



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 70 OF 2013

BETWEEN

JACOB ODHIAMBO NYANGWARA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Homa Bay

(E.N. Maina, J. dated 21st March 2013)

in

H. C. Cr. A. No. 1 of 2013)

JUDGMENT OF THE COURT

The appellant, **Jacob Odhiambo Nyangwara**, was charged in the Senior Resident Magistrate's court with the offence of defilement of a girl contrary to **Section 8 (1) and (2)** of ***the Sexual Offences Act No. 3 of 2006***.

The particulars of the offence were that on 20th May 2008 at [particulars withheld] Estate, Oyugis Town in Rachuonyo District within the former Nyanza Province, he had carnal knowledge of **FO (PW 1), the complainant**, a girl aged 7 years. He faced an alternative charge of indecent act with a child contrary to **section 11 (1)** of the same Act, the particulars of which were that he intentionally and unlawfully indecently induced FO by touching her private parts.

The appellant denied the offence.

The brief facts are that on 20th May, 2009, the appellant accosted FO who was with her friend **CA, PW2**. He beat CA causing her to run away, and then caught hold of FO and dragged her into a nearby bush. He removed her skirt and under pants, lay down on her and defiled her. When she tried to scream, he covered her mouth with his hand. After defiling her, the appellant left FO to walk home alone bleeding profusely.

CA, a girl aged 8 years, was with FO on the material day when the appellant came upon them, beat her

(CA), and chased her away. Thereafter she went home leaving FO with the appellant. When FO returned home a short while later, she was crying and was bleeding from her private parts. CA testified that the person who had beat her and pulled FO into the bush was the appellant who she pointed out in court.

On arriving home from school, **HO, PW 3** found his sister, FO crying and when he saw that there was blood on her thighs, and her clothes were soiled he took her to their mother PW4 who was in the market. **PW4** testified that at about 6.30 pm, FO and HO, her children, came to see her at the market. Both children were crying, and FO was bleeding profusely from her private parts. She took FO to Rachuonyo District Hospital, and later reported the matter to the Oyugis Police Station where she was issued with a P3 form. She later received a description of the assailant from FO and CA, who stated that they could identify him if they saw him again. PW 4 set out to trace the appellant, and her enquiries led both herself and CA to Rachuonyo District Hospital, where CA saw and identified the appellant. When confronted by PW4, the appellant attempted to run away, but was arrested by **PC Dan Ombogo, PW 7**, before escaping from the hospital, and after CA identified him.

After he received the complainant from PW4, PC Ombogo interviewed FO at the hospital, and retrieved the clothes that she was wearing on the material day which he produced in court, together with the age assessment report that specified FO's age as between 7 and 9 years.

Dorah Obel, PW5, a registered clinical officer, produced the P3 form which indicated that there were lacerations of the perineum on FO's genitalia, and there was fresh bleeding from the vagina and the clitoris was swollen; the inner part had fresh blood and the hymen was torn.

Inspector of Police Benedict Mwangangi, PW 6, conducted an identification parade comprising eight other members on 30th May 2008, which both FO and CA attended and identified the appellant as the person who had defiled FO. He produced the Identification Parade Form, which he stated was carried out in compliance with the Police Standing Orders.

In his defence, the appellant gave a sworn statement where he merely stated that he was attending to his sick brother at Rachuonyo District Hospital when he was arrested, and charged with the offence which he denied having committed. He did not call any witnesses.

After hearing the case, the trial magistrate found that the main charge was proved, convicted and sentenced the appellant to life imprisonment. Dissatisfied with that decision, he appealed to the High Court that upheld the trial court's decision.

The appellant has now preferred an appeal to this Court on the grounds and written submissions presented to this Court, namely that the trial court wrongly convicted him on the basis of a defective charge sheet which only specified that **section 8 (2)**, and that **section 214** of the **Criminal Procedure Code** was not complied with; that the High Court relied on the evidence of FO and CA without subjecting them to *voire dire* examination; that the High Court failed to comply with the requirements of **Article 50** of the Constitution on the appellant's right to silence, and was not required to testify during the proceedings; that the High Court upheld the conviction on a contradictory medical report in that the age assessment report was produced by an unqualified person, and that FO's age was not ascertained; that the medical report was inconclusive and did not specify the degree of harm.

Mr. Sirtuy, learned Principal Prosecution Counsel, opposed the appeal, and submitted that the appellant was properly identified by FO and CA and so was placed at the scene of the crime. With respect to the complaint that no *voire dire* examination was conducted, counsel submitted that the trial court conducted the *voire dire* examination on FO, CA and HO, and was satisfied that they were capable of testifying.

We have considered the evidence and the submissions, and are of the view that the grounds to be addressed by this Court are;

- i) *Whether the charge sheet was defective;*

- ii) *Whether voire dire examination was carried out;*
- iii) *Whether the trial court violated the appellant's right to silence;*
- iv) *Whether the medical report and the age assessment reports were contradictory.*

The jurisdiction of this Court, it is clearly defined as determining only questions of law on second appeals. See ***Joseph Njoroge vs Republic [1982] KLR 388***.

Appreciating the scope of our jurisdiction, we will begin with the appellant's assertion that the charge sheet was defective. Though the charge sheet specified **section 8 (2)** of the ***Sexual Offences Act 2006***, it omitted to specify that this provision was required to be read with **section 8 (1)**.

In determining whether the failure to include **section 8 (1)** within the charge sheet rendered it defective, **section 134** of the ***Criminal Procedure Code***, which deals with the framing of charges states that,

“Every charge ...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.” [Emphasis ours].

In the instant case, the charge sheet was proper since the offence of defilement was specified, and the particulars sufficiently communicated the nature of the offence of defilement. As such the appellant was aware of the charges and the offence that he faced. This notwithstanding, such omission was curable under the **section 382** of the ***Criminal Procedure Code***, and we consider that its inclusion would not in any way prejudice or occasion a miscarriage of justice upon the appellant. This ground therefore lacks merit.

Turning to whether a *voire dire* examination was conducted in the case of FO and CA, **Section 19(1)** of the ***Oaths and Statutory Declarations Act*** provides the procedure of receiving evidence of children of tender years. In addition, numerous decisions have set out the steps to be followed by the trial court, among them, ***Nyasani s/o Gichana vs Republic (1958) EA 190***; ***Fransisio Matovu vs Republic [1961] EA, 260 at p. 262***, and ***Kinyua vs R. (2002) 1KLR 256***. In the ***Nyasani case (supra)*** the court observed that in *voire dire* examination;

“It is clearly the duty of the court under that section to ascertain, first whether a child tendered as a witness understands the nature of an oath, and if the finding of this question is in the negative, to satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.”

The record shows that the trial court having established that both FO and CA aged 7 and 8 years respectively, were children of tender years, subjected them both to *voire dire* examinations to determine whether they were of sufficient intelligence to testify, and understood the necessity of speaking truthfully. In conducting the *voire dire* examination, the trial magistrate questioned both minor witnesses on the schools they attended, the class they were in, whether or not they attended church, whether they understood that they were in a court of law, and what it meant to testify truthfully. Their answers to these questions satisfied the trial court that FO and CA had the requisite intelligence to testify, and understood the seriousness of their testimony. As a consequence, we find that the complaint that *voire dire* examination was not conducted is unfounded.

The appellant's next complaint was that the trial court violated his right to silence as articulated by **Article 50** of the Constitution; that he had “...a right to remain silent, and not to testify during the proceedings.”

Our review of the evidence shows that the appellant chose to waive his right to cross examine all of the prosecution witnesses. His only participation in the trial was when he proffered his defence where he stated that, he was residing with his uncle, when he was informed that his brother was ill, and when his

condition worsened, he took him to Rachuonyo District Hospital, where he was arrested as charged with this offence.

At no time did he indicate to the trial court that he wished to remain silent, but this notwithstanding, he remained silent throughout the prosecution’s case, and only testified in his defence, which was out of his own volition. As such, the complaint that his right of silence was violated is unfounded, and we dismiss it.

Finally, on the issue that the age assessment report was produced by an unqualified person, **Section 77 (1)** of the **Evidence Act** provides;

“In criminal proceedings any document purported to be a report under the hand of a Government analyst, medical practitioner, or ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.”

Section 77 (3) goes further to stipulate;

“When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner and medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.”

As such, if the appellant required a medical doctor to produce the age assessment report, he had only to apply to the court to have the medical doctor summoned. He did not do so, and did not at the time object to its production. There was no law prohibiting PC Ombogo from producing the report in court.

As to the contention that the medical report was contradictory as it did not indicate that FO was subjected to grievous bodily harm, both the trial court and the High Court found as a matter of fact that FO was defiled. The medical report stated that she had sustained injuries to her genitalia following the ordeal. When this evidence is considered together with all the witness evidence, we can find no contradictions or inconsistencies in the medical report. Accordingly, this ground lacks merit and is also dismissed.

In sum, we find that the appellant’s appeal is without merit, and we order that the same be and is hereby dismissed in its entirety.

It is so ordered.

DATED and delivered at Kisumu this 20th day of July, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR