by the complainant, her under pant and his bicycle were not produced as exhibits; that the superior court erred in finding that prosecution case was established when the witnesses did not describe his physical appearance; that the superior court erred in law in finding that the charge was proved when spermatozoa was not found in the complainant's private parts and lastly, the superior court failed to analyse and evaluate the evidence.

The evidence to support the charges was straight forward. On the afternoon of 6th February, 2008, **W** (PW2), the complainant who was a Standard I pupil aged 6 years was sent by her mother to check the goats which were grazing near the road. While there, the appellant appeared, carried her on his bicycle and took her to a house painted black. While in the house, the appellant sodomised and defiled the complainant. The complainant remained in the appellant's house the whole afternoon and throughout the night. The appellant again defiled her in the morning after which he took her to the roadside where she was found by **MT** (PW7), very early in the morning of 7th February, 2008.

Maina Thiribi testified at the trial that he took the complainant to her home and that on the previous night they had looked for the complainant after she had been reported missing. The complainant was taken to Nanyuki Hospital and examined by **Pauline Lekore** (PW10) a clinical officer on the same day. The clinical officer, after examination concluded that, there had been a forceful and painful penetration. The clinical officer testified in part:

“The complainant had a T-shirt that had blood stains. Her underpants had a foul smelling discharge and feecal. She was in much pain. There was tenderness on the neck with bruises. On the right forbearing there was a bruise. The child was aged 6 years. On examination the vulva was reddened and tender. The hymen was perforated. There was a perireal tear and a brusied labia minora. There was also anal tear with redness and pain. There was faecal

The child was referred to Cottage Hospital and later to Nyeri Provincial General Hospital. I conclude that there was forceful and painful penetration”.

The appellant was arrested two days later on 8th February, 2005. Three students **M** (PW3); **N** (PW4); **A** (PW5) (the three students) and **Johnson Mwangi** (PW9), (Pastor), all testified at the trial that they saw the appellant carrying the complainant on the bicycle on the afternoon of 6th February, 2005. Each of the three students later identified the appellant in an identification parade conducted by **C.I. Enock Hamala** (PW8) on 11th February, 2005.

The appellant denied committing the offence at the trial and claimed that the charges were a frame up. He stated that on the material day, which was a Sunday, he left his home for refreshments and on the following day he was arrested by people who took him to the police base. He stated that he found two people who had been arrested for the same offences at the police base and that the two people were subsequently released.

The trial magistrate after evaluating the evidence made findings, that; the complainant was a truthful witness; that complainant was abducted, sodomised and defiled; that the evidence of the clinical officer corroborated the complainant’s evidence; that the complainant was positively identified as the person who was carrying the complainant on the bicycle by the three students and a pastor; that the defence of the appellant that he was framed up was not true and that it is the appellant who abducted, sodomised and defiled the complainant.

The superior court after considering and re-evaluating the evidence also made findings that, the complainant was a truthful witness; that the complainant being a truth witness, the appellant could have been lawfully convicted without corroboration of the complainant’s evidence as stipulated by the proviso to Section 124 of the Evidence Act; that the identifications parades were properly conducted; that the appellant was identified in broad daylight by the three students and a pastor; that the defence of the appellant was not truthful and that he appellant abducted, sodomised and defiled the complainant.

Most of the grounds of appeal raised by the appellant relate to matters of fact and not law. The same issues were raised in the superior court, considered and rejected. The superior court quite correctly appreciated that the prosecution case was dependent on the credibility of the witnesses and recognized that it would not interfere with the findings of the trial court based on the credibility of witnesses unless it was shown that no reasonable tribunal could have made such findings on the basis of the evidence available. The superior court found no reasons for interfering with the finding of the trial court and indeed made similar findings as the trial court. The defence of the appellant that the case was fabricated was not credible because none of the prosecution witnesses including the complainant knew the appellant before.

There are thus concurrent findings of fact which were based on ample and credible evidence. We have no reason for interfering with those findings (see **Karingo vs. Republic** [1982] KLR 213).

The evidence of the three students, Pastor and MT was strong circumstantial evidence which amply corroborated the evidence of the complainant and irresistibly pointed at the appellant as the person who

abducted, sodomised and defiled the appellant.

In view of the foregoing, the appeal has no merit. It is accordingly dismissed.

Dated and delivered at Nyeri this 12th day of June, 2009.

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR