



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 78 OF 2017

BETWEEN

DANIEL MBITHUKA MUIA.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (B. Jaden, J.) delivered on 31st October 2013 in H.C. CRA. No 102 of 2011)

JUDGMENT OF THE COURT

1. **Daniel Mbithuka Muia**, the appellant, was charged and convicted of defilement of a girl aged between 12 and 15 years contrary to **section 8(3)** of the **Sexual Offences Act**. The offence was said to have been committed on 27th September 2010 in Makueni County. The girl who was defiled, **EMM**, was 13 years old.
2. The trial court convicted the appellant and sentenced him to 25 years' imprisonment. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to the High Court. The High Court upheld the conviction but reduced the sentence to 20 years' imprisonment.
3. Undeterred, the appellant preferred a second appeal to this Court. In his supplementary grounds of appeal, the appellant, who was unrepresented, faulted the learned judge for: upholding his conviction on a defective charge; transferring the onus of proof to him; upholding the conviction in the absence of sufficient evidence of identification; and for upholding the conviction, which he contended was premised on contradictory evidence.
4. This being a second appeal, the Court is restricted to address itself on matters of law only. In ***Kaingo v Republic [1982] KLR 213***, this Court stated: -

“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 a second appeal is whether there was any evidence on which the trial court could find as it did.”
5. We shall therefore revisit the record of appeal, albeit briefly, to determine whether there are any issues of law that warrant our interference with the impugned judgment.
6. The record shows that the complainant was asleep in her aunt's house when she woke up at about 11.00 a.m. and found the appellant on top of her. Her underpants had been removed and the appellant was busy defiling her. The complainant called out her aunt, the appellant's wife, who rushed to her room and struck a match stick, as the appellant dashed out.
7. On the following day, the complainant reported the incident to her other aunt, AMN, PW2, who reported the matter to the area Chief and to the police. **Catherine Nzomo, PW3**, a Clinical Officer who examined the complainant and filled the P3 Form, found that the complainant had bruises on her genitals as well as spermatozoa. The clinical officer assessed the complainant's age as 13 years.
8. In his defence, the appellant simply denied having committed the offence, saying that he had been framed up by the complainant. His wife, DW2, denied having heard the complainant calling her on the material night.
9. This appeal was heard on 28th April 2020 by use of technology (skype video conference) pursuant to the practice directions for the

protection of judges, judicial officers, judiciary staff, other court users and the general public from the risks associated with the global COVID 19 pandemic issued by the Chief Justice on 20th March, 2020 vide **Gazette Notice No.3137** on 17th April 2020.

10. The appellant relied on his written submissions. He submitted that the charge was defective in two respects. The first defect, he said, was that the charge sheet cited **section 8(3)** instead of **section 8(1)** as read with **8(3)** of the **Sexual Offences Act**. The second defect was that it omitted the word “**intentionally**” in describing the alleged act of defilement.

11. The appellant further submitted that the complainant’s evidence was contradictory and inconsistent; that there were no favourable circumstances for a positive identification; and that the onus of proof was shifted to him, contrary to dictates of the law.

12. **Mr. Obiri**, learned counsel for the respondent, opposed the appeal. He submitted that the charge sheet was not defective; that it contained sufficient particulars to enable the appellant understand the charges he was facing and respond to them; that there was no truth in the appellant’s contention that the onus of proof was shifted to him; and that the complainant was able to see and identify the appellant because when she called the appellant’s wife she struck a match stick that produced sufficient light. Further, no other man was in the house at the material time, counsel added.

13. We have carefully considered the record of appeal and the submissions by both parties. The appellant’s first ground of appeal is that the learned judge erred in law in affirming a conviction that was grounded on a defective charge. The appellant faced a charge of defilement contrary to **section 8(3)** of the **Sexual Offences Act** which provides that: -

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

14. The appellant’s contention was that failure to cite **section 8(1)** which defines the offence of defilement is fatal to the prosecution case. Mr. Obiri, though conceding that section **8(1)** of the **Sexual Offences Act** was not cited, submitted that no miscarriage of justice was occasioned by such omission. In his view, the charge as drafted was in compliance with the provisions of **section 134** of the **Criminal Procedure Code** which states that: -

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

In **Samuel Kilonzo Musau v Republic [2014] eKLR**, this Court held that such irregularity is curable under **section 382** of the **Criminal Procedure Code**, as it did not occasion any miscarriage of justice.

We respectfully agree with that holding. The omission to cite section 8(1) of the Act did not prejudice the appellant in any way. He knew the charge that he was facing and defended himself accordingly.

15. As regards the alleged second defect, that is, failure to state that the offence was “**intentionally**” committed, we do not find any merit in that argument because under **section 9** of the **Sexual Offences Act**, there is no requirement to state that the offence of defilement was intentional; and neither did we understand the appellant to be arguing that he may have committed the offence unintentionally. We reject that submission.

16. Turning to the complainant’s evidence, which the appellant submitted was contradictory and inconsistent, we note that the appellant did not specify the part of the evidence that he was alluding to. On our part, having gone through the entire record of appeal, we found no material contradiction or inconsistency in the complainant’s evidence.

17. But even if there are any, they are minor or inconsequential. In **Dickson Elia Nsamba Shapwata & Another v Republic, CR. Appeal No.92 of 2007**, the Court of Appeal of Tanzania held: -

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether the inconsistencies and contradictions are minor, or whether they go to the roof of the matter.”

We respectfully agree with that rendition of the law.

18. We now turn to the issue of identification. The appellant submitted that the learned judge did not consider the possibility of mistaken identification by the complainant. The complainant, whose mother had passed away, was staying with her aunt, the appellant’s wife and the appellant together with their children. The complainant knew the appellant.

19. Although the offence was committed at about 11 p.m. when it was dark, the complainant said that when she called out the appellant’s wife, having realised that someone was defiling her, her aunt struck a match stick that lit the room. The complainant testified: **“I saw you. I saw (you) when your wife lit a matchbox.”**

20. It was not demonstrated that there was any other man in the appellant’s house on that material night who may have committed the said offence. There was sufficient evidence that the complainant was defiled on the material night. No other person apart from the appellant could have done it. We believe the appellant was properly identified by the complainant. No plausible reason was advanced by the appellant as to why the complainant would have decided to frame him up as alleged.

21. On our part, we are satisfied that the appellant was properly convicted by the trial court and the first appellate court carefully analysed the evidence and arrived at a well-founded decision. We find no merit in this appeal and dismiss it in its entirety.

Dated and delivered at Nairobi this 24th day of July, 2020.

M.K. KOOME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR