IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & AZANGALALA, JJ.A.)

CRIMINAL APPEAL NO. 22 OF 2015

BETWEEN

JEFFERSON MURIITHI MBUVA.....APPELLANT

AND

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

(An appeal from the Judgment of the High Court of Kenya at Nyeri (Wakiaga, J.) dated 28th November, 2014

in

H.C. Cr. C. No. 36 of 2011)

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JUDGMENT OF THE COURT

[1] ***Jefferson Muriithi Mbuva***, the appellant, was charged, tried, convicted and sentenced to life imprisonment for the offence of defilement contrary to ***section 8 (2)*** of the ***Sexual Offences Act, No. 3 of 2006.*** He also faced an alternative count of indecent act with a child contrary to ***section 11 (1)*** of the same ***Act***. The particulars of the offence for which he was convicted were that he had on the 13th day of April, 2010, at [particulars withheld] Sub-location, in Mukurwe-ini District within Central Province (now Nyeri County), committed an act which caused penetration with the complainant B.N.

[2] The appellant was dissatisfied with his conviction and sentence and appealed to the High Court. That appeal was unsuccessful hence this second appeal. In his supplementary grounds of appeal which he adopted in preference to the initial grounds he had filed, the appellant raised five (5) issues, namely; that the High Court Judge erred in law in upholding his conviction on the evidence of witnesses related to the complainant; that corroborative evidence was improperly admitted and relied upon; that the charge sheet was defective; that the evidence before the trial court was not re-assessed or otherwise re-evaluated and that his defence was improperly rejected.

[3] In the appellant's written submissions, he complained, among other things, that no independent witness was called by the prosecution to buttress that of the complainant and his kin. He attacked the manner in which a child witness's testimony was taken without administering the *voire dire* examination. He complained of the substitution of the charge sheet which impaired preparation of his defence. He

further argued that he had been framed because of his ethnicity which argument was improperly rejected.

[4] The Republic, through the learned ***Senior Assistant Deputy Public Prosecutor, Mr. Kaigai,*** opposed the appeal on the ground that there was overwhelming evidence against the appellant. Learned counsel submitted that the testimony of the complainant was cogent and was corroborated by that of two other witnesses and a doctor who produced a P3 form on the injury sustained by the complainant. In learned counsel's view, the evidence adduced by the prosecution displaced the appellant's defence.

[5] This is a second appeal. The law, to wit, ***section 361*** of the ***Criminal Procedure Code,*** limits this Court's involvement at a second appeal to considering points of law only. The section reads:

> ***"361***
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> ***...***
>
> ***A party to an appeal from a subordinate court may, subject to sub-section (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;"***

[6] There is a plethora of authorities on the point and to name but one by way of illustration, there is the case of ***Bonface Kamande & 2 Others -v- Republic [2010] eKLR (Criminal Appeal No. 166 of 2004),*** where we stated:

> ***"On a second appeal to the Court which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two counts below and we would only be entitled to interfere if and only if we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it".***

[7] Starting with the attack on the failure of the two courts below to evaluate and/or re-evaluate the evidence, we think the attack is unfortunate. We say so, because the attack is not borne out by the record. To the contrary, we find that both the trial court and the High Court discharged their mandates as was required of them. The learned ***Senior Resident Magistrate, (F. M. Kombo),*** considered the testimony of each witness and having done so, concluded that the child, ***B. M***., had been defiled by the appellant.

[8] On his part, the High Court Judge ***(Wakiaga, J.,)*** summarized the evidence of crucial witnesses who testified before the trial court and having done so, concluded that the conviction of the appellant was safe.

[9] In our view, both the trial court and the High Court could do no better by way of analysis or evaluation of the relevant evidence adduced. Accordingly, we reject the ground that the two courts below failed to analyze and evaluate evidence.

[10] As regards the ground of appeal alleging failure of the prosecution to call independent witnesses, we do not think there is any merit in this complaint. In our view, by no means can it be said that the evidence adduced against any accused person must come from witnesses unrelated to the complainant. If that were the case, it would be fairly difficult to achieve any conviction in offences involving relatives or offences against them by strangers. It would for instance, be nigh impossible to convict relatives viciously robbed by strangers as all essential witnesses would be related.

[11] We are also far from convinced that the evidence adduced against the appellant barely established the case against him so as to lead to an inference that had a particular witness been called, his or her evidence would have advanced the prosecution case. (See ***Bukenya & Others -v- Uganda [1972] E.A.***

549. In ***Donald Majiwa Achilwa & 2 Others -v- Republic [2009] eKLR,*** we stated:

> ***"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case, is entitled to infer that had that witness been called, his evidence would have tended to be adverse to the prosecution case".***

[12] In this case, there was also no particular witness who was withheld by the prosecution and the appellant, at the trial, did not furnish the name(s) of any particular witness(es) who should have been called to testify against him but was not called by the prosecution. We accordingly find that nothing turns on the fact that the essential witnesses who testified were all related to the complainant.

[13]Related to the above ground was the complaint that the evidence of ***S M, (PW 6), (M),*** who was a minor, should not have been relied upon as he was not subjected to the *voire dire* examination. The record indeed shows that the learned trial magistrate took the evidence of ***M*** without a *voire dire* examination. ***M*** however, testified on oath and was cross-examined by the appellant who raised no complaint then. The appellant did not also raise the complaint before the High Court. In our view, the appellant was not unduly prejudiced by the failure to administer the *voire dire* examination of ***M***. In any event, even if that evidence was disregarded, it was not the only corroborative evidence. There was also the testimony of ***M W M, (PW 5), (M),*** the complainant's grandmother. Immediately after the incident, the complainant reported the same to ***M*** who observed that the complainant's buttocks had petroleum jelly applied to them as the complainant had complained. The defilement was also confirmed by ***Dr. Salome Wanjohi*** who completed, signed and later produced the P3 form in respect of the injury sustained by the complainant.

[14] As regards the ground of appeal alleging that the appellant was convicted on a defective charge, we find, on our perusal of the record, that nowhere did the appellant raise such a challenge before the trial court and before the first appellate court. It is now trite that this kind of complaint should be brought to the attention of the court at the earliest opportunity. In his submissions before us, the appellant complained that the charge omitted the terms *"unwillingly"* and *"unlawfully"* which omission, according to the appellant, made it fatally defective. We do not agree. The charge which the appellant faced contained sufficient particulars of the offence he faced. There was in any event, abundance of evidence to prove sodomy on the complainant who was aged only six (6) years. The appellant did not also show how he was prejudiced by the omission of the words *"unwillingly and unlawfully"* in the charge sheet. Those words are not, in any event in ***section 8 (2)*** of the ***Sexual Offences Act***. Nothing therefore turns on the issue of a defective charge as, in our view, no defect was shown to exist.

[15] The final complaint raised by the appellant was that his defence was improperly rejected. The appellant in an unsworn statement claimed that he was framed because of his ethnicity. We have carefully perused the entire record and detect no trace of ethnic consideration in the prosecution of the appellant. The appellant, in our view, is hanging on straws. It is plain to us that it was only coincidental that all essential witnesses were of a different tribe from that of the appellant.

[16] In the end, we agree with both courts below on their concurrent findings that the charge of defilement was proved to the required standard against the appellant. Consequently, we find this appeal devoid of merit.

We dismiss it in its entirety.

It is so ordered.

Dated and delivered at Nyeri this 25th day of January, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR