IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 32 OF 2016

BETWEEN

JACKSON JUMA KENGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 17th February, 2016 in **H.C.CR.A No. 29 of 2013)**

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JUDGMENT OF THE COURT

[1] This is a second appeal against the judgement of the High Court dated 17th February, 2013 wherein the appellant's conviction and sentence for the offence of defilement was confirmed.

The summary of the evidence adduced before the trial court is as follows. S N (PW1) hired the appellant who was a '*boda boda'* rider to ferry his daughter M.A.N, a minor aged 3 ½ years old to and from school at [particulars withheld] Academy. On 22nd September, 2010 the appellant picked up the minor early in the morning and dropped her at school. However, he returned the minor back home at around 12:15 p.m. which was a bit later than usual. J A (PW5), the minor's mother, noticed that she was not herself. She was moody, quiet and sleepy. She allowed her to sleep until 4:00 p.m. when S came back from work. He also noticed that the minor wasn't cheerful but attributed her mood to fatigue.

[2] In the evening when J was preparing the minor for a bath, the minor was still irritable and did not want to be touched but J didn't think much of it. It was when she took off the child's under pants that J saw blood stains on them that she informed S. Both of them examined the child and noticed there was bleeding from her genetalia. Upon asking her what had transpired, she started crying and while pointing at her genetalia she stated that it was Jack. Jack was the appellant's nick name. M.A.N was rushed to the hospital where it was confirmed that she had been defiled.

[3] The following day as usual, the appellant turned up to take the minor to school. Determined to get to the bottom of the matter, S invited the appellant into the house to question him about the issue. Immediately, the appellant entered the house M.A.N begun crying and moved away from the appellant. The appellant feigned ignorance and suggested that S should find out from school what had happened to his daughter.

The appellant then took S and the minor to school and they all went to the head teacher's office. It emerged that on the material day, the appellant had dropped the minor at school on time and she was received by Everlyn Nekesa (PW2), a child handler and taken to her teacher Joyce Kavere (PW3). According to both Everlyn and Joyce, the minor was bubbly and seemed okay. If something had occurred at the school, Joyce insisted she would have noticed during the physical activities which the minor actively participated in. As far as the school administration was concerned, the minor was okay when she was handed over to the appellant at around 11:30 a.m. Apparently, that day the appellant had not only gone to pick up the minor from school quite early at around 11:00 a.m. but also wanted to go and take her from her classroom. Michael Christopher (PW1), the school's caretaker, told him to wait until 11:30 a.m. when the children would be brought to the reception.

[4] Thereafter, the appellant was arrested and charged with the offence of defilement contrary to ***Section 8(1)*** as read with ***Section 8(2)*** of the ***Sexual Offences Act***, the particulars being that on 22nd September, 2010 within Malindi Township in Malindi District of the then Coast Province, the appellant intentionally and unlawfully committed an act which caused the penetration of his genital organ into the genital organ of M.A.N a girl aged 3 ½ years old.

[5] In his defence the appellant gave unsworn statement. He denied committing the offence. He testified that on 23rd September, 2010 S called him at around 6:45 a.m. to pick him and his daughter up. He took them to the child's school and waited for them outside. After about 15 minutes he saw Cpl Millicent Soi (PW8) in the company of another police officer enter the school. After a while S, the child and the police officers came out of the school and he was arrested and charged.

[6] Faced with the foregoing evidence, the trial court found that the appellant was the only person who had the opportunity of defiling the child thus convicted and sentenced him to life imprisonment. Aggrieved with the trial court's decision, the appellant preferred an appeal to the High Court which appeal was dismissed vide a judgment dated 17th February, 2016. It is that decision that has provoked this second appeal premised on the grounds that the learned Judge erred by failing to-

- **Find that offence of defilement was not established as per Section 8(1) of the Sexual Offences Act.**
- **Appreciate that the appellant had not been accorded a fair trial.**
- **Find that there was no medical evidence connecting the appellant to the offence.**

At the hearing of the appeal, the appellant appeared in person while the state was represented by Mr. Monda, Senior Assistant Director of Public Prosecution.

[7] The appellant submitted that he was not accorded a fair trial because no reasons were given as to why the Resident Magistrate who had initially heard part of his case and the Principal Magistrate who had been subsequently assigned the matter disqualified themselves. Be that as it may, it was clear on the record that the Chief Magistrate at Malindi Law Courts had referred the matter to the Resident Judge at Malindi to issue directions. It seemed that no such directions were given. Therefore, it was unclear how the matter was transferred to Malindi.

He argued that Dr. Ibrahim Abdulahi (PW7) who had examined the child testified that the most probable weapon that caused penetration was *'blunt'*. The effect of his testimony was that the prosecution had not established what had caused penetration of the minor. In addition, the doctor stated that the child was not bleeding as at the time she was examined. In his view, the offence of defilement had not been established. Emphasising that he was framed, the appellant contended that the conduct of the child as described by her parents was not consistent with someone who had been defiled. He was at a loss as to why the child, if indeed she was defiled, was not crying due to pain and fell asleep. He further submitted that there was no medical evidence linking him to the offence. He urged the Court to allow the appeal on those grounds.

[8] In opposing the appeal, Mr. Monda maintained that the learned Judge had properly re-evaluated the evidence on record and arrived at the correct conclusion. He went on to state that there were concurrent findings of fact by the two lower courts and this Court ought not to interfere with the same.

[9] This being a second appeal, only issues of law fall for consideration by this Court by dint of ***Section 361 (1)*** of the ***Criminal Procedure Code***. In considering such an appeal, the guiding principle is that the Court will normally not interfere with the decision of the first appellate court unless it is apparent from the evidence on record, that no reasonable tribunal could have reached that conclusion. Additionally, this Court is beholden to accept the findings of fact of the two courts below, provided they are based on acceptable and clear evidence which was adduced at the trial.

In ***Kaingo v R (1982) KLR 213 at p. 219,*** this Court said:-

> **"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 second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R, (1956) 17 EACA 146)".**

See also ***M'Riungu vs. Republic [1983] KLR 455***.

[10] A fair trial is one of the precepts of the rule of law and is enshrined under ***Article 50 (1)*** of the ***Constitution*** in the following manner: -

> ***"Every*** **person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court…."**

It was on that basis that the Resident Magistrate and the Principal Magistrate, all of whom were stationed in Malindi, disqualified themselves from handling the mater. Their reason for doing so was that the minor's father was a State counsel also stationed at Malindi. In particular, the Principal Magistrate, D.W. Nyambu expressed: -

> **"I have looked at the proceedings in this file. This file is partly heard before court 3. I note that the father of the complainant is a State Counsel here in Malindi. He is known to all magistrates in this station.**
>
> **I am of the view that for justice to be seen to be done it would be in the interest of justice that this case be transferred to Kilifi Law Courts for hearing. I am not imputing that the Malindi Court would not administer justice but justice must not only be done but it must be seen to be done. I thus order that this matter be mentioned in court 1 for further orders and directions."**

In our view, there was nothing wrong with the learned magistrates at Malindi disqualifying themselves from hearing the matter. In fact, it is clearly demonstrated that the motive behind the disqualification/recusal was to ensure the appellant received a fair trial before a court where the child's father was not personally known to the magistrates. In this we are guided by the Supreme Court's sentiments in ***Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 others [2013] eKLR*** that-

> **"From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised." Emphasis added.**

It is not in dispute that the matter was eventually placed before the Resident Judge at Malindi for directions. There is nothing on record to indicate the directions, if any, were given. Nonetheless, we give the benefit of doubt to the State that the proper procedure was followed in transferring the matter to Kilifi Law Courts. The transfer of the matter to Kilifi did not occasion the appellant any prejudice.

[11] Turning to the substantive issues of the appeal, M.A.N did not testify after the trial court found that

she was too young to do so. In cases like this where the victim is too young to give evidence, ***Section 33*** of the ***Sexual Offences Act*** allows the trial court to rely on the evidence of the surrounding circumstances. See this Court's decision in ***M.M vs. Republic [2014] eKLR***. Consequently, the evidence against the appellant was circumstantial.

It cannot be gainsaid that a conviction can be properly founded on circumstantial evidence, namely evidence of surrounding circumstances from which an inference may be drawn as to the commission of a criminal offence. See ***Makau & Another vs. Republic [2010] 2 EA 283***. However, to form the basis of a conviction, the circumstantial evidence must satisfy several conditions. It must be incompatible with the innocence of the accused person; incapable of explanation upon any other hypothesis than that of guilt of the accused person; and there must be no other existing circumstances, which could weaken or destroy the inference of guilt. See ***Sawe vs. Republic [2003] KLR 364***.

[12] It is not in dispute that M.A.N was defiled. Contrary to the appellant's allegations, the minor's parents testified that they noticed on the material day that she was bleeding from her genitalia. She was rushed to the hospital on the same day and the doctor confirmed that her hymen had been perforated thus evidencing defilement. It was expected that Dr. Ibrahim who examined the minor a few days later for purposes of filing in the P3 form would not see bleeding. He, however, referred to the treatment notes of the doctor who saw the minor on the material day. It is worth pointing out that the said doctor indicated in his notes that the minor was bleeding.

[13] In our considered view, the circumstantial evidence against the appellant irresistibly pointed towards his guilt. J gave uncontroverted evidence that on the morning of the material day M.A.N was jovial when she released her to the appellant. The same was corroborated by the evidence of the teacher and child handler who received the child at school. Equally, the teacher and the child handler gave uncontroverted evidence that when they released M.A.N to the appellant she was okay. The totality of the evidence by the school administration ruled out the possibility that the child could have been defiled at school.

What was left was the period between when the appellant picked the minor at 11:30 a.m. and 12:15 p.m. when he dropped her home. According to J, the appellant had taken considerable time before dropping the minor back home taking into account that the distance between the school and the house was a few metres. The norm was that the appellant would drop the minor back home ten minutes after leaving school. In light of the foregoing and the evidence given in respect of the child's behaviour after returning home, we agree with both lower courts that only the appellant had the opportunity of committing the offence since he was with the child during the period in question. There was no opportunity or possibility of any other person defiling the child.

[14] The fact that there was no medical evidence linking him to the offence did not dislodge the circumstantial evidence. In that regard, we are guided by this Court's decision in ***Matano Ngao Nzuma vs. Republic – Criminal Appeal No. 31 of 2010 (unreported)*** wherein while considering ***Section 36(1)*** of the ***Sexual Offences Act*** which provides as follows:

> **"Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."**

The Court in its own words stated;

> **"Our reading of the above section reveals that there is no mandatory requirement that an accused person charged with a sexual offence must be subjected to a DNA sampling unless the court believed it was a necessary step to take."**

Albeit the absence of the minor's testimony, there was independent evidence of her mother, her father and

the clinical officer that linked the appellant to the defilement of the minor.

[15] From the foregoing analysis we find that the two courts below carefully considered the evidence presented to them, applied the law correctly and made the right conclusions. We have no reason to interfere with their concurrent findings of fact. We are satisfied there are no points of law arising in this matter that would impeach the said findings. We find that this appeal lacks merit and we accordingly dismiss it, and uphold the conviction and sentence of the trial court.

Dated and delivered at Mombasa this 12th day of October, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR