IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 50 OF 2016

BETWEEN

PATRICK MUTWIRI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Malindi (Chitembwe, J.) dated 27th October, 2015

in

H.C.CR.APP. No. 15 of 2014)

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JUDGMENT OF THE COURT

[1] This is a second appeal from the decision of the High Court at Malindi, delivered on 27th October, 2015. The background of the matter being that the appellant had previously been charged before the Lamu Principal Magistrate's Court with the offence of Defilement contrary to **section 8(1)(3)** of the Sexual offences Act No. 3 of 2006. The particulars of the charge being that:

> ***'On the 21st November, 2012 at around 00.05Hrs at* [particulars withheld] *village in Lamu District within Lamu County, intentionally caused his penis to penetrate the anus of H.K.K, a child aged 15 years.'***

The appellant also faced an alternative charge of indecent act with a child contrary to **section 11(1)** of the Sexual offences Act No. 3 of 2006. The particulars of the alternative charge are that:

> ***'On the 21st November, 2012 at around 0005Hrs at* [particulars withheld] *village in Lamu District within Lamu County, intentionally touched the anus of H.K.K, a child aged 15 years with his penis.'***

The appellant denied the charges and his trial commenced, with the prosecution calling a total of five witnesses, while the appellant testified and called his wife as a witness.

[2] According to the prosecution case, the complainant (PW1) was a standard 7 pupil who was on his way home at midnight on the material date. He was alone and had just come from a nearby shop. Before he could get to the boda boda (motorbike) stage, he met the appellant, who had a motorbike of his own. He was also a person well known to PW1. The appellant began talking to him but PW1 informed him that he was in a hurry. However, the appellant suddenly grabbed PW1 and dragged him to a nearby bush, where he gagged and showed him Kshs. 50/- while commanding him to take off his trousers. The complainant refused to do so and the appellant would have none of it; he forcibly took PW1's pants off and inserted his penis into his anus. Any distress calls by PW1 were muffled by the gag to his mouth. Luckily, the appellant's motorbike, which had been left by the roadside, attracted the attention of two passersby who decided to investigate. They made their way to the scene and caught the appellant red-handed, sodomising PW1 and they proceeded to apprehend him. On their way to the police station, the appellant once again attempted to bribe PW1 into accepting Kshs. 2,000/- in exchange for his freedom. PW1 declined the bribe but unfortunately, before the group could make it to the police station, the appellant managed to escape. Nonetheless, the trio proceeded to record their statements at the police station.

[3] According to PW2 (Hamisi Suleiman), they were alerted to the scene of crime by PW1's muffled screams. On arrival, they found PW1 with the appellant, both had their pants halfway down. PW1, whom they deduced had been sodomised, was holding a Kshs. 50/- note. On this basis they decided to take the appellant to the police station but he escaped along the way. To their dismay, on arrival at the police station, the trio discovered that the appellant had already made a report of his own, claiming instead that the three had robbed him of his phone and Kshs. 9,500/-.

[4] PW3 (Alex Mwasambu), who was the other passerby, confirmed this narrative and stated that on arrival at the police station, they indeed found the accused in the process of making his report as aforesaid but once the trio explained the situation to the police, the appellant was arrested .Thereafter, PW1 underwent a medical examination and the medical report as well as the testimony of PW4 (Stephen Ewoi Ekale) revealed that PW1 had bruises in his anus. However, the medical report, prepared on 21st November, 2012 was inconclusive as to cause of the bruises. PW4 however stated that the same could have been caused by a hard stool, a worm infection or injuries by a blunt object or possibly sexual intercourse.

In the course of investigation, PW5 (No. 81090 PC Stanley Kiplagat) who was the officer on duty at the time visited the crime scene and noted that the grass appeared to have been slept on. He also placed the age of PW1 at 15years, based on the subsequent clinical notes prepared by PW4, coupled with PW1's identification of the appellant, he was arrested and subsequently charged with the offences aforesaid.

[5] At the close of the prosecution case, the learned trial magistrate found that the age of the complainant was sufficiently established. Further, that as per the P3 form, there appeared to be no nexus shown between the complainant and the appellant and in the premises, that there was no *prima facie* case shown to support the principal charge of defilement. Accordingly, the appellant was acquitted of that charge. However, with regard to the alternative charge of indecent act with a child, the learned trial magistrate found that a *prima facie* case had been shown to warrant the appellant to be put on his defence and he was accordingly placed onto his defence.

[6] When called upon to tender his defence, the appellant chose to give a sworn statement, with himself and his wife as the only witnesses. It was his case that together with PW2, they were water melon and paw paw brokers. On the material date he said, they went to Kiongwe Mjini to harvest water melons and returned at 7pm when they parted ways; with PW2 going to town while the appellant went home and slept. At around midnight, the appellant was awoken by his wife to go fetch her medicine at a nearby clinic. He thus left home and on his way, decided to pass by a local club and imbibe a bottle of mnazi (palm wine) with some friends, among them one PW3.He said that at around 12.55 a.m., PW2 demanded that the appellant should give him back his money. The appellant told him he did not have it and PW2 left. At 1 a.m., the appellant left the club and as he walked in the dark, he was stopped by some people who demanded to know why he was shining a light on them. Among those people was PW3, who demanded his Kshs. 150/- from the appellant. The appellant's pleas that he did not have money fell on deaf ears, as one Sila Ndungu who was seated atop the appellant's motorbike, grabbed the appellant's neck and in two minutes, the duo had robbed him of Kshs. 9,500/- as well as a mobile phone, Alcatel 2500 and disappeared into the darkness. The appellant decided to go to the police station where he reported the matter to PC Ntingi who also recorded his statement. Thereafter, the appellant returned home and shared his ordeal with his wife, who gave him Kshs. 200/- to go purchase medicine. On his way to the clinic he once again encountered PW2, PW3 and two others and he informed them that he had already reported the matter to the police, saying that they should either return his money of face the full force of the law. The lot chose to accompany him to the police station but on arrival, the appellant was shocked to see PC Ntingi turn on him and side with his enemies by locking him up and thereafter present him to PW5 who charged him with offences he said he knew nothing about.

Little was said by DW2 (Anna Wamucii), who simply confirmed that the appellant was her husband of five years and spoke of his good character, saying they had two children together and that he was not a drunkard.

[7] After considering this evidence, the trial magistrate **Munguti J.M (Ag. SPM)** while acquitting the appellant of the offence of Defilement found that the charge of indecent assault to a child had been proved beyond reasonable doubt. Therefore, he convicted and sentenced the appellant to 10 years imprisonment.

[8] Dissatisfied with this outcome, the appellant lodged an appeal at the High Court at Malindi. In a judgment rendered on 27th October, 2015, the learned Judge **Chitembwe J.** found the appeal devoid of merit, dismissed the same and upheld the trial court's conviction and sentence, hence the present appeal before this Court.

In this appeal, the appellant faults the findings of the two courts below on grounds that the learned Judge erred by failing to hold that the appellant was never accorded a fair hearing contrary to **section 146(1)** of the Criminal Procedure Code (CPC); that the trial proceedings resulted in a mistrial; that the trial magistrate offended **section 150 of** the CPC in not allowing the matter to start *de novo;* that the prosecution case was never proved nor was the age of the minor ascertained; that some vital witnesses did not appear in court and hence the prosecution case remained unproven; that **section 109** of the Evidence Act was not adhered to and lastly, that the defence raised cast enough doubt to render a conviction unsafe. We wish to observe that **sections 146 and 150** CPC quoted above are quoted out of context and are inapplicable to the circumstances cited.

[9] With leave of court, the appellant ventilated his appeal through written submissions. He began by addressing the issue of mistrial. Pointing to the High court's decision, the appellant stated that while the Judge rightly held that the magistrate erred in the manner in which he handled the ruling on a case to answer, the Judge nonetheless failed to declare a mistrial. The appellant, agrees with the Judge that the procedure adopted by the magistrate was erroneous. It was contended that instead of acquitting him of the principal charge, the magistrate ought to have put the appellant on his defence on both counts and thereafter determine the case on the entire evidence. To this end, the appellant relied on the authority in the case of **Okethi Okale v. Republic (1965) EALR 555,** contending that in proceeding as he did, the learned trial magistrate was erroneously making a case against the appellant over and above what had been placed before him. That once the magistrate rejected the main charge for lack of a *prima facie* case, then the court had no authority to proceed on the alternative count either. To the appellant, that lapse in proper procedure was a grave defect which should have been resolved in his favour and on such realization, the High court ought to have declared a mistrial.

[10] Secondly, that despite the appellant's request for the matter to start *de novo,* the same was not granted, thus offending the provisions of

section 150 of the CPC. In addition, that though the court had ordered the recall and re- examination of PW2 and 3, the prosecution failed to do so, thus hindering the appellant's right to fair trial. In addition, that the prosecution is duty bound to make available all the necessary witnesses to establish the truth and failure to do so may lead to an inference that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution. In support of this assertion, the appellant relied on the case of **Bukenya v. Uganda (1972) EA 549** and stated that the failure by the prosecution to recall PW2 & 3 as directed by court ought to have resulted in such an inference being drawn. As such, that the learned Judge should have found the conviction unsafe.

[11] Thirdly, that since no birth certificate or age assessment report was ever produced to prove the age of the complainant, the prosecution case was not proven beyond reasonable doubt and the learned Judge erred in not making such a finding. The appellant pointed out that the complainant never testified in court as to his age, nor were either of his parents called as witnesses to clear any doubt in this regard. The only evidence which pegged the complainant's age at 15 years was the testimony of the medical officer (PW 4) and the P3 form, which according to the appellant was not conclusive. The appellant also contended that the evidence tendered by the prosecution was insufficient as the medical evidence failed to link him to the offence.

[12] With regard to fair trial, the appellant submitted that he was never given a chance to read the prosecution's written submissions contrary to Article 50(2) (5) of the Constitution, thus rendering the resulting judgment null and void. The court has been urged to rely on the decision in **Ann Njogu v. Republic, Nairobi C.A No. 551 of 2007.**

Lastly, the appellant lamented that his defence was never accorded due consideration by both courts for nowhere in the judgment is the defence adverted to. In particular, that his alibi was never challenged and the prosecution on the whole, failed to prove its case. On that note, the appellant urged this court to allow the appeal, quash the conviction and set aside the sentence.

[13] Appearing for the State was Senior Prosecution Counsel **Mr. Wangila,** who urged the court to dismiss the appeal. He pointed out that though the court had allowed the appellant to recall and cross- examine PW1 and PW2, the appellant failed to pursue the issue. In any event, the discretion as to whether witnesses should be recalled lies with the court under **section 150** of the CPC. With regard to the sufficiency of evidence, Counsel submitted that the P3 form showed that the complainant's genitals had been injured. On the issue of age, he stated that the trial magistrate conducted *voir dire* examination and in any event, the issue of age has only been raised for the first time in this appeal. Further, that the complainant, having been a standard 7 pupil, was clearly a minor. Counsel thus prayed for the dismissal of the appeal.

[14] This being a second appeal, only matters of law fall for our consideration by dint of **section 361** of the CPC. As stated many times before, this court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See ***Chemangong -vs- R, [1984] KLR 611***and ***Kaingo -vs- R, (1982) KLR 213 at p. 219,*** where the Court pronounced itself as follows:-

> ***'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).'***

With that in mind, the issues that fall for determination in this appeal are whether:

a) There was want of procedure and if so, whether the same is fatal;

b) Whether the prosecution case was established and;

c) Whether the appellant's right to fair trial was infringed.

[15] On the first issue, the appellant has contended that there was a lapse in procedure in two ways; firstly, that despite having acquitted him of the principal charge for want of evidence, the trial magistrate nonetheless convicted him on the alternative charge based on the same defective evidence. In addressing this aspect, the learned Judge was of the view that:

> ***'The trial magistrate made a ruling and indicated that the evidence established the alternative count and acquitted the appellant of the main count of defilement. The best practice would have been to put the appellant on his defence on both counts and thereafter determine the case on the entire evidence. The trial court could have then concluded that what was proved was the offence of indecent act and not defilement'***

It is on the basis of that holding that the appellant now holds the view that his conviction was based on weak evidence, was unsafe and ought to have been quashed. The basis upon which this position is premised remains unclear. No law requires (nor has any been cited) that where an accused faces an alternative charge, the same must be defended alongside the main charge. If anything, **section 210** of the CPC stipulates as follows:

> ***'Acquittal of accused person when no case to answer If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.'*** (emphasis added)

The magistrate was within her powers to acquit for the charge in respect of which no case had been made out. Worth remembering, is that the charge of indecent act with a child is a lesser offence to that of defilement. Unlike defilement, with indecent assault, no penetration needs to be proven. All that needs to be shown is that the accused had contact with the genitals, buttocks or breasts of the complainant. The learned

Judge of the High Court only outlined what is the common practice. He did not say that it is mandatory for an accused person to be placed onto his defence on both the main and alternative counts where it is evident at the close of the prosecution case that the evidence adduced supports either the lesser charge or the alternative charge. Moreover, no prejudice whatsoever was occasioned by the procedure adopted by the learned magistrate.

[16] Secondly, the appellant also contended that since there was a change of magistrate during the course of his trial, he demanded to have the proceedings start afresh, which demand was not acceded to by the trial court. Consequently, that by declining to allow the matter to start *de novo,* the learned trial magistrate made an error of law which went to the root of the conviction and the appellate court ought to have found as much. Closely connected to this as well, is the assertion that the two courts below never interrogated the lighting at the scene of crime and the circumstances of the appellant's identification by the complainant.

Starting with the issue of *de novo* hearing; under section **200(3)** of the CPC it is provided that;

> ***'Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re summoned and reheard and the succeeding magistrate shall inform the accused person of that right.'***

In this case, the record shows that the appellant indeed made such a demand. It also shows that the magistrate duly ordered that PW2 and PW3 be re called for cross examination. However, nothing much was said about the matter thereafter. Nor were the said witnesses re called.

While it avails to an accused to request for proceedings to begin afresh under **section 200** of the CPC, in **Ndegwa -vs- Republic [1985] KLR 534** the Court of Appeal held the section should be used sparingly; When only a few and critical witnesses have testified and witnesses are available, a new trial may be ordered. Though the court of appeal in the **Ndegwa case** (*supra)* appreciated that a new magistrate may not be able to assess the demeanour of witnesses who have already testified before another magistrate, it stated that the discretion lies with the succeeding magistrate to decide whether to proceed from where a case has reached or recall witnesses, depending on the particular circumstances of each case. Considering that the magistrate in this case exercised that discretion in favour of the appellant and ordered a recall of the said witnesses, it behooved the appellant to follow up on having the said witnesses availed for his cross examination. Instead, he went quiet and the record shows the defence as having proceeded as though no such order had been made. In addition, the appellant never raised the said issue at the first appellate court. This court has in the past stated that where issues of fact fail to be raised at the trial court and at the first appellate court, this court lacks the benefit of having read the reasoning of those courts on the matter and will thus hesitate to interfere with their findings (see **Abdalla Hassan Hiyesa v Republic [2015] eKLR** and **Joseph Kamau Gichuki v Republic [2013] eKLR** as well as **S J M v Republic [2016] eKLR)**. The court will thus not delve into the merits or demerits of having the matter start *de novo.* Similarly, it will not address the issue of interrogation of the lighting because issues as to the intensity of the light etc are issues of fact and do not fall for our determination.

[17] The appellant has also impugned the findings of the learned Judge with regards to the prosecution case, saying that he ought to have held that the age of the complainant was never proven, nor was the appellant connected to the offence and that vital witnesses were never called.

On the issue of the complainant's age, as this Court has held on several occasions, failure to prove the exact age of a victim does not entitle an accused person to an acquittal. Furthermore, this Court has adopted a more liberal approach as to what constitutes proof of age. This Court has held that it is not necessary for a victim's age to be proved with mathematical precision. It is not mandatory therefore for a medical age assessment to be done, nor is a birth certificate mandatory as proof of a victim's age. See this Court's decision in **Kaingu Elias Kasomo vs Republic Malindi Criminal Appeal No. 504 of 2010, where this Court pronounced itself as follows;**:-

> ***'Age of the victim of the sexual assault under the sexual offences act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim....'*** (emphasis added***).***

[18] In this case, the appellant never attacked the credibility of the evidence on age. Rather, he simply asserts on one hand that none was furnished and on the other, that the little there was by way of medical reports, which had been discounted by court at the close of the prosecution case. The claim by the appellant that both the medical report and the P3 form were rejected in totality by the trial court does not lie. From a reading of the record, the medical evidence was held to be insufficient only with regard to the charge of defilement. On the alternative charge of indecent act with a child, the magistrate in fact stated that:

> ***'The court has accepted the version of events as given by the prosecution witnesses that the accused was accidentally caught red handed and arrested and his claims that he was arrested for pursuing his money which had been (sic) robbed are rejected.***
>
> ***I find the charge of indecent act with a child was proved beyond reasonable doubt and proceed to find the accused guilty as charged…' (***emphasis added***)***
>
> *On the issue as to whether the appellant's defence of alibi was considered by the two courts below, there is no doubt that the prosecution evidence displaced the appellant's alibi by placing him squarely at the locus in quo. The prosecution discharged its burden of proof as far as the appellant's alibi defence was concerned. When considering the appellant's defence, the learned Judge expressed himself as follows:-*
>
> ***'According to the appellant, he had gone out at night to buy medicine. If he was robbed by PW2 and PW3 among other robbers, there is no connection between that robbery and the case of defilement. The appellant did not claim that PW1 was one of the***

robbers. I am equally satisfied that there was no robbery...'

The appellant can thus not claim that his defence was never considered.

[19] Having considered the entire evidence on record, the appellant's grounds of appeal, his very detailed written submissions and the response by the learned counsel for the state, we are satisfied that there are no points of law raised in this appeal that can be resolved in favour of the appellant. We have no basis at all for interfering with the concurrent findings of the two courts below. This appeal lacks merit and the same must fail. We 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