REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 269 of 2010

SAMUEL KILONZO MUSAU……...……..APPELLANT

VERSUS

REPUBLIC…….…..RESPONDENT

(Being an appeal from the original conviction and sentence in Kithimani Senior Resident Magistrate's Court Criminal Case No. 268/2008 by Hon. A.W. Mwangi SRM on 12.08.2010)

JUDGMENT

1. Samuel Kilonzo Musau ("Appellant") was charged before the Kithimani Senior Resident Magistrate's Court with the main count of defilement. The charge sheet states:

CHARGE COUNT: DEFILEMENT CONTRARY TO SECTION 8(1)(2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

PARTICULARS: SAMUEL KILONZO MUSAU: On the 16th of March, at [particulars withheld], Yatta District within the Eastern Province intentionally and unlawfully did an act which caused penetration with his genitals namely penis into the genitals namels vagina of M.N., a girl aged seven (7) years.

2. The Appellant also faced an alternative charge of committing an indecent act to a child contrary to section 11(1) of the Sexual Offences Act.

3. At the trial, the prosecution produced six witnesses. The first to testify was the Complainant, M.N. (PW1). The Trial Magistrate conducted a *voir dire* and concluded that she was competent to give sworn testimony. In her evidence, the Complainant testified that around 5:00pm on 16/03/2008, she was returning home from the *posho* mill where her mother had sent her when the Appellant grabbed her, stuffed stones in her mouth, and dragged her to a nearby forest where he defiled her. He then threatened to kill her if she told anyone about the defilement. She went home and after some hesitation finally gathered the courage to report what had happened to her mother. She testified that she did not know the Appellant by name, but that she knew him as one of the men who worked at a nearby quarry.

4. Her mother then asked for all the men who worked at the quarry to be called. About 5 of the men were assembled but the Appellant was not one of them. The Appellant was later called to join the assembly, and she was able to pick him out from the parade. She later learned that the Appellant was known as Kilonzo. During cross-examination, the Complainant insisted that the Appellant attacked her while the sun was still up and she was able to see him very well throughout the attack. She also insisted that she used to see the Appellant everyday on her way to the river although she did not know his name.

5. PW2 was the Complainant's mother. She also gave a sworn statement. Her testimony was that at around 5:00pm of 16/03/2008 her daughter who she had sent to the *posho* mill returned and told her that she had been assaulted by a certain man who worked in the quarry. The girl looked weak. She examined her and saw what looked like semen in her underwear. With the help of a neighbor, she called for all the men who worked in the quarry. When the men came the Appellant was not among them. He later joined the group at around 7.30pm. With the help of two lamps and big torches, the Complainant was able to pick out the Appellant as the man who had assaulted her earlier. She reported the matter to [particulars withheld] Police Post and took the girl to hospital. On being cross-examined she indicated that she had no idea where the Appellant had been when the other quarry workers first assembled. They were told that he was away in Kiatineni and they decided to wait for him. On being cross-examined by the Court, the witness indicated that it is the Appellant's co-workers who pointed out that he was missing from the parade.

6. On 10/12/2009, after the first two witnesses had testified, the Prosecution applied to amend the charge. The amendment was to include the words "intentionally and unlawfully" to the charge sheet. The Appellant raised no objection and the amendment was allowed. The record indicates that the charge was then read and explained to the Appellant in Kikamba, and that he pleaded not guilty. The hearing proceeded with the prosecution calling the third witness to the stand.

7. PW3 – Munyao Mutua – is one of the villagers who assembled around the Complainant's mothers stall when he heard screams. He also participated in the identification parade wherein the Complainant picked out the Appellant as her assailant. He described how they gathered all the quarry workers, put on lamps and asked the child to identify her attacker. Once the child picked out the Appellant, they put her inside a stall and switched the Appellant's position in the line-up. The child came out a second time and was able to pick out the Appellant from his new position. On being cross-examined, he testified that the villagers only paraded employees from Kinuthia's quarry because it had been reported that the attacker was an employee at that quarry. He also testified that they fetched the Appellant from his house and took him to join the parade. It was his testimony that he did not know the Appellant well but he used to see him at the village.

8. PW4 – Peter Mutinda – was a quarry worker like the Appellant though he worked in a different quarry. His testimony confirmed the account of the identification parade given by PW2 and PW3. Being a quarry worker, he was one of those who were asked to join the parade. The child came out and picked the Appellant. She was taken to a stall, the Appellant was taken to a different position but when she returned, she was able to pick the Appellant out from his new position. The identification was done with the aid of a lamp since it was already dark. He also confirmed that the Appellant did not go to the parade voluntarily – that he had to be taken there by other people though he was not one of the people who took the Appellant to the parade.

9. PC James Ndegwa of Yatta Police Station testified as PW5. He took over the investigations file from PC Mwaniki who had been transferred to another station. He did not arrest the Appellant, but participated in the arrest of the Appellant's surety when both he and the Appellant were at large after failing to show up in court. On re-examination, he testified that he did not visit the scene of the crime. He also testified that the Appellant was not taken for any medical examination because it was not necessary. He also testified that he was not aware that the Complainant's family owed the Appellant any money, or that they had his teeth removed.

10. The last witness for the Prosecution was Alfred Toronke, a Clinical Officer at Matuu District Hospital. He testified that he examined the Complainant who had allegedly been defiled on 16/03/2008. The Complainant complained of pain in her vaginal area and when passing urine. She had no visible injuries on her body, though her hymen was broken, her vulva was swollen and there were lacerations on her vaginal area. She had no discharge, no spermatozoa and no fungal infection. Based on the injuries, he concluded that the child had been defiled. He examined the child after she had been treated at Thika District Hospital.

11. On 11/03/2010 the Learned Magistrate concluded that the Appellant had a case to answer and put him

on his defence. The record indicates that Section 211 of the CPC was complied with, and the Appellant chose to give an unsworn statement, with no witnesses.

12. In his defence, he stated that after breakfast on 16/03/2008 he attended church with his family then he left for Mithini market where he had some issues to sort out. The Appellant's narrative was that he went back home from the market. While at home his employer called him to Kiatineni to collect his money. He left for his employer's and reached there at 5:00pm. After collecting his money he went with his employer to some club which he left at 8:00pm. The Appellant testified that while heading back home he met a group of people who told him that they had been looking for him. He stated that the group of people assaulted him, broke his tooth and took his money. They then frog marched him to [particulars withheld] Police Post where they informed the policeman that the Complainant was following them and would arrive shortly. By midnight the Complainant had not arrived – and she never showed up. He was locked up at the station for another three days without being told what he had done. On 19/03/2008 he was accompanied by a policeman to Yatta Police Station where he remained for another 7 days. On 28/03/2008 he was finally arraigned in court with an offence he had no clue about. In other words, his theory of defence was denial: he insisted that he knew nothing about the defilement.

13. The trial court in its judgment found that the Prosecution had proved beyond reasonable doubt that the Appellant defiled the Complainant. The Court considered that the events took place at 5:00pm when there was sufficient light, the Complainant spent considerable time with the Appellant and was therefore able to see him properly. The trial Court was also convinced that the Complainant knew her attacker as a person who worked in a nearby quarry – even though she did not know him by name. The Court observed that her evidence remained consistent even on cross-examination, and that she had no reason to lie against the Appellant. She also testified with the innocence of a child, and struck the court as an honest witness.

14. The Court also believed the testimony of the Complainant's mother, the quarry worker who was in the parade with the Appellant and the PW3 who was one of those who organised the parade. The Court concluded that the fact that the Complainant was able to pick out the Appellant from two different positions in the parade confirmed that she knew him as the attacker. It was not lost on the Court that it was dark – the Magistrate observed that the lighting that was provided by the lamps and the torch used in the identification was sufficient to aid the Complainant to pick out her attacker.

15. The Court dismissed the Appellant's account of the events as lies and proceeded to convict him on the charge of defilement. She heard his mitigation and sentenced him to serve life in prison.

16. The Appellant was aggrieved with the conviction thus this Appeal. His Appeal is pegged on three grounds – that he had been detained for longer than is by law required; that the conviction was based on a mistaken identification; and that the court failed to follow the procedure laid down in Section 214 of the CPC when the charge was amended.

17. This being the first appeal, I am guided by the decision in the case of ***Okeno v. Republic [1972] EA 32*** where the role of a first appellate Court is given as follows:

An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinitize the evidence to see if there was some evidence to see if there was some evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)

18. I have read the testimony of the Complainant and her narration of the events which led to this case. Before she testified, the Magistrate conducted a *voir dire* in which she ascertained that the Complainant

was a child who was nevertheless competent to give a sworn statement. Her evidence was that the Appellant accosted her on her way back home from the *posho* mill and defiled her. She narrated the entire ordeal which lasted long enough for her to see her attacker. The events took place at around 5:00pm when there was sufficient light. She had seen the Appellant on previous occasions, even though she did not know him by his name. When she was called upon to identify him, she did so – not once, but twice from different positions in a parade of 25 people. Although the identification was done at night, there was sufficient light from the lamps and torches which were at the scene. This witness' testimony was consistent even on cross-examination. Her testimony remained unshaken. In the circumstances, I find that she gave a true account of what happened to her on that fateful day, and properly identified the Appellant as her attacker.

19. The evidence of PW2, PW3 and PW4 is also important to the case. PW2 is the Complainant's mother. She testified that the child was 7 years old. She examined her after she reported the defilement and discovered what looked like semen in her underwear. The Complainant informed her that she had been defiled by a man who she knew as a quarry worker. She then mobilized some people who assisted her with the identification parade from where her daughter picked out the Appellant from among other quarry workers. PW3 is one of those who assisted with the parade. PW4 took part in the parade since he was a quarry worker. He narrated how it was conducted and how the Complainant consistently picked out the Appellant even though his position had been changed in the lineup.

20. PW6 examined the Complainant and testified that she had been defiled. He produced the P3 form in respect of his examination.

21. From the above testimony, it is evident that the Complainant's account of the events was accurate. The identification of the Appellant as the attacker was also properly done. Our case law (see, for example, ***Charles Maitanyi v R*** **[1986] 1 KLR 198**) admonishes courts to exercise the greatest caution and circumspection before convicting on testimony of identification especially where the evidence is that of a single identifying witness. However, here, even after exercising the great circumspection, we cannot say that the Learned Magistrate was in error to hold that the Appellant was properly identified. As the Learned Magistrate pointed out, the incident occurred at 5:00 pm when it was still day light. The Complainant spent a little bit of time with the Appellant during the ordeal. They were, obviously, close enough for the defilement to take place with no hindered line of vision. More importantly, this was identification by recognition: the Complainant knew her attacker even before the incident. She testified quite forthrightly and remained unshaken on cross examination that she used to see the Appellant as she went to the river. Indeed, the Complainant described her attacker to her mother shortly after the attack. The make-shift identification parade innovatively performed by the villagers, in my view, only strengthened the identification by recognition.

22. To my mind, the issue of identification is the only serious one going to the facts. The record is plainly clear that the Appellant's alibi is unavailing. He claimed that he met a group of people who beat him up and took away his money and then frog-matched him to the Police. But we have a number of witnesses who testified that they were present when the identification parade was done which belies the Appellant's narrative. In any event, the Learned Magistrate who heard and saw the witnesses pronounced on their credibility: she found the Prosecution witnesses to be credible and straight-forward. Their narrative was simple and believable. She believed them. I have no reason whatsoever to interfere with the Learned Magistrate's findings on this.

23. The Appellant challenged the manner in which the "identification parade" was carried out, saying it was unlawful. The rules governing the conduct of identification parades (which the Appellant has referred to in his written submissions) usually apply to identification parades conducted by the police for the purpose of singling out a suspect to be charged in court. In the present case the identification parade was done by members of the community in order to enable the Complainant to point out who her attacker was so the attacker could be handed to the police. They did the parade and the Appellant was pinpointed as the attacker. They then handed him over to the police. If the police felt the need to conduct another identification parade before charging the suspect then they were under an obligation to do so under the strict rules that govern identification parades. This was not the scenario in the present case and this

ground of appeal must therefore fail. As I have already held, there was safe and positive identification of the Appellant by the Complainant.

24. In his grounds of appeal, the Appellant states that he was detained for longer than the 24 hours in violation of the law. This appears true from the Court record. The charge sheet reads that he was arrested on 26/03/2008 and that he was arraigned on 28/03/2008. His own statement is that he was arrested on 16/03/2008. The evidence from the other witnesses is consistent with this fact. They all state that they handed over the Appellant to the Police on 16/03/2008. There is therefore a discrepancy between the witness accounts and the charge sheet which reads that he was arrested on 26/03/2008.

25. Even accepting this position as true, which I do, my view is that this delay in presenting the Appellant before a Court is not one which entitles him to an acquittal. Our case law now establishes that failure to produce an accused person before a Court within 24-hours does not automatically nullify any subsequent trial; it triggers a right by the accused person to seek civil remedies against the state. Of course there are times when the delay in presentment is so flagrant that the Court will conclude that there was a deliberate attempt to frustrate the rights of the accused person and suppress the constitutionally-guaranteed rights to fair trial. This was not the case here, and indeed, the Appellant does not claim as much. He has only urged me to order the Commissioner of Police to compensate him. However, this is not the forum to ask for such an order.

26. The final ground of appeal is that the trial court allowed an amendment to the charge sheet but did not thereafter comply with the provisions of Section 214 of the CPC. The section requires that whenever a charge is amended, the Accused must be called to take a fresh plea after the charge is read to him. In the present case, it is evident from the record that the Appellant was asked to take a fresh plea after the charge was amended. The Section also provides that when a charge is altered the Accused may demand that any or all of the witnesses who had previously testified be recalled to the stand. The language of the section does not impose a duty on the court to advise the Accused of the option of recalling witnesses – it states that it is the Accused who should make a request. Once s/he makes the request the court must then oblige. The record does not indicate any such request from the Accused, and he cannot now blame the court. To understand the differences in language, compare, for example, section 214 with section 200(3) of the Civil Procedure Code. The latter section reads:

*Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate **shall** inform the accused person of that right.*

27. Our case law has, correctly, held that the language of this section makes it mandatory for the succeeding magistrate to inform the accused person of his right to recall witnesses. Section 214(1)(ii), on the other hand, provides:

Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

28. This section gives the accused person the right to demand that the witnesses be recalled but it does not create a mandatory obligation on the Court to advise the accused person of the right. It would be good practice for magistrates to inform accused persons of this right as a means of enhancing liberties and protections of fair trial, but failing to give this advise is not a reversible error.

1. Before ending, there is one other matter I would like to address. Even though the Appellant did not raise it, there appears to be a technical deficiency in the Charge Sheet. As set out in paragraph 1 of this judgment, the Appellant was charged contrary to section 8(1)(2) of the Sexual Offences Act. In fact, there is no such section in the Sexual Offences Act. The Appellant did not raise this issue but it is important to address it here. For purposes of fairness and completeness the Court must ask whether this error in the charge sheet entitles the Appellant to an acquittal or whether it is a technical one curable because it did

not occasion a miscarriage of justice.

2. I have said elsewhere that the answer to this question must begin with section 382 of the Criminal Procedure Code. In material part, it provides that:

…. no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

3. The proviso to Section 382 provides that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

4. Next, then, we must ask ourselves when it is appropriate to find that a charge sheet is fatally defective. Our case law has given pointers. Two cases are pertinent: the case of ***Yosefa v. Uganda [1969] E.A. 236*** – a decision of the Court of Appeals – and ***Sigilani v. Republic [2004] 2 KLR 480*** – a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. ***Sigilani*** held:

The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

5. As I have previously held, the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? In this case, the Appellant was charged under section 8(1)(2) of the Sexual Offences Act. No such section exists in the Act. Did this prejudice the Appellant and occasion a miscarriage of justice? I have previously said that the answer to that question is provided by seeking to see if the accused person can be said to have understood the charges facing him well enough to understand the ingredients of the crime charged so that he can fashion his defence. This can be tested, for example, by how much or vigorously he participated in the trial process and whether the record shows that he was able to follow the proceedings and ask questions in line with his theory of defence.

6. At the end of the day, therefore, the test is not at all a formalistic one but a substantive one. On my part, I have adopted a test that looks at the trial process in its totality rather than the retail defects separately. The aim is to establish if the trial process could have been said to be fair to the accused person. If the charge sheet has a technical defect but all the other procedures are meticulously followed and the other substantive rights of the accused person are evidently respected in the trial process, it will be easier for a Court to fairly immunize the technical defect in the charge sheet – especially if it is clear that the accused person understood what was facing him and his participation in the trial process vindicates that position. On the other hand, if a defect in the charge is followed by a series of other procedural or substantive mishaps or miscues in the trial process which all affect the rights of the accused person, in my view, the Court should be reluctant to utilize section 382 to cure the charge sheet even if each of the defects in the trial process could, standing on its own, be cured or treated as harmless error. An accumulation of singular streams of procedural defects which would otherwise be harmless errors spew into a river of substantive defect which would entitle an accused person to an acquittal upon appeal.

29. Applying this approach to the facts of the present case, I can confidently say that no miscarriage of justice was occasioned by the technical defect in the charge sheet and I will proceed to “cure” it under section 382 of the Criminal Procedure Code. The fact that the Appellant did not even raise the issue in this first appeal, is an indication that he suffered no substantive miscarriage of justice. Further indication is provided by his participation in the trial process in a way that makes clear that he understood the

charges facing him. All in all, I am certain that the trial process was fair and the Appellant had sufficient notice of the charges facing him.

30. The upshot of this is that the appeal herein must fail. The sentence imposed was 20 years which is the statutorily prescribed minimum for a person convicted of defiling a child such as the Complainant who is 7 years old. Consequently, I dismiss the appeal in its entirety. Orders accordingly.

DATED and **DELIVERED** at **MACHAKOS** this **28TH** day of **SEPTEMBER, 2012.**

_____

J.M. NGUGI
JUDGE