IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MWERA, SICHALE & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 26 OF 2015

BETWEEN

JOHN SEROBII …..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Mbogholi, J) dated 19th June, 2014

in

HC CR.A. NO. 297 OF 2011)

****

JUDGMENT OF THE COURT

Background

1***. JOHN SEROBII*****,** the appellant herein was charged with the offence of defilement contrary to ***section 8(1) (2) of the Sexual Offences Act, No.3 of 2006*** and an alternative charge of indecent act with a child contrary to ***section 11 (1) of the Sexual Offences Act*** in the Chief Magistrate's Court at Thika.

2. The particulars of the offence of defilement were that on the 18th January, 2011, at ***[particulars withheld]*** Estate in Thika District, the appellant committed the act which caused penetration with EG, [PW1], a child aged 8 years. The particulars of the alternative charge were that on the above mentioned date and place, the appellant intentionally committed an indecent act with PW1, a child of the age 8 by touching the genital organ of the said PW1.

3. The appellant took plea on the 21st January, 2011, and denied having committed the offences. At

the conclusion of the trial the appellant was found guilty as charged of the offence of defilement, convicted and sentenced to life imprisonment. On the alternative count, the trial court found the appellant not guilty and acquitted him under ***Section 215 of the Criminal Procedure Code***. The correct procedure should have been that after convicting on the main charge, the learned trial magistrate should not have made any finding on the alternative.

4. Aggrieved with the trial court's decision, the appellant filed an appeal in the High Court. The High Court, Mbogholi, J, vide a judgment dated 19th June, 2014, dismissed the appellant's appeal.

5. It is against that decision that the appellant filed a memorandum of appeal on 8th July, 2014, based on the following grounds:

i. *The superior court Judge erred in law in dismissing the appeal without observing that the entire prosecution case was riddled with material contradictions and inconsistencies thus section 163(c) of the Evidence Act was infringed.*

ii. *The superior court Judge erred in law in failing to find that failure by the prosecution to adduce crucial and essential witnesses and evidence for the determination of the case flouted section 150 of the Criminal Procedure Code and went against the rules of natural justice.*

iii. *The superior court Judge erred in law in failing to find that the appellant did not understand the language used in trial and that this contravened his right to fair trial under section 198(j) of the CPC.*

iv. *The superior court Judge erred in law in holding that the offence charged was proved beyond reasonable doubt against the appellant.*

v. *The superior court Judge erred in law in failing to find that the rejection of the appellant's defence by the trial court without giving any reasons for the rejection and in the process violating section 169 of the CPC.*

Submissions

6. At the hearing of this appeal, the appellant who appeared in person relied on his memorandum of appeal filed on 8th July, 2014.

7. Mr O. J. Omondi, learned Senior Public Prosecution Counsel, in opposing the appeal, submitted that the appellant was charged with the offence of defilement and the complainant gave a vivid account of what transpired when she was taken to the appellant’s house. Counsel maintained that the evidence against the appellant remained unchallenged or controverted in any way.

Counsel submitted that the issue of identification was very clear as the appellant was known to the complainant. It was, therefore, a case of recognition. According to counsel, the medical report tendered in evidence proved that the complainant was defiled and the case was proved beyond any reasonable doubt. He contended that the offence of defilement attracts a mandatory sentence of life imprisonment as the complainant was a child of tender age (8 years). Counsel urged us to uphold the sentence and conviction as the appeal lacks merit in its entirety.

Determination

8. This being a 2nd appeal, this Court is restricted to address itself on matters of law only as provided for in ***section 361 (1) of the Criminal Procedure Code***. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. In ***DAVID NJOROGE MACHARIA V R, [2011] eKLR*** this Court said:

"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings."

9. We have considered the grounds of appeal, submissions by the appellant, the learned prosecution counsel and the law. The appellant contends that he did not understand the language used at the trial. The record indicates that the proceedings were translated into the Kiswahili language. Further, from the cross-examination which the appellant himself conducted at the trial, it is quite evident that he understood the language used. This ground of appeal must, therefore, fail.

10. The appellant has also argued that the learned judge erred in law in failing to find that the rejection of his defence by the trial court without reasons violated ***section 169 of the Criminal Procedure Code***. The trial court and the 1st appellate court each considered the defence of the appellant. The trial court in its judgment stated:

"The accused person tells court that he did not do anything to the child. He however does not explain what the child was doing in his house without her trouser. He further does not dispute that he indeed ran out from the house through the window."

The High Court in its judgment in quoting the above extract held:

"The above extract would appear to be a shifting of the burden of proof to the appellant. In law he was under no obligation to explain anything because it is the duty of the prosecution to prove the case against him. That notwithstanding, this was not prejudicial to him because the evidence adduced sufficiently answered the said questions."

11. From the foregoing, it is evident that the appellant's defence was considered by the trial court and reasons were given. The High Court correctly found that the reasons given by the trial court for dismissing the appellants defence appeared to be shifting of the burden of proof to the appellant. That notwithstanding, the High Court found that it was not prejudicial to the appellant as the evidence adduced was sufficient to sustain a conviction. Consequently, we are of the view that the learned judge cannot be faulted on this ground and therefore that ground of appeal also fails.

12. The appellant has also faulted the learned judge for holding that the offence charged against him

was proved beyond reasonable doubt. The question is whether the complainant, PW1, was defiled and whether the prosecution proved that it was the appellant who defiled her. PW1 testified that on the material day when she was at home, the appellant who was their neighbour, gagged her mouth with a scarf and took her to his house, where he lived alone. He then put her on the bed, purportedly locked the house with a padlock from outside and then removed her trousers. It was her testimony that the appellant laid her on her back and then inserted his male genital organ into her genital organ; that she felt pain but could not scream as her mouth was gagged; that after a while she heard her aunt, PW3 speaking from outside, and that the appellant rose up, dressed and jumped out of the house through the window. PW2, PW1's mother, informed the court that when she came back home she found the incident had occurred and the appellant was being held by village elders. PW2 was informed of the incidence and when they examined PW1, there was some wetness at the external genitalia. That the incidence was reported at Kirwara Police Station and PW1 was taken to Thika District Hospital where the doctor confirmed defilement and found there was some bleeding from the external genitalia. It was PW3's evidence that when she got to the scene, she found PW1 inside the appellant's house who informed her that she was left inside when the appellant took off from the house through the window. Dr Saudi Mohamed (PW4), who gave evidence on behalf of Dr Kinyua who had examined PW1, informed the court that PW1’s examination revealed that her hymen membrane was absent.

13. From the evidence aforementioned it is not in dispute that PW1 was defiled. It is also not in dispute that she was 8 years old as PW2 produced an immunization card indicating that PW1 was born on the 19th June, 2003. The evidence on record also satisfactorily pointed to the appellant's guilt. This is because firstly, the trial court examined PW1's demeanour and found her to be a truthful witness. Secondly, PW1 knew the appellant and she even mentioned his name in court as the one who had sexually assaulted her. Thirdly, the medical report confirmed that there was penetration and also a fresh wound that was bleeding and the hymen membrane was absent. Lastly, PW3 who got to the scene testified that she found PW1 in the appellant's house and that PW1 informed her that the appellant had defiled her.

14. The proviso the ***S124 of the Evidence Act*** provides that:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

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

15. Accordingly, it is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was telling the truth. From the trial court record, it appears that the victim told the truth, because in the judgment, it was stated that:

"The child told court (sic) that she knew the accused person and even called him by his name John Serobii in court. I had a chance of seeing the child as she testified and I had no reasons to doubt the testimony of the child."

The evidence on the record shows that PW1 identified the appellant by name as the one who defiled her. PW3, an independent witness, corroborated PW1's evidence

16. From this evidence, we are satisfied that the prosecution proved to the required standard that PW1 had been defiled and that it was the appellant who defiled her. Consequently, we find no reason to interfere with the concurrent findings of the two courts below. See ***CHEMANGONG V R, [1984] KLR 611.***

17. The upshot of the foregoing is that this appeal has no merit and we accordingly dismiss it in its entirety.

Dated and delivered at Nairobi this 31st day of July, 2015.

J. W. MWERA

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

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