REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT ELDORET

Criminal Appeal 65 of 2006

BETWEEN

MICHAEL LOKWARA AYAN……APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Kitale (W. Karanja, J) dated 16th February, 2006

in

H.C.CR.A. NO. 18 OF 2005)

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JUDGMENT OF THE COURT

In this second and last appeal, *MICHAEL LOKWARA AYAN, (the appellant)* challenges his conviction 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 16th day of July, 2004 at Lodwar Township in Turkana District of the Rift Valley Province, he unlawfully had carnal knowledge of *A.E.,* a girl under the age of sixteen years. There was also an alternative charge of indecent assault on a female based on the same facts. Upon his conviction on the main charge, the appellant was sentenced to serve 28 years in prison. As this is a second appeal, only issues of law may be raised and considered. - See *Section 361* of the Criminal Procedure Code.

As the sun set on the residents of ***[particulars withheld]*** Estate in Lodwar Township, on 16th July, 2004, 9½ year-old *A.E. (PW1)* hereinafter *("A.E")*, was sent by her grandmother to fetch some water from a tap near her house. There was enough light at the time although it was nearly 7 p.m. A.E. took a bucket and filled it up with water at the tap. Not far from the tap, she saw the appellant's wife whom she asked for assistance to place the bucket on her head. The wife refused to do so. Suddenly, the appellant appeared at the scene and held A.E.'s hands. He led her to his house and closed the door behind them. He armed himself with a knife and commanded her not to scream. Then he placed her on

his bed, covered her mouth, removed her knickers and had carnal knowledge of her. She felt pain in her genitalia as the appellant did so. Meanwhile A.E.'s grandmother *M.N. E. (PW2) ("M.N.E.")* thought A.E. was taking too long and so she went looking for her at the tap. She found the bucket full of water but not A.E.. Just then, A.E. appeared from the appellant's house which was nearby. The appellant had let A.E. go when he heard M.N.E.'s voice. When M.N.E. asked her why she had gone to that house, A.E. said it was the appellant who had led her there but did not tell her what transpired inside the house. She noticed however that A.E. was not walking properly. Both knew the appellant who was M.N.E.'s neighbour and A.E. referred to him by his nickname "Afro".

On reaching M.N.E.'s house, A.E. took a shower and went to her mother's house. It is there that she told her mother what the appellant did to her. They went back to M.N.E.'s house and gave the information to her. The mother, together with some members of the public proceeded to the appellant's house and arrested him. They took him to Lodwar Police Station where he was re-arrested by *PC Victor Ng'eno (PW3)* the same night. The following day A.E. was issued with a P3 form and was referred to hospital. *Dr. Philip Kipkurui Tonui (PW4*) who was on duty on 20th July, 2004 at Lodwar District Hospital examined her and completed the P3 Form. He confirmed that A.E. had a bruised right labia minora, torn hymen at 8 o'clock position, and whitish vaginal discharge. He concluded that she had been defiled.

In his defence, the appellant denied having known A.E. before or having defiled her as alleged. His defence was however rejected by the two courts below who made concurrent findings of fact as narrated by four prosecution witnesses. In confirming the findings made by the trial court and dismissing the first appeal, the superior court stated as follows:-

"….. there is no dispute that the complainant was aged approximately 10 years old, and that she was defiled on the night in question. Her evidence was corroborated by the medical evidence adduced through PW4. The only issue for determination is whether it was the appellant who defiled her. From the evidence on record, it was not dark. Indeed the complainant could not have been sent to fetch water if it was dark. She could therefore see clearly. PW2 also said it was not dark. She saw the complainant emerging from the appellant's house. She told her then that it was the appellant who had taken her there but she did not disclose immediately that she had been defiled. The complainant and her grandmother both knew the appellant well before that date. The issue of possible mistaken identity does not therefore arise. The fact that the complainant told her parents and PW2 that she had been defiled by the appellant immediately after she got home corroborates her evidence to the effect that it was the appellant who defiled her. The evidence of the complainant was tendered on oath. It was properly tested by the appellant in cross-examination and it was not dented. The learned trial magistrate found her evidence truthful. I have no reason to fault that finding. My finding is that the learned trial magistrate analysed the evidence before him properly. He also considered the appellant's defence but found it unsustainable. He also applied the relevant case law appropriately. I find that he arrived at the right decision."

Although the appellant, who appears in person listed some 13 grounds in his memorandum of appeal, they substantially relate to the findings of fact made by the two courts below, including the severity of sentence, but, as stated earlier, this Court is not at liberty to interfere with concurrent findings of fact unless such findings are based on no evidence at all or on a perversion of it. While we do not accept the learned Judge's conclusion that the young girl's immediate report of the assault on her to PW2 and her parent's amounted to corroboration of her evidence, we nevertheless have carefully examined the record and we are satisfied that there was a proper basis for the factual findings made by the two courts below. We have no reason to upset them.

The appellant nevertheless raised three issues of law which deserve our consideration. The first was

the omission by the prosecution to summon the mother of A.E. as a witness, which omission, in his submission, was fatal to the prosecution case. He submitted that the mother was the first person who received the report on the defilement and the person who led members of the public to arrest the appellant. She is also the person who took A.E. to hospital and to Dr. Tonui (PW4) for completion of the P3 Form. She was therefore an essential witness in the case. In response to that submission, learned Senior Principal State counsel, Mr. Omutelema, submitted that there was no prejudice caused either to the appellant or the prosecution by failure to call the mother as the four witnesses who testified for the prosecution proved the elements of the offence charged beyond reasonable doubt.

The law on witnesses has been variously stated by this Court before and is summarized in *Section 143* of the Evidence Act Cap 80, Laws of Kenya; that is:-

"S. 143: No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

The prosecution in this case called only four witnesses, to prove the elements of the offence charged. The complainant was the most crucial witness and was found to have been truthful in her evidence. In law, such evidence was receivable on its own without requirement for corroboration after the amendment to *Section 124* of the Evidence Act by *Legal Notice No. 5 of 2003*. The proviso after that amendment 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."

We may mention in passing that there was a further amendment to the proviso made by *Legal Notice No. 3 of 2006*. deleting *"a child of tender years who is"* and also deleting the word *"child"* wherever it appears thereafter and substituting *"alleged victim".* That amendment however came after the commission of the offence in issue in this case on 16th July, 2004. Corroboration of A.E's evidence was however found in the evidence of M.N.E. (PW2) and Dr. Tonui (PW4). M.N.E. testified, and was not shaken in cross-examination, that she was staying with A.E at the time and that she saw her emerging from the appellant's house. Although A.E. did not immediately inform her that she had been defiled, M.N.E. noticed that she was not walking properly and soon after, A.E. disclosed to the same information she had given to her mother about the defilement. Dr. Tonui's evidence was similarly corroborative. In those circumstances we agree with Mr. Omutelema that the prosecution had no obligation to summon any number of witnesses, including that of the mother, merely to lend extra weight to the prosecution evidence. The evidence on record left no doubt about the commission of the offence and the person who committed it. We reject that ground of appeal.

The second legal issue raised by the appellant was that his semen was not medically examined to confirm that he was the one who defiled the complainant. Failure to do so, in his submission, raised reasonable doubts that he had committed the offence but none of the two courts below made such finding. With respect, that submission has no substance. The appellant was known personally by A.E. and M.N.E. and therefore the issue of identity did not arise. At any rate, the identity of the appellant was resolved on cogent evidence by the two courts below. Short of DNA examination, which in this case we find unnecessary, there was little relevance in requiring the sampling of the appellant's semen. We reject that ground of appeal also.

Finally the appellant submitted that the P3 form was completed long after the complainant obtained it

on 17th July, 2004, and the possibility cannot be ruled out therefore, that the complainant had been defiled elsewhere, if she was. It is indeed the case that the P3 form was issued on 17th July, 2004 and was completed on 20th July 2004. That is about three days. The evidence on record however is that Dr. Tonui who completed the form was on duty on 20th July, 2004 and that is when the form was completed although it had been issued on 17th July, 2004. We find nothing in that evidence to negate the findings made by Dr. Tonui which the two courts below accepted, and in any event was not shaken in cross-examination. That ground fails too.

In sum, the appeal raises no valid issue of law and we have no reason to interfere with the decision of the superior court in upholding the trial court's decision. We order that the appeal be and is hereby dismissed in its entirety.

DATED and DELIVERED at ELDORET this 21st day of September, 2007.

R.S.C. OMOLO

……..……

JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR