IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO, (P), SICHALE & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 74 OF 2016

BETWEEN

RICHARD MUNENE ……………...........……………………….. APPELLANT

VERSUS

REPUBLIC ……………...……………………………………… RESPONDENT

(Appeal from a Judgement of the High Court of Kenya at Kerugoya (R. K. Limo, J) dated 28th August, 2016

in

HC. CRA 126 OF 2013)

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JUDGMENT OF THE COURT

The appellant's conviction and sentence to life imprisonment imposed by the magistrate's court for the offence of defilement having been upheld by the High Court, his counsel Mrs. Makworo has before us in this second appeal summarized the following questions for our determination;

i. that two out of six prosecution witnesses (PW4 and PW5), gave evidence without witness statements; that by the time the investigating officer testified, there were no witness statements by these two witnesses; and that as a result, the High Court ought to have disregarded the evidence of PW4 and PW5;

ii. that at the close of the defence case, the trial court invoked its powers under **section 150** of the Criminal Procedure Code and on its own motion summoned a witness (Francis) who due to his tender years (three years old) did not testify; and that without *voir dire* examination the trial court had no basis for the conclusion that the boy could not testify on account of age;

iii. that the evidence presented by the prosecution was contradictory;

iv. that the appellant's *alibi* defence was not considered;

v. that having raised 6 grounds of appeal before the High Court the learned Judge made an error in framing 3 issues which omitted some of the grounds raised by the appellant; and

vi. that the offence was not proved.

Mr. Mailany, the Senior Assistant Director of Public Prosecutions for his part opposed the appeal and submitted that the appellant did not prove that he was not furnished with the statements of the two witnesses in contention; that even if PW4 and PW5 recorded their statements after the commencement of the trial, the appellant was not prejudiced because he participated fully in the trial and cross examined the two witnesses; that in any case no law prohibits the recording of statements once a trial commences.

On the failure by the trial court to explain why the evidence of Francis was not taken , counsel submitted that it was obvious from the record that the trial magistrate was satisfied that on account of his tender age of three he could not testify.

As regards proof of the offence and contradictory prosecution evidence, counsel submitted that the testimony of clinical officer corroborated that of complainant and that the 3 days old tears on her private parts were consistent with the insertion by the appellant of his genital organs into the complainant's.

On whether it was erroneous for the Judge to frame his own issues outside those framed by the appellant, counsel argued that it was not mandatory for the Judge to consider every ground of appeal in isolation; and that the three issues framed by the learned Judge were all-encompassing. Counsel urged that the defence of *alibi* was not available as the appellant did not give its notice to the prosecution; and that, in any case, apart from merely stating that he was not at home on the material day, he did not give the details of where he was.

By **section 361(1)** of the Criminal Procedure Code, only matters of law fall for our determination being a second appeal. As we do so we also bear in mind that we ought not to interfere with the concurrent findings of fact by the two courts below unless such findings were based on no evidence or they were based on a misapprehension of the evidence, or that the two courts below acted on wrong principles in making the impugned decision. See **Kaingo V R** [1982] KLR 213.

We begin with the submissions that the prosecution evidence was contradictory. In a criminal trial, the accused person enjoys a presumption of innocence because the burden of proving the charges is on the prosecution, and to do so beyond any reasonable doubt. Secondly in an adversarial system the purpose of evidentiary rules is to assist the court in establishing the truth and in the process provide protection to the accused in respect to his right to a fair trial. As they say, the prosecution must present a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction. Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

In this appeal the inconsistencies identified are in relation to the dates on P3 form and treatment notes, the names of the complainant on the charge sheet and in the birth certificate, the date of the offence on the charge sheet and the treatment card; that the complainant told different people different version of what had happened to her; that she had been injured by a stick; that she had a headache; and that she had been defiled.

To our mind these are matters of fact which both courts below satisfactorily reconciled by finding that they were insufficient to set aside the prosecution case against the appellant. There is no merit on this ground.

It has been argued for the appellant that at the commencement of the trial PW4 and PW5 had not recorded witness statements.

Article 50 (2) (j) of the Constitution provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, to have reasonable access to that evidence and to have adequate time and facilities to prepare his defence.

In **Thomas Patrick Gilbert Cholmondeley v Republic**, Criminal Appeal No. 116 of 2007, though decided before the promulgation of the 2010 Constitution this Court aptly expressed itself as follows:

> **"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified."**

Dealing with the right to a fair trial under Article 50(2) (c) and (j) this Court said in **Simon Githaka Malombe V R**, Criminal Appeal No. 314 of 2010 that;

> **"…. Indeed, the availability of witnesses statements to the defense has always been a fundamental facet of this guarantee and avoids the spectre of trial by ambush especially in a criminal case. The High Court, sitting as a Constitutional Court had in the case of JUMA –VS- REPUBLIC [2007] EA 461 reasoned as follows, and we agree;**
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> > **'We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence…' "**

The trial court record for 10th January, 2013, in so far as it relates to this question, is to the effect that the prosecution was ordered to furnish the appellant with the charge sheet and witness statements.

Subsequently, on 14th March, 2013, the prosecution applied for adjournment to call three witnesses; the clinical officer, one Macharia, the complainant's and one M, as the last two had recorded their statements. On account of that, the trial was stood over to 28th March, 2013 when the complainant and M testified. From that testimony, at least that of the complainant grandmother, she reiterated that her evidence in court was the same as that in her statement to the police. The appellant exhaustively cross-examined both witnesses and at no stage did he complain that he was handicapped due to witness statements. This ground, for these reasons, must fail.

The learned Judge has also been faulted for failing to explain the basis upon which he declined to receive the evidence of F who had been summoned on account of having witnessed the appellant take away the complainant before the latter was defiled. At the close of the defence case, and for his role, the trial court formed the opinion that Francis was an essential witness to the just decision of the case and proceeded to summon him.

Section 150 of the CPC provides as follows:

> **"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:**
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> > **Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."**

In **Michael Kinuthia Muturi v R,** Criminal Appeal No. 51 of 2008 the Court explained that the power to summon a witness is fairly circumscribed and will only be exercised when it is essential to a just decision of the case.

The complaint raised by the appellant is that the learned Judge failed to find that the trial court erroneously discharged F without testing whether he was incapable of giving evidence on account of tender years.

We repeat what, in our view is elementary principle of criminal law that, although the prosecution must avail all witness necessary to establish the truth and whose evidence appear essential to the just decision of the case, no particular number of witnesses is required for the proof of any fact; and that the prosecution is not obliged to call a superfluity of witnesses. See **Section 143 of Evidence Act** and **Bukenya & Others V Uganda** [1972] EA 549.

The trial court had the advantage of seeing the child, Francis who was in the company of the mother. From that vantage position the magistrate made a determination based on his observation that the child was too young to testify. Nothing was placed before the first appellate court to suggest the discretion was improperly exercised. This ground must similarly fail.

The learned Judge was of the view that the following issues fell for his determination; whether the misdescription of the complainant was fatal to the prosecution case; whether the discrepancy on the dates on the P3 Form and treatment notes affected the weight of the prosecution case; and whether the prosecution case was proved beyond reasonable doubt. For this, it has been contended before us that the Judge failed to consider all the grounds of appeal raised in the appellant's petition. We are unable to agree with that contention. The three issues framed by the learned Judge as set out above were wide enough to cover all the grounds of appeal. We are satisfied with his analysis and evaluation of the evidence, and with respect, agree that there was overwhelming evidence incriminating the appellant.

His *alibi* defence was displaced by that evidence that placed him at the scene. As this Court has repeatedly said, in order to test the veracity of the defence of *alibi* and in weighing it with all the other evidence to see if the accused person's guilt is established beyond all reasonable doubt, the defence must be raised early enough so that it can be tested by investigators in order to obviate any suggestion that the defence was an afterthought.

The accused does not, however, assume the burden of proving his innocence once the defence of *alibi* is raised. It is for the prosecution to test it. It is for this reason that it is stressed that it be raised early.

See **Victor Mwendwa Mulinge V R,** Criminal Appeal No. 357 of 2012 and **Karanja V. R** (1983) KLR 501.

Consequently, we find no merit in this appeal. It is accordingly dismissed.

Dated and delivered at Nyeri this 11th day of October, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

<u>DEPUTY REGISTRAR</u>