Case Number:	Criminal Appeal 671 of 2010
Date Delivered:	16 Oct 2013
Case Class:	Criminal
Court:	Court of Appeal at Eldoret
Case Action:	Judgment
Judge:	John Wycliffe Mwera, William Ouko, Jamila Mohammed
Citation:	Samwel Kiberenge v Republic [2013] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Uasin Gishu
Docket Number:	-
History Docket Number:	127 of 2008
Case Outcome:	Appeal dismissed
History County:	Bungoma
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT ELDORET

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

CRIMINAL APPEAL NO. 671 OF 2010

BETWEEN

SAMWEL KIBERENGE …….. APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of the High Court of Kenya at Bungoma (Muchemi, J) delivered on 13th May, 2010

in

H.C.CR.C. NO. 127 OF 2008)

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JUDGMENT OF THE COURT

This is a second appeal by *SAMWEL KIBERENGE*, hereinafter referred to as the appellant, from a conviction and sentence of life imprisonment for defilement of a girl contrary to *section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006*. The conviction was upheld and sentence enhanced from thirty (30) years imprisonment to life imprisonment by the learned judge of the High Court [Muchemi, J], sitting as the first appellate court. The appeal originates from a trial in the Senior Resident Magistrate's Court [Sogomo, RM] where the appellant was charged with defilement of a girl as explained above.

The particulars are that on the 25th day of August, 2008 at ***[particulars withheld]*** in Bungoma District within the Western Province, the appellant unlawfully committed an act of penetration against *NNM* a girl aged ten [10] years.

The appellant was also charged with an alternative offence of indecent act with a child contrary to *section 11 (1) of the Sexual Offences Act No. 3 of 2006,* allegedly committed on the same day against the said child.

The appellant was presented before the subordinate court at Bungoma and denied the charges.The matter proceeded to full hearing with the prosecution calling a total of five (5) witnesses. In his defence, the appellant tendered sworn evidence and did not call any witnesses.

The brief facts of the case are that NNM, who gave unsworn evidence, told the court that on the material date she was in the home of her cousin, CN [PW 3], the appellant's wife at around 8 pm when the appellant sent CN to the chemist in Bungoma to buy medicine at that odd hour as she was suffering from malaria and a cough. She had been sent to the appellant's home by her mother PNW [PW 2] to help in taking care of PW 3's baby during the school holidays. NNM testified that she was helping take care of the appellant's infant son. She further testified that when CN left, the appellant grabbed the child from her hands and took him to the bedroom. He then grabbed her and put her on the floor, removed her skirt, biker and had sexual intercourse with her. The appellant thereafter threatened her with death if she disclosed what he had done to her and, therefore, she did not disclose the incident when she returned to her parent's home.

When NNM returned to her home, her mother noticed that her walking was awkward and on checking her private parts she found a smelly discharge. PNM took her to hospital and upon examination by Dr. Moki, she was found to have been defiled. Dr. Mulianga Ekesa, [PW 5] [Ekesa] who produced the Medical Examination Report on behalf of Dr Mole under *Section 77 of the Evidence Act*, testified that the complainant's private parts were swollen and reddened with a smelly discharge from the urethra. The examination report revealed that she had a high vagina swab that indicated that she was infected with gonorrhoea. Police Constable Purity Kawira (PW4) testified that she received a report from Nafula and recorded the witnesses' statements. She later arrested the appellant who was taken to the Police Station at Sio area within Bungoma.

In his defence, the appellant under oath denied the charge and stated that he was framed by his wife, C, since he had another wife, a fact that she was not happy about.

The trial court considered the evidence and found the appellant guilty as charged, convicted him and sentenced him to serve thirty (30) years imprisonment on the main charge. Aggrieved by the decision of the trial court, the appellant filed an appeal which was heard by Justice F.N. Muchemi. The High Court re-analysed and re-evaluated the evidence tendered before the trial court and concluded that the prosecution case was watertight. Based on its findings, the High Court dismissed the appeal, affirmed the conviction but found that since NNM was 10 years, the trial court erred in imposing a sentence of 30 years. In the result, the learned judge in terms of *Section 8 (2) of the Sexual Offences Act*, enhanced the sentence to life imprisonment.

Aggrieved by the decision of the High Court, the appellant filed a Memorandum of Appeal on 28th July,

2010, to this Court. At the hearing of the appeal, the appellant who appeared in person, wholly relied on the nine grounds set out in the Memorandum of Appeal which are reproduced hereunder:

1. That the learned Judge erred in law in dismissing the appellant's appeal and charge sheet (sic) that was incurably defective in substance and invalid.

2. The learned Judge erred in law in failing to find that there was violation of the appellant's fundamental rights under section 77 (2) (b) of the then Constitution of Kenya as read with section 198 (1) of the Criminal Procedure Code, which require interpretation of the evidence given in his presence during trial.

3. The learned Judge erred in law by arriving at a wrong decision against the weight of evidence on record.

4. The learned Judge erred in law when she failed to consider that the evidence on record does not support the charge.

5. The learned Judge erred in law in failing to take into consideration the appellant's evidence when making the judgment.

6. The learned Judge grossly misdirected herself as she did not observe that the appellant's fundamental constitutionally guaranteed right had been violated grossly as he was placed in Bungoma Police custody as from 2/8/2008 to 9/8/2008 hence 7 days than (sic) the required period of 24 hours.

7. That the learned judge erred in law in dismissing the appellant's appeal by failing to appreciate that the case was not only insufficient, but was contradictory, unreliable, fubricative, [sic] speculative, discredited and inconsistent in material (sic). The particulars were totally inadequate to sustain a conviction.

8. That the learned Judge erred in law in dismissing the appellant's appeal considering that the forensic evidence was missing as the victim was not taken for DNA test to verify if the semen deposit were from the appellant.

9. That in all circumstances of the case, the learned Judge did not exercise her authority in the matter judiciously and or excusably. [sic]"

The appellant further generally reiterated his defence, that the charges were fabricated by his first wife who had a disagreement with him. He urged the court to allow his appeal.

Mr Nicholas K. Mutuku, learned Senior Assistant Director of Public Prosecutions, opposed the appeal stating that the conviction and sentence were safe. He contended that there was sufficient evidence to support the charge of defilement before the trial court; that the evidence of NNM was well corroborated by that of her mother PNW and the medical evidence. He argued that the delay in disclosing the alleged defilement was due to threats of death from the appellant. In any event, he argued, that if the appellant was to be examined for a sexually transmitted disease there was a likelihood

that the findings would be different as the period of time for testing was sufficient for the appellant to have sought treatment and healed.

Mr Mutuku further contended that the appeal does not raise any legal grounds; that the issue of delay in bringing the appellant to court had its remedies under *Section 72 (6) of the former Constitution* and, therefore, was inconsequential to this appeal. Regarding a grudge between the appellant and the mother of the complainant, Mr Mutuku submitted the same was raised and addressed in the trial court and High Court and the concurrent findings of the two courts was that the grudge was never shown to exist. That is a finding of fact.

On the issue of sentence enhancement, he submitted that the learned Judge was correct and within the law, having been guided by the prescribed sentence for the offence in the Sexual Offences Act. In view of the foregoing, he urged the court to find that both courts below evaluated the evidence properly. He therefore, urged us to dismiss the appeal and uphold both the conviction and sentence.

We have carefully considered the grounds of appeal, the submissions by the learned counsel for the respondent and the law.

This being a second appeal, this court is restricted to address itself only on matters of law by dint of the provisions of *Section 361 (1) of the Criminal Procedure Code*. *Section 361 (1)* provides:

"361 (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-

*(a) on a matter of fact, and severity of sentence is a matter of fact."*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. See *CHEMAGONG V R, [1984] KLR 611*. In *KAINGO V R, (1982) KLR 213* at p. 219 this Court said:

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (REUBEN KARARI C/O KARANJA V. R, (1956) 17 EACA 146)."

In view of the aforementioned, the issues of law arising for the court's determination are:

1. Whether there was sufficient and sound evidence to establish the charge against the appellant"

2. Whether the appellant's detention was unlawful and whether the delay was inordinate"

3. Whether the sentence was enhanced lawfully"

On the issue whether there was sufficient and sound evidence to establish the charge against the appellant, in considering whether the evidence was sufficient, the trial court in its judgment at page 4 stated that:

"….I have warned myself against entering a conviction based on the uncorroborated evidence of a minor in the case of this nature and I find that for reasons aforegoing (sic) it would be safe to do so. Accordingly I find that the accused did commit the acts complained of and in result I convict him....."

For her part, the High Court Judge in her judgment at page 5 stated that:

"I am satisfied that the Appellant was convicted on very sound evidence which was not challenged by the defence. The conviction is therefore safe."

Notably, the trial court believed that the complainant, NNM, stated the truth by stating in the judgment at page 3 as follows:

"The only eye witness to the incident in question is the complainant herself....As the court of trial I had the benefit of observing her demeanour and it was manifest that she was frightened and embarrassed. Secondly, I am unwilling to discount her evidence because it gels with what she narrated to her mother PW2 when she decided to open up. Thirdly, the findings by the medical officer as noted in the P3 form are consistent with the history PW1 gave of a sexual assault against her. At the trial I also read the demeanour of the complainant PW2 and PW3 and I found them to be both candid and forthright. Factoring in the complainant's evidence that articulates with that of the doctors I have no reason to disbelieve the said witness."

The proviso to *section 124 of the Evidence act (Cap 80, Laws of Kenya)* as amended by *Act No. 5 of 2003*, stipulates:

"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."

This Court is guided by the case of *JACOB ODHIAMBO OMUMBO V R, [2008] e-KLR*, where this Court held:

"Though P's evidence was that of a child of tender years, the court can convict on it by virtue of the proviso to S 124 of the Evidence Act." (supra)

In the instant appeal, we note that the trial magistrate observed that PW 1 was intelligent enough to appreciate the court proceedings and the need to be truthful. Further, the trial magistrate observed that PW 2 and PW 3 were both candid and forthright; and that PW1's evidence was in consonance with that of the doctor.

We are, for those reasons, of the view that there was sufficient and sound evidence to establish the charge against the appellant.

On whether the delay in taking the appellant to court invalidated the charge, we reiterate what this Court said in the case of *JULIUS KAMAU MBUGUA V R, [2010] eKLR 37*:

"The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6) of the former Constitution. That is the appropriate remedy which the appellant should have sought in a different forum."

In the instant appeal, the record shows that the total hours spent in police custody was slightly over twenty four [24] hours. The breach could logically give rise to a civil remedy which the appellant can seek in a different forum.

Finally, on the issue of whether the sentence was enhanced lawfully, the only sentence available for a charge under *section 8 (1) (2) of the Sexual Offences Act, No. 3 of 2006* is life-imprisonment. The *Sexual Offences Act No. 3 of 2006* provides that:

"8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(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." Emphasis supplied.

The Sexual Offences Act provides for minimum sentences and Parliament gives no discretion to the courts to impose sentences below those specified as minimum. This is in tandem with the main objective of the Act which is *"prevention and protection of all persons from harm from unlawful sexual acts*".

A reading of *Section 8 (2)* clearly shows that the only sentence provided for a person who commits defilement of a child aged eleven years and below is life imprisonment. Once there is proof that a child is eleven years and below, the mandatory sentence is life imprisonment. In the instant appeal, the age of PW 1 was unequivocally proven as ten years from her birth certificate which was admitted in evidence.

This Court is guided by the case of *JOSEPH KIPLIMO V R, CR NO. 416 OF 2010*, where this Court stated as regards *Section 8 (2) of the Sexual Offences Act*:

"This provision apparently provides only one sentence for a person who commits an offence of defilement with a child aged below eleven years and further that that sentence of life sentence is

mandatory. Section 8 (3) states that a person who commits the same offence but with a child between the ages of twelve and fifteen years is liable, upon conviction to imprisonment for a term not less than twenty years whereas Section 8 (4) sets out a sentence not less than fifteen years for one convicted of the same offence where the victim is between the ages of sixteen and eighteen. In short, for the offender where the victim is above eleven years, the court has discretion to decide on the sentence albeit the sentence cannot be below either fifteen years or twenty years. But for the same offence with children below eleven years, that discretion is not specifically spelt out by Parliament. … As the law stands, Section 8 (2) [supra] does not allow for substitution of a definite period of imprisonment. it provides for life imprisonment and no more no less. … The issue of sentence in this case is a matter of law as it is the issue as to whether the sentence meted out to the appellant is lawful or not. It is not a question of severity of sentence. It is whether a lawful sentence was awarded. We have jurisdiction to interfere." [Emphasis supplied]

Accordingly, we hold that in accordance with *Section 8 (2) of the Sexual Offences Act*, the first appellate court made the correct decision by setting aside the unlawful sentence of thirty [30] years imposed by the trial court and substituting it with that lawfully provided for by the *Sexual Offences Act*, being a mandatory sentence of life imprisonment.

In the result, this appeal fails and we find no basis to interfere with the decision of the High Court. Accordingly, we dismiss the appeal in its entirety.

Dated and delivered at Eldoret this 16th day of October, 2013.

J. W. MWERA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR