REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.134 OF 2017

(FORMERLY NKR HCRA.22/15)

(Appeal Originating from Nyahururu CM's Court by: Hon. V. Ochanda – R.M.)

STEPHEN NJOMO MUHITO……..…APPELLANT

- V E R S U S -

REPUBLIC…….....RESPONDENT

J U D G M E N T

Stephen Njomo Muhito, the appellant herein, was charged with the offence of defilement Contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act (SOA).

The particulars of the charge were that on 16/2/2014 at [particulars withheld], in Ol Kalou Division, Nyandarua County, intentionally caused his penis to penetrate the anus of F.M.K. a child aged 9 years.

In the alternative, he faced a charge of indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act. On the same day, at same time the appellant intentionally touched the buttocks of F.M.K. child aged 9 years.

The appellant denied the offence and the case proceeded to full trial with the prosecution calling a total of six witnesses. When called upon to defend himself, the appellant testified on oath. He was found guilty, convicted and was sentenced to serve life imprisonment.

The appellant is aggrieved by both conviction and sentence and has preferred this appeal filed in court on 22/10/2014. Further grounds were adduced in his written submissions filed in court on 23/2/2017. The grounds can be summarized as follows:

(1) That the charge was defective;

(2) That the appellant's Constitutional rights under Article 49(1)(f) were violated;

(3) That the evidence that the trial court relied upon was contradictory/inconsistent;

(4) That the trial court shifted the burden of proof to the defence;

(5) That the appellant's mental condition was not considered.

Ms. Waweru, counsel for the State opposed the appeal and submitted that the burden of proof was

properly discharged and the conviction is properly founded; On identification, counsel noted that the appellant was well known to the complainant, as he was a neighbour to his aunt; that the complainant had been to the appellant's house before; that PW2 found the complainant in the appellant's house and corroborated PW1's evidence; that PW3 stated that PW1 identified the offender as Njomo, the appellant; that the medical evidence confirmed that the appellant was defiled; counsel also urged that the act of penetration was proved as confirmed by PW5 the Clinical Officer who found that the anal area was bruised and tender, which is evidence of forced penetration. Counsel observed that the defence was a bare denial.

On the allegation that the charge was defective, counsel urged that there was indeed an error between the date of arrest and date of arraignment in court, i.e. 11/2/2014, but that the appellant never raised it at the trial and it was not fatal to the charge. Counsel denied that there was any violation of the appellant's fundamental rights.

This being the first appeal, it is common place that this court is mandated to reconsider and re-evaluate the evidence on record bearing in mind that it did not see or hear the witnesses. ***See Okeno v Republic 1972 EA 32***.

After the court conducted a voire dire examination on PW1, (FMK) the court concluded that the child understood the importance of telling the truth but did not understand the meaning of the oath. PW1 was therefore affirmed. PW1 told the court that he was 9 years old. He recalled that on 16/2/2014, he was living with his aunt W; that the appellant who lived in the same plot found him in his aunt's kitchen, carried him to his house while covering his mouth, removed his (PW1's) shorts and told him to kneel; that the appellant pulled his trouser to his knees, spat on his fingers and smeared the saliva on his anus and inserted his male organ in his anus. He cried and he heard M ask the appellant what he was doing to the child. PW1 said that when he left the house, he met his uncle N (PW3) who he informed what had happened to him and it is then PW3 locked the appellant's door from outside, called the chief who in turn called the police.

PW2, R M told the court that he was in his house, a room of 10 x 10 m – (mud house) which is next to the appellant's house. He heard the appellant talking to somebody and he went to find out. He knocked on the door and the appellant opened. He saw a boy who had no trousers kneeling facing the wall, next to the appellant; PW2 first left but when in his house, he heard the boy crying and it is then he asked the appellant what he was doing to the child. He later met the boy with the aunt and heard that the boy had been defiled.

PW3 J N W testified that on 16/2/2014 about 6.00 p.m. he went to Z W's (his sister) home. He learnt that the sister sent the child and he had disappeared. He met the child (PW1) with the sister and learnt that the appellant had locked him up in his house; that PW1 tried to ran away but PW3 caught him. PW3 said that PW1 told him what the appellant had done to him and he went and locked the appellant's house from outside and police were called.

PW4, Z W recalled that she was at home with her children and those of her sister; that PW1 told her he was cold and went to the kitchen. Later she sent another boy to call PW1 but he was nowhere. She started to look for PW1 and found him at the gate and instead of entering the house, he ran off and his uncle (PW3) chased, caught him and interrogated him and it is then he explained what the appellant did to him.

It is PW6 PC John Njoka who visited the scene. He found that the appellant had locked himself in the house and broke the door to remove him; that PW1 repeated to him what the appellant had done to him. He arrested the appellant while PW1 was taken to hospital.

PW5 Peter Nginyo a Clinical Officer at J.M. Kariuki District Hospital examined PW1 about 10.00 p.m on 16/2/2014; that he found lacerations with tenderness around PW1's anal region but there was no discharge. He also examined the appellant but he had no injury to his male organ. He also examined the appellant's mental status and then found he had been admitted in 2001 and 2008 for mental illness and

was attending outpatient clinic; that his mental status was controlled but he was engaged in substance abuse.

When called upon to defend himself, the appellant in his unsworn evidence recalled that he was in the house when somebody knocked and he was informed that he committed the offence; that the boy's mother had wanted to live with him, he lived with her for 1 ½ months and she wanted money for fees and later she threatened him. He denied committing the offence.

I have reviewed and considered the evidence before the trial court. The age of the complainant was not an issue PW1 said that he was 9 years old, PW6 produced PW1's immunization card which shows the date of birth as 13/2/2005. When the offence was committed, he was 9 years old.

To prove an offence of defilement, the prosecution has to establish that there was penetration.

Penetration is defined in Section 2 of the Sexual Offences act as;

> ***"2. Interpretation***
>
> ***(1) In this Act, unless the context otherwise requires:-***
>
> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"***

PW1 described in detail what happened to him; that the appellant removed his shorts, inserted his male organ in his anus. He was injured in his anal area as confirmed by PW5 who examined PW1 on the same night and made a finding that PW1 was defiled. There was evidence of penetration and there is no requirement that spermatozoa be present. No doubt PW1 was defiled.

This offence allegedly took place at 6.00 p.m. It was still day time. PW1 told the court that he was actually carried from the kitchen by the appellant to his house. He knew the appellant. They lived in the same plot. PW2 a neighbour to the appellant confirmed seeing PW1 in the appellant's house on that evening and later he heard the complainant crying while in the appellant's house. Soon after the incident PW1 named the appellant to PW3 as the offender. PW6, who arrested the appellant, confirmed that PW1 informed him that it is the appellant who had defiled him. The first report made by the complainant was consistent, identifying the appellant as the offender. PW2 and 6 found the appellant still in his house from where he was arrested. He never escaped from the scene. The complainant told the court that in fact that was not the first time that appellant had defiled him.

I am satisfied that the issue of identification did not arise and the lower court arrived at the proper finding that it is the appellant who defiled PW1.

The appellant contends that the trial court did not take into account his state of mind:,

PW5 on examining the appellant found that he had suffered a mental illness in 2001 and 2008. The Clinical Officer said that according to the records, the appellant was consistently attending outpatient clinic and was therefore in his right mind save that he was abusing drugs. In fact at no stage did the appellant allege that he was not well nor did he display any signs that he was not understanding the proceedings. Had it occurred, the trial court would have taken steps to have him examined again. As regards his state of mind the trial court did consider that issue and in its judgment, the court noted that it had observed the appellant and he followed and comprehended the proceedings by cross examining the witnesses and even testified in his defence. There was no evidence of mental illness and this court cannot arrive at a different finding.

The appellant's defence is that he was framed. The appellant gave an explanation in his defence that the complainant's mother had wanted to live with him and he tried but they seem to have fallen out. That is an issue he raised as an afterthought. At no stage did he put it to the witnesses when they testified. The

appellant also cross examined the witnesses and at no stage raise the defence of insanity or grudge. He had the opportunity to do it and he did not take advantage of it. He cannot raise the said defences so late at this stage.

The other ground raised by the appellant is that the charge was defective: He alleged that the particulars of the charge indicated that the offence was committed on 16/2/2014 but that on the charge sheet, where it shows the date of arrest and date of arraignment in court, it reads that he was arrested on 16/2/2014 and arraigned in court on 11/2/2014. Obviously, it was not possible to be arraigned in court at an earlier date before arrest. There is an obvious error on the charge sheet. But in any event the two dates do not form part of the particulars of the charge. The record of the court clearly shows that the appellant was arraigned before the trial court on 19/2/2014 when plea was taken. What is important is that the statement of the offence and particulars of the charge are correct.

Section 134 of the CPC provides what is required to be contained in a charge or information. The section reads:

> ***"134. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

In the instant case, the charge and particulars were proper and the error was peripheral and did not render the charge defective as to nullify the trial. It is noteworthy that this issue was not raised at trial. That ground must fail.

On breach of fundamental rights:

The appellant alleges that he was arrested on 16/2/2014 a Sunday, but he was not arraigned before the court till 19/2/2014, after 3 days, which offends his rights under Article 49(1)(f) of the Constitution. The said Article reads as follows:

> ***"49(1) An arrested person has the right;***
>
> ***(f) to be brought before a court as soon as reasonably possible, but not later than***
>
> ***(i) twenty four hours after being arrested; or***
>
> ***(ii) if the twenty four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;***

The appellant was arrested on 16/2/2014 night, a Sunday. I believe having been arrested on Sunday night, the police may not have been ready with the charge on 17/2/2014 and should have arraigned the appellant in court by latest 18/2/2014. The court has no idea why the appellant was not arraigned in court on 18/2/2014. However, the appellant never complained about this breach during the trial. Even if he had, breach of fundamental rights is a totally different jurisdiction from the criminal jurisdiction. Breach of the appellant's fundamental rights cannot be a bar to his prosecution under the criminal jurisdiction because, if indeed there was a delay in bringing him to court, it is the police who are to blame. In the criminal case, there is a complainant whose rights have been breached and the case against the appellant has to proceed independent of the allegations of breach. Besides, the appellant never raised this allegation at the trial to enable the prosecution respond to them. They may have had an explanation for the delay. The prosecution cannot be called upon, at this stage to explain the delay. A similar issue was considered in the case of ***Mwalimu –vrs- Republic (2008) KLR 111*** the Court of Appeal Held:

> ***2. Under section 72(3) of the Constitution, where a person charged with a non-capital offence was brought before the Court after twenty-four hours or, where he was charged with a capital offence, after fourteen days, complained that the provisions of the Constitution had not been***

complied with, the prosecution could still prove that he was brought to Court 'as soon as was reasonably practicable' notwithstanding that he was not brought to Court within the stipulated time.

3. The mere fact that an accused person was brought to court either after the twenty-four hours or the fourteen days, as the case might be, stipulated in the Constitution, did not ipso facto prove a breach of the Constitution. Each case had to be decided on its own facts and circumstances and in deciding whether there had been a breach, the Court must act on evidence.

4. Section 84(1) of the Constitution suggested that there had to be an allegation of breach before the Court could be called upon to make a determination of the issue and the allegation had to be raised within the earliest opportunity.

As held above, the fact that there was a delay in bringing the appellant to court is not evidence of breach parse. Each case has to be considered on its own special facts. The above case was decided under the old Constitution but the principle is still the same.

The above notwithstanding, the appellant has an avenue through which to ventilate his grievance relating to breach of his rights, under Article 22 of the Constitution. I find no merit in the ground and it must fail.

The appellant also alleges that there were material contradictions in the prosecution case. One of them is that the complainant was referred to as a 'she' yet the evidence was that the complainant was a boy. The court did not specifically state the sex of the complainant. He introduced himself as F.M.K. PW2 who knew the complainant described him as a boy. PW4 also identified her nephew as a boy. PW6 identified the complainant as a boy. It is only when PW5 was recalled that he kept referring to a "she" instead of a "he". In the P3 form, PW5 described the complainant as a "he". The reference to the complainant as a 'she' was a mere error made by PW5 who had already testified. There is overwhelming evidence that the complainant was a boy and the inconsistency in PW5's evidence is inconsequential. I have earlier considered the evidence adduced in this case and I am satisfied that there was sufficient evidence for the trial court to found a conviction upon:-

Whether the trial court shifted the burden of proof to the accused. I do agree that at page 29 (Judgment) lines 1 – 3, the court observed

"He called no witnesses to confirm where he was around 6.30 p.m. So while prosecution witnesses, without a shadow of doubt placed him at the scene, he on the other hand had no defence to disapprove that fact. He alleged not being at the scene but offered no evidence as to where he was."

I do agree with the appellant that to the extent that the court required the appellant to explain where he was faulting him for or not offering an explanation, the court did shift the onus of proof on the appellant. In criminal cases, the onus always rests on the prosecution to prove its case beyond any reasonable doubt. Except in a few instances where the accused may be required to explain, that duty never shifts to on accused. Even where an accused raises an alibi; there is no duty placed on him to prove whether or not the alibi is true; the court only needs to examine the alibi as against the prosecution evidence to find out if the alibi raises any doubt in the prosecution evidence. The appellant relied on the decision in *Okoth Okale –vs- Republic EA 555* in which the court reiterated that the duty lies squarely on the prosecution to prove its case as set out in the charge sheet, beyond reasonable doubt. Although the trial court fell in to error by stating that the appellant should have explained where he was, yet upon review of all the evidence in its totality, I am satisfied that the defence was a bare denial, an aforethought and I hereby dismiss it as unbelievable.

In the end, I find that the conviction herein was well founded as there was overwhelming evidence against the appellant to return a verdict of guilty. I uphold the conviction and confirm it.

The complainant was a child aged 9 years and the court handed the appellant the only sentence provided

under Section 8(2) of the Sexual Offences Act; that is life imprisonment. I dismiss the appeal both on conviction and sentence.

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R.P.V. Wendoh

JUDGE

Dated, Signed and Delivered at NYAHURURU this 9th day of March, 2017.

PRESENT:

Mr. Mutembei - Prosecution Counsel

N/A - for appellant

Soi - Court Assistant

In person - Appellant