



REPUBLIC OF KENYA



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**PNK v Republic (Criminal Appeal 368 of 2012)
[2022] KECA 553 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KECA 553 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 368 OF 2012
W KARANJA, F TUIYOT'T & KI LAIBUTA, JJA
JUNE 10, 2022**

BETWEEN

PNK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at Nakuru
(W. Ouko, J.) delivered on 3rd August 2012 in HCCR.A No. 213 of 2010)*

JUDGMENT

1. This is a second appeal from the judgment of the Principal Magistrate's Court at Nyahururu (C. K. Obara) delivered on 18th May 2010 in Criminal Case No. 1020 of 2007.
2. The brief background is that the appellant was charged in the Principal Magistrate's Court at Nyahururu in Criminal Case No. 1020 of 2007 with two counts of defilement and, in the alternative, committing an indecent act with a child. On the first count, the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act, 2006](#). The particulars of the offence were that on 7th April 2007 in Nyandarua District of the then Central Province, he intentionally committed an act which caused penetration with AMN (name withheld) a girl aged 6 (six) years. In the alternative, the appellant was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, 2006. The particulars of the alternative charge were that, on the date and at the place aforesaid, the appellant intentionally committed an indecent act with AMN, a girl aged 6 years.
3. On the second count, the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, 2006. The particulars of the offence were that on 7th April 2007 in Nyandarua District of the then Central Province, he intentionally committed an act which caused penetration with DNN (name withheld) a child aged 3 ½ (three-and-a-half) years.



In the alternative, the appellant was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, 2006. The particulars of the alternative charge were that, on the date and at the place aforesaid, the appellant intentionally committed an indecent act with DNN, a girl aged 3 ½ years.

4. From the evidence adduced at the trial by the prosecution, the two infant victims of the offences with which the appellant was charged were his own daughters.
5. The appellant denied the two principal counts and the alternative charges, whereupon the matter proceeded to trial with the prosecution calling 5 witnesses.
6. AMN, the 1st victim (PW1) told the trial court that, on the material day, their mother had gone to hospital leaving her with her father (the appellant) and her sister DNN (PW2); that her father took her to the sitting room and defiled her; that he blocked her mouth with a piece of cloth as he defiled her; that after the appellant defiled her, he turned on her younger sister (PW2), who was seated on a chair, and defiled her; that she cried out, but no-one came to their rescue. She concluded by stating that, when her mother returned, she told her what had happened, and they were both taken to hospital by both parents.
7. PW2 stated that, on the material day, the appellant removed her dress and pants, and defiled her; and that she felt a lot of pain. Notably, their mother did not testify at the appellant's trial.
8. PW4 (Peter Nginyo), the Clinical Officer at Ol Kalou District Hospital, also testified and produced 2 Medical Examination Reports (P3 forms) prepared by Dr. Bingwa with whom he (PW4) had worked for 2 years before retirement. According to the P3 Forms, Dr. Bingwa had examined the two children on two different dates and prepared the two reports. PW2 was examined on 7th April 2007 while PW1 was examined on 10th April 2007.
9. According to PW4, the medical examination reports showed that PW1 had scratch marks/bruises on the front side of her abdomen, which were about 3- 4 days old; that the probable weapon used was hand/finger nails; that on further examination on her genitalia, there was a tear on the perineum; that her hymen was broken and a yellowish discharge was noted; that high vaginal swab revealed presence of spermatozoa; and that the doctor recommended follow-up treatment and counselling.
10. The medical examination on PW2 revealed that she was unkempt at the time of examination; that she had scratch marks on her back, and the bruises were old; that she had other bruises on her chest and abdomen, which were about 3-4 days old; that the external genitalia was normal; that her hymen was broken, and that there was a yellowish discharge from her vagina; and that a high vaginal swab revealed presence of spermatozoa and epithelial cells noted.
11. PW5 (PC Robert Mutuku), the investigating officer, told the trial court that, on the material date at about 10.00pm, he was telephoned by one Jeremiah of [particulars withheld] Village who told him that someone had been apprehended by members of the public for having defiled his two children; that he (PW5) rushed to the scene in the company of PC Muriithi; that, on their way, they met the appellant who had been apprehended by members of the public together with the two children (AMN and DNN); that they went back to Ol Kalou Police Station, recorded their reports and took the two children to Ol Kalou District Hospital.

According to him, the children were treated and discharged. They later returned to the station and recorded statements, whereupon they were issued with P3 Forms. Consequently, the appellant was charged with the two counts of the above-mentioned offences.



12. In his defence, the appellant stated that the complainants' mother (MW) left for her home on 20th February 2007 taking with her the two children and a toddler; that she stayed at her home for a period of 1 ½ months and returned on 3rd April 2007 without the three children; that she told him that she had gotten another man to marry her; that on 4th April 2007, the children were brought by his (the appellant's) cousin; that on 5th April 2007 thugs broke into his house claiming that his wife had told them that he, the appellant, had raped his two children; that they tied him up; that, at the time, the children and their mother were at the children's grandmother's house; that on 7th April 2007 he was taken to Ol Kalou Police Station where he was accused of defiling the two children. He denied ever doing so.
13. After the trial, the Hon. Resident Magistrate (C. K. Obara) delivered his judgment on 18th May 2010 thereby convicting the appellant. He sentenced him to life imprisonment.
14. Aggrieved by the conviction and sentence, the appellant appealed to the High Court of Kenya at Nakuru. In its judgment in HCCCr Case No. 230 of 2010 delivered on 3rd August 2012, the High Court (W. Ouko, J. – as he then was) dismissed the appellant's appeal and upheld the conviction and sentence meted by the trial court.
15. Being further aggrieved, the appellant appealed to this Court on 5 grounds set out in his undated Memorandum of Appeal, which was subsequently revised to the 7 grounds set out in his undated, Supplementary Memorandum of Appeal filed on 25th October 2021. According to the appellant, the learned Judge erred in law in: upholding the conviction and sentence based on a defective and duplex charge sheet; not finding that the appellant's constitutional rights were grossly infringed upon; upholding the conviction and sentence on reliance on inconsistent and incomplete prosecution evidence; not finding that the availed medical evidence was not satisfactory, but peace-meal; overlooking the non-availability of some very essential witnesses; not finding that the appellant was denied to cross-examine vital witnesses; and in not finding that the charges were tailored to suit the prosecution case.
16. In support, the appellant filed undated written submissions on 25th October 2021 requesting the Court to allow his appeal. In response, learned State Counsel (Ms. Jacinta Kibiri for the Director of Public Prosecutions), also filed written submissions dated 7th February 2022, which she highlighted orally, urging the Court to dismiss this appeal.
17. This Court's mandate on a second appeal is conferred by Section 361(1) (a) of the [Criminal Procedure Code](#), which 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.”
18. The jurisdiction of this Court on a second appeal, as is the case here, has been the subject of judicial pronouncements in various cases, such as *Stephen M'Trungi & Another v Republic* [1982-88] 1 KAR p.360 where it was held:

“Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no



reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

19. We also agree with what this Court had to say in *Samuel Warui Karimi v Republic* [2016] eKLR:

“This is a second appeal and 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 *Chemangong -vs- R*, [1984] KLR 611.”

20. Having carefully considered the proceedings at the trial court, the record of appeal in the High Court and in this Court, the grounds on which that appeal and the appeal before us are based together with the respective submissions of the parties, we find nothing in the proceedings before the two courts below to suggest that the concurrent findings of fact in the two courts were based on either no evidence or on misapprehension of evidence. Neither do we find anything to lead to the conclusion that the trial court and the High Court acted on wrong principles in making the findings of evidence leading to the appellant’s conviction and sentence, and the subsequent decision to dismiss his first appeal. Accordingly, there is nothing on record to warrant our interference with the lower courts’ concurrent findings of fact. In view of the foregoing, we confine ourselves to the points of law raised in this appeal.

21. Turning to the first ground on which his appeal is anchored, the appellant’s case is that the High Court upheld his conviction and sentence based on “a defective and duplex charge sheet.” Even though the appellant raised no issue before the trial court relating to the alleged defects in the charge sheet, the trial Magistrate noted, of his own motion, that –

“... section 8(2) of the Sexual Offences Act was not incorporated in the charge sheet and also the second charge is framed as an offence under the Sexual Offences Act, 2007. Which Act does not exist.

However, I will treat the same as an oversight which should not be a major influence on my ultimate decision.” (sic)

22. In the appellant’s submission, the charge sheet on the basis of which he was charged, tried, convicted and sentenced was defective. Be that as it may, the defect, if any, was curable under Section 382 of the Criminal Procedure Code. It is also noteworthy that the defect complained of was by no means fatal. On the first appeal, the learned Judge had this to say of the matter:

“The fact that sub-section (2) of section 8 of the Sexual Offences Act was not cited in the charge sheet was not fatal. Similarly reference to Sexual Offences Act, 2007 in the second count instead of 2006 is of no consequence.”

23. Indeed, the two counts of the charge against the appellant should have been stated as “defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, 2006.” The pertinent question is what effect (if any) such a defect has on the proceedings. In answer to this question, section 382 of the Criminal Procedure Code provides in part:

“Subject to the provisions hereinbefore contained, 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



inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice”

24. In the same vein, the Supreme Court of India in *Willie (William) Slaney v State of Madhya Pradesh* [A.I.R. 1956 Madras Weekly Notes 391], held that:

“Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.”

25. Having considered the record of appeal, the submissions of the parties and the afore-cited authorities on the ground in issue, we are of the considered view that no failure of justice occurred in this case merely in consequence of failure to cite on the charge sheet the correct subsection of the section under which the appellant was charged. Neither was it consequential to cite the Act as of 2007 instead of 2006. It would be far-fetched to conclude that any prejudice was occasioned at the trial by the defect or irregularity complained of. We agree with the decisions of the two courts below that the defect complained of was inconsequential and, accordingly, this ground of appeal fails.
26. On the second ground, the appellant faults the two courts below for not finding that the appellant’s constitutional rights were “grossly infringed upon.” According to him, the learned Judge erred in law and in fact in failing to find that he (the appellant) was detained longer than prescribed by law. He cites Article 49(1) (f) of the *Constitution*, which reads:

“ 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 ...”

27. We hasten to observe that the afore-cited provision of the Constitution, having come into force on 27th August 2010, did not apply to the appellant, who was arrested and charged in April 2007. The uncontested fact is that the appellant was arrested on 7th April 2007 and charged in court five days later on 11th April 2007. Be that as it may, this complaint was not raised before the trial court for consideration, but was introduced for the first time as a ground in his Petition of Appeal to the High Court. While the complaint may constitute a legitimate cause of action in separate civil proceedings, suffice it for the moment to observe that such a complaint cannot be the subject of determination on second appeal to this Court, on a point of law, unless it was also the subject of the trial and appeal in the two courts below.



28. When faced with a similar issue in the case of *Alfayo Gombe Okello v Republic* [2010] eKLR this Court held:

“... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”

29. Even if that ground were to hold, it cannot be a basis for acquittal. This Court in *Fappyton Mutuku Ngui vs. Republic* [2014] eKLR held that –

“The correct position in law was set out in *Julius Kamau Mbugua v Republic* (2010) eKLR where the Court stated that the violation of the appellant’s right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights.”

30. Thirdly, the appellant’s case is that he was convicted on inconsistent and incomplete prosecution evidence. While this Court is not obligated to re-examine and re-evaluate the nature and weight of evidence on which the appellant was convicted, we are nonetheless inclined to examine whether the prosecution had discharged its burden of proof beyond a reasonable doubt, which in itself would beg for answers as to: whether there was evidence that the appellant was responsible for the offences with which he was charged; whether there was evidence of penetration; and whether there was evidence that the children, who were his daughters, were below the age of 11 years.

31. The learned State counsel submitted that the Court only needs to satisfy itself as to the ingredients of defilement, namely: penetration; the victims’ age; and whether the appellant was the perpetrator (see *SKM v Republic* [2021] eKLR). Having carefully considered the record of appeal, we find nothing to fault the findings of the two courts below that the three ingredients of defilement had been proved to the required standard. The two self-explanatory medical reports produced by PW4 proved penetration. The broken hymens, bruises and presence of spermatozoa on the two children’s genitalia told it all.

Neither were their tender ages contested. They were aged 6 and 3 ½ years respectively.

32. As to the identity of the perpetrator, the testimonies of the two children left no doubt in the mind of the trial court and of the learned Judge that their father (the appellant) was responsible for their ordeal. They immediately told their mother what had happened to them on her return home that same day. Their report to PW5 on the same day was consistent with what they told their mother on that very day. So were their recorded statements and subsequent testimonies at the trial. Accordingly, we find nothing that would lead to the conclusion that the appellant had been convicted on inconsistent and incomplete evidence. Similarly, his appeal on this ground cannot stand.

33. The appellant’s fourth ground of appeal that the medical evidence was unsatisfactory and peace-meal is, in our considered view, insufficient to warrant departure from the findings of the two courts below. According to him, “... PW4 was not qualified to produce medical evidence where he never participated in the treatment nor examination of the alleged victims further, the appellant was not subjected to any examination as the law demands.” [sic]

34. It is noteworthy that besides lamenting in his defence that “... the doctor who examined the complainants never examined [him] to ascertain if [he] was involved,” he did not object to PW4’s qualification. In any event, PW4 only produced medical examination reports prepared by a doctor,



who was well known to him, and with whom he had worked for two years before he (the doctor) retired. . Indeed, PW4’s unshaken testimony was based on the P3 form and treatment notes prepared by that medical doctor. Notably, the appellant did not allege that the medical doctor by whom the medical reports on PW1 and PW2 were prepared was not qualified to examine them and report on their respective conditions in proof of penetration. His only complaint is that he was not examined by the same doctor who treated the victims to ascertain whether he was the perpetrator of the offence in issue. However, there are other ways of establishing the identity of the perpetrator of such an offence as the one with which the appellant was charged.

35. In so far as the appellant’s identity as disclosed by his two daughters was not in doubt, we find nothing to fault the two courts below in their findings that he was the perpetrator of the offence against the two children. In our considered view, it did not require any scientific evidence or medical examination of any kind to corroborate the testimonies of his two daughters as to the identity of the person who defiled them, and in proof of the third ingredient of the offence of defilement. Accordingly, his appeal on this ground fails.
36. On his fifth ground of appeal, the appellant laments what he views as the two courts’ alleged “overlooking of some very essential witnesses.” According to him, the victims’ mother should have been called as a witness to corroborate the charges against him. We do not agree. There is no statutory requirement for such corroboration as long as the trial court forms the view that the victim’s testimony is truthful. We say so mindful of the proviso to section 124 of the *Evidence Act*, Revised 2014 [1989], which reads:

“... 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”

37. With regard to the appellant’s submission that certain “essential” witnesses, such as the victims’ mother and one Jeremiah, the members of public who arrested him, and the victims’ grandmother, were not called to testify, we can only say that the prosecution calls those witnesses it considers necessary to support the charge. Article 50(2) of the Constitution provides that “every accused person has the right to a fair trial,” which includes the right “... (k) to adduce and challenge evidence.” Indeed, the appellant was at liberty to call any witness in his defence, including those he contends should have been called to testify at his trial.
38. This Court is alive to the fact that there is no legal requirement in law on the number of witnesses required to prove any particular fact. That is the essence of Section 143 of the Evidence Act, which provides that “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.” In *Keter vs. Republic* [2007] 1 EA p.135, the court held inter alia that:

“The prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”



39. The appellant’s sixth ground of appeal is that he was “... denied to cross- examine vital witnesses.” We do not find that to be the case. As the learned Judge observed:

“... the appellant actively participated in the trial cross-examining the witnesses, making applications for adjournment, to be taken to the hospital and even submitted in Kiswahili at the close of his defence.”

40. How, then, can it be said that the appellant was denied the opportunity to cross-examine any of the witnesses who testified for the prosecution? We can only conclude that the appellant is intent on raising just about any issue he considers weighty in support of his appeal. However, this is not one of them. The appellant was at liberty to cross-examine at will any of the witnesses who testified at the trial as he did. He chose not to cross-examine some of them, but that is not to say that he was barred from doing so. He was not.

41. Finally, the appellant contends that the charges against him were tailored to suit the prosecution case. Suffice it to observe that the prosecution sets out to call evidence in proof of the charge or charges against an accused. It follows, therefore, that the prosecution did no more than accomplish its statutory duty by calling evidence in proof of the charges against the appellant. That it succeeded in doing so is not sufficient to fault its role in the trial.

42. Having considered the record of appeal before us, the judgments of the two courts below, the grounds on which the appeal before us is made, the written submissions of the appellant and the written and oral submissions of learned State counsel, we find that the appellant’s appeal herein on both conviction and sentence fails and the same is hereby dismissed in its entirety. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022.

W. KARANJA

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

