



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: NAMBUYE, KIAGE & MURGOR, JJA)
CRIMINAL APPEAL NO. 102 OF 2015

BETWEEN
JOSEPH KAKEI KASWILI.....APPELLANT
VERSUS
REPUBLIC.....DEFENDANT

(Appeal from the Ruling /Judgment of the High Court of Kenya at Machakos (B.T. Jaden, J) Dated 29th January, 2015.

in

H.C.CR. A. NO. 296 OF 2013)

JUDGMENT OF THE COURT

This is a second appeal arising from the Judgment of **B. Thurairaja Jaden, J** dated the 29th day of January, 2015, vide which the learned Judge dismissed the appellant’s appeal against both the conviction and sentence handed out against him by the chief magistrate’s court at Kitui (**B.M. Kimemia**) (S.M.), on the 4th day of April, 2012, for the offence of defilement contrary to **section 8(1) (3)** Sexual Offences Act No.3/2006. The particulars of the offence were that the appellant **Joseph Kakei Kiswili** (the appellant), on diverse dates between **19th and 31st July, 2010** at an unknown time at *[particulars withheld]* in Kitui District of the Eastern Province (as it was then known) intentionally penetrated with his penis the vagina of **MK** a child aged 13 years. The appellant denied the charge provoking a trial in which the prosecution called five (5) witnesses in support of the case, while the appellant who gave sworn evidence was the sole witness for his defence.

The background to the appeal is that the complainant **MK** missed school consecutively from **19th through to the 21st July, 2010**. **Mr. Muthui** the head Teacher sent for her parents, PW2,her mother, and PW3 her father. Both parents attended **Mr. Muthui** on the 26th July, 2010. Through the intervention of a **Mrs. Muthuri**, a teacher at the school, **MK** revealed the perpetration of the defilement against her by the appellant on each of the three consecutive days when she missed school. It was however not until the 5th

day of October, 2010 when **J** and **F** went to Kitui police station in the company of **MK** and the appellant and formally filed a report of defilement to **P.C. Monica Aoko** who booked the report in the OB and then referred **MK** to Hospital for a medical checkup, treatment and age assessment. The appellant was arrested and subsequently arraigned before the chief magistrates' court at Kitui for the offence of defilement against **MK**. In a judgment dated the 4th day of April, 2012, the learned trial magistrate (**B.M. Kimemia**, PM) having concluded that the prosecution case was proved to the required threshold, convicted the appellant and sentenced him to serve twenty one years of imprisonment.

On appeal to the High Court against the conviction and sentence, the learned Judge concurred with the findings of the trial magistrate that the prosecution had proved beyond reasonable doubt that **MK** had been defiled by the appellant consecutively between **the 19th-21st July, 2010**; that **MK** was a truthful and credible witness and her evidence was reliable; that the offence took place in broad day light and the issue of mistaken identity did not arise; that the issue of fabrication of the charge against the appellant did not arise as both sides agreed that there was no bad blood between the two families; that the evidence of **MK** was sufficient to found a conviction against the appellant and did not require corroboration in terms of the proviso to **section 124** of the Evidence Act Cap 80 Laws of Kenya; and lastly, that the appellant's defence was rightly rejected by the trial court as it had no merit. On account of the totality of the above findings, the learned Judge dismissed the appellant's appeal.

The appellant is now before us on a second appeal raising six (6) grounds of appeal in an amended memorandum of appeal handed in on the hearing date alongside written submissions. It is the appellant's complaint that the learned Judge of the High Court erred in law, when she failed to appreciate that: the appellant's rights to a fair trial were gravely infringed hence occasioned a serious prejudice; that the prosecution was premised on an incurably defective charge; that sections **85(2)** and **88(1)** of the Criminal Procedure Code (CPC) were flouted occasioning prejudice to the appellant; that the entire prosecution evidence was inconsistent and materially contradictory as it was at variance with the particulars of the charge and did not therefore prove the charge beyond reasonable doubt; that sections **213** and **310** of the CPC were also grossly flouted occasioning prejudice; and lastly that the learned Judge failed to consider the appellant's statement of defence.

In his written submissions, the appellant contends that he was denied a fair trial when the State failed to accord him free legal services, and second, when the trial court failed to accord him an opportunity to address the court on his submissions; that the charge was defective as there is no charge capable of being laid as "contrary to section **8(1) (3)** of the Sexual Offences Act", as such charge is nonexistent; and also when it made provision for the offence committed on diverse days between the 19th to 31st day of July, 2010 which particulars were at variance with the evidence adduced by the prosecution in support of the case, and was therefore fatal to the prosecution case; that section **85 (2)** and **88 (1)** of the CPC were flouted for lack of participation of a duly authorized prosecutor in the Court proceedings when the appellant's plea was taken thereby rendering the entire proceedings incompetent *ab initio*, and hence a mistrial.

The appellant continued to urge further that the prosecution evidence was full of conjectures, speculations, doubts, mere suspicions, inconsistencies and material contradictions and did not therefore meet the threshold of proof beyond reasonable doubt; that the appellant gave a plausible defence which was neither investigated nor displaced by the prosecution's evidence; that medical evidence was improperly introduced in evidence without following the laid down procedure in sections **33** and **77** of the Evidence Act; and lastly, that crucial witnesses were not called to testify.

To buttress his submissions, the appellant referred to numerous case law which we have taken judicial notice of and shall bear them in mind in the determination of the appeal under review.

The learned Senior Assistant Director of Public Prosecution (SADPP) Mr. **O' Mirera Moses** opposed the appeal on the grounds that **MK** had been defiled on three (3) consecutive days in the month of July, 2010; that the complainant identified the appellant as the perpetrator; that the two courts below concurrently found that this was a case of recognition of the perpetrator as the incidences took place in broad day light; that the minor knew the appellant very well as an employee in a neighbouring home; that there was no

bad blood between the two families as confirmed by **J , F** and the appellant himself and therefore the issue of fabricating the charge against the appellant did not arise.

This being a second appeal, by dint of **section 361** of the Criminal Procedure Code, our mandate is as set out in a long line of cases namely that as a second appellate court, we must confine ourselves both to the interrogation and determination of points of law only, and we should not interfere with the concurrent findings of fact arrived at by the two courts below unless we are convinced that these were based on no evidence. The test we are enjoined to apply is to determine whether there was any evidence on the basis of which the trial court and the 1st appellate court could find as they did (See **Karingo versus Republic [1982] KLR 213**).

We have given due consideration to the totality of the record, in the light of the rival submissions set out above, and in our view, the following are the issues that fall for our interrogation and determination, namely:

- (1) Whether section 85 (2) and 88 (1) of the Criminal Procedure Code were violated by the trial magistrate on the day the appellant's plea was taken.*
- (2) Whether the appellant was denied a fair trial.*
- (3) Whether medical evidence was improperly admitted in evidence in contravention of sections 33 and 77 of the Evidence Act.*
- (4) Whether crucial witnesses were not called.*
- (5) Whether the prosecution case proceeded on the basis of a defective charge.*
- (6) Whether the particulars of the charge were at variance with the evidence adduced.*
- (7) Whether the prosecution case was full of conjectures, suspicions, inconsistencies, contradictions, gaps and doubts which were never reconciled by the two courts below and therefore rendered it incredible and should not have been acted upon by the two courts below to found and affirm the appellant's conviction and sentence.*

With regard to issue number 1, section **85 (2)** of the Criminal Procedure Code authorizes the Director of Public Prosecution, to appoint in writing under his hand any advocate of the High Court or a person employed in the public service to be a public prosecutor for the purpose of any case. Section **88 (1)** of the same CPC on the other hand authorizes a magistrate to permit any person to prosecute a case before him/her or without such permission by either a public prosecutor or a person specially authorized by the Director of Public Prosecution to conduct such prosecution. The record indicates that on the day the appellant's plea was taken, **I.P Korir** was present in court as the court prosecutor. The appellant was not present when his file was called out for plea in the first instance. The matter was then rescheduled for mention on another date for plea and a warrant of arrest issued against him. Shortly thereafter, the appellant appeared in court and the court prosecutor, alerted the court of his subsequent presence. His file was once more placed before the same magistrate who noted that the "Coram was as before" and then proceeded to take the appellant's plea. The reason why the learned trial magistrate made a note of "Coram as before" was because there was no change in the constitution of the court in terms of the presiding magistrate or the Court prosecutor. The presence of a prosecutor is further borne out by the following entry made on the record by the trial magistrate.

"Court prosecutor- the accused is now present"

In view of all the above, it is our finding that the court was properly constituted when the appellant's plea was taken.

With regard to issue number 2, the first limb of denial of a fair trial relates to violation of sections **213**

and **310** of the CPC. Section **213** of the CPC donates a right to both an accused person and the prosecutor to address the court both at the no case to answer stage and at the conclusion of the trial. Section **310** on the other hand donates a right to the State to seek leave to call evidence in rebuttal of any new evidence that may be raised by an accused person in his defence. The right in section **310** is however not absolute. It is subject to section **161** of the CPC which claws back this right making it merely discretionary. It is simply to the effect that the fact of an accused person giving new evidence in his defence does not *per se* guarantee the prosecutor a right of reply except where the Director of Public Prosecution is personally present in court and he is the one conducting the proceedings.

In **Otieno versus Republic [2006] 1KLR 241**, the Court held *inter alia* that a violation of sections **213** and **310** of the Criminal Procedure Code renders the proceedings null and void. On the basis of the record before us, we find no evidence of violation of sections **213** and **310** of the CPC by the trial court. At the conclusion of the trial, the prosecutor did not seek leave to call any evidence in rebuttal of the appellant's defence. Instead, parties elected to file written submissions. The appellant's advocate then on record for him was the first to file his. The State sought leave to reply to the appellant's submissions which request was granted. The appellant's advocate never sought leave of Court to respond to the prosecutors' submissions. Neither party sought to orally highlight its respective submissions. The trial magistrate was therefore entitled to reserve the matter for judgment upon receiving the respective submissions from both parties. In light of all the above, we find no merit in the appellant's complaint that Sections **213** and **310** of the CPC were violated.

Turning to the alleged non compliance with Article 50 of the Kenya Constitution, 2010, the relevant portion reads as follows:-

“Article 50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court of law or if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right

.....

(g) to choose, and be represented by an advocate and to be informed of this right promptly.

(h) to have an advocate assigned to the accused person by the State and at the States' expense if substantial injustice would otherwise result, and to be informed of this right.

In **David Macharia Njoroge versus Republic [2011] eKLR**, the Court while construing the above provision observed that provision of free legal representation to an accused person was necessary especially in instances where an accused person faces a capital offence that carries with it a penalty that entails loss of life.

In **Douglas Kinyua Njeru versus Republic [2015] eKLR** the Court approved the reasoning in **David Macharia versus Republic** (supra) and added that the right to free legal representation at the State's expense guaranteed under **Article 50** of the Constitution remained aspirational until such a time when Parliament would enact legislation to give effect to that provision. In **Thomas Alugha Ndegwa versus Republic [2016] eKLR**, the Court observed that the Government of Kenya had established a Legal Aid institutional framework for the provision of legal aid namely the Legal Aid Act Number 6 of 2016 with a commencement date of 20th May, 2016. In light of the jurisprudence highlighted above, and especially the fact that the Legal Aid Act enacted in 2016 took effect only on the 20th day of May, 2016, it is our view that although the appellant was arraigned in Court in October, 2010, and therefore after the promulgation of the Kenya Constitution 2010, that apparently guaranteed him free legal aid. But as at that point in time, the said right was merely aspirational. It is only recently that Parliament has put in place legislation to actualize the right guaranteed under **Article 50(1) (2) (h)**, in the form of the Legal Aid Act No. 6 of 2016, effective 20th May, 2016. It is therefore our finding that the State had no obligation to grant free legal aid to the appellant as of right as at the time he was arraigned in court.

With regard to issue number 3, it is not disputed that **Dr. Indumira** attended to **MK** on the 5th, 6th, 7th and 10th October, 2010 when medical examinations and tests were carried out on her; **Dr. Patrick Mutua** attended to her on the 8th of October, 2010 when he filled the P3 form for her using information gathered from the medical charts under the hand of **Dr. Indumira**; while **Dr. Muturi** a dentist attended to her on the 17th day of October, when the age assessment was carried out and her age assessed at thirteen (13) years of age. **Dr. Indumira** and **Dr. Muturi** did not attend court to give evidence as they were allegedly transferred away from Kitui hospital. **Dr. Mutua** who was familiar with the signatures and the hand writings of both of them tendered the medical documents in court both on his own behalf and on behalf of the other two colleagues.

Section 33 of the Evidence Act cap 80 Laws of Kenya deals with admission in evidence of statements made by persons whose attendance to court cannot be procured without an amount of undue delay or expense which in the circumstances of the case appears to the Court to be unreasonable. Section 77 of the Act on the other hand makes provision for the admission in evidence of medical evidence. This section further provides that the court is entitled to assume the genuineness of the signature (s) appended on such documents, though the Court has liberty to summon such expert for purposes of cross-examination if need be. Apart from complaining that medical evidence was not properly tendered in evidence, the appellant has not explained how the production of medical evidence through **Dr. Mutua** who admitted that he filled the P3 form for the complainant and identified the signatures and handwritings of his two other colleagues on whose behalf he tendered the other documents in evidence contravened sections 33 and 77 of the Evidence Act. We therefore find that sections 33 and 77 of the Evidence Act (supra) were not flouted.

Regarding issue number 4, section 134 of the Evidence Act (supra) is explicit that no particular number of witnesses, in the absence of any provision of law to the contrary is required to prove any fact. In **Mwangi versus Republic [1984] KLR 595**, the Court held *inter alia* that, as to whether a witness should be called by the prosecution is a matter within the discretion of the prosecution, and the court will not interfere with that discretion unless it is shown that the prosecution was influenced by some oblique motive to withhold such a witness from court. In **Bukenya & Others versus Uganda [1972] EA 549**, the predecessor of the Court placed an obligation on the prosecution to make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. A corresponding obligation was placed on the court to call witnesses whose evidence is essential for the just decision of the case. That power donated in the **Bukenya case** (supra) is no licence for either the prosecution or the court to call a superfluity of witnesses. The power exists solely for purposes of calling only such witnesses as are sufficient and necessary to establish the charge to the required threshold. See **Keter versus Republic [2007] 1 EA 135**.

The witnesses the appellant complained that were not called were a **Mrs. Muthuri** through whose intervention **MK** disclosed the act of defilement against her by the appellant; a **Mrs. Katumo** who allegedly told **F** that **MK** had not been to school since July, 2010 and the milk buyers who allegedly witnessed appellant lead **MK** to his house on the three consecutive days when the defilement was perpetrated against her. In our view, the evidence of these would have been witnesses had no probative value either to the prosecution case or the defence and its exclusion caused no prejudice or miscarriage of justice to the appellant.

Issue number 5 and 6 are interrelated. We find it prudent to deal with them as together. Issue number 5 relates to alleged defects due to the misdescription of the charging provision which reads as follows:-

“ defilement contrary to section 8(1) (3) of the Sexual Offences Act No. 3 of 2006.”

Section 8 (1) of the Sexual Offences Act defines the offence of defilement thus:-

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

Section 8(3) on the other hand, it provides as follows:-

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

The appellant’s complaint is that, instead of the particulars of the offence being specified as “**section 8 (1) (3)**” it ought to have read:-

“Defilement contrary to section 8(3) of the Sexual Offences Act No. 3/2006.”

The complaint in issue number 6 is that the charge specifies diverse dates of 19th to 30th July 2010 when the offence is alleged to have occurred which dates were alleged to be at a variance with the evidence tendered.

To begin with **section 134** of the **Criminal Procedure Code**, is concerned with the framing of charges, and stipulates 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].

Udo Udoma Chief Justice of Uganda (as he was then) in **State of Uganda versus Wagara [1964] E.A. 366**, at page 368, stated *inter alia* that in the absence of any amendment, the prosecution was bound by the particulars of the charge. In **Furo versus Uganda [1967] EA 632**, the same Chief Justice **Udo Udoma** faulted the trial magistrate for relying on evidence that was at variance with the particulars of the charge without amending the charge, and re-aligning it to the evidence tendered by the prosecution. In **Mwasya versus Republic [1967] EA 345**, the Court held *inter alia* that where a crucial issue of fact is not contested in any trial, the variance between the charge and the evidence tendered is curable under **section 382** of the Criminal Procedure Code. In **Yongo versus Republic [1983] KLR 319**, the Court held *inter alia* that a charge is defective where it *inter alia* gives a misdescription of the alleged offence in the particulars. In **Kimeu versus Republic [2002] 1 KLR 756**, the Court held *inter alia* that not every conflict between the particulars of the charge and the evidence will vitiate a conviction especially where the conflict is minor or of such a nature that no discernible prejudice is caused to the accused.

As regards, the misdescription of the charging provision, the charge sheet clearly specified the nature offence for which the appellant was charged, which in this case was defilement, and more particular, that he was charged with defiling a child of between the age of twelve and fifteen years. As a consequence, the appellant was aware of the charges that he faced, notwithstanding the misdescription of the charging provision.

Concerning the issue that the charge was at a variance with the evidence, the charge sheet specified that the offence took place on diverse dates between 19th and 30th July 2010. According to MK’s evidence in re-examination “... **she was defiled only on three consecutive days, that is from 19th through to 21st July, 2010**”. No evidence was adduced regarding the period between the 22nd and the 31st of April, 2010. As observed by the court in the **Isaac Omambia case versus Republic [1995] eKLR**, both the trial magistrate and the prosecutor had an opportunity to invoke **section 214** of the CPC either to amend or substitute the charge, to re-align it to the evidence or alternatively to tender evidence in support of the charge as laid.

The above notwithstanding, the evidence showed that the appellant defiled MK on three consecutive dates between 19th to 21st July 2010. Having found her to be a truthful and credible witness, the two courts below reached concurrent findings, with which we agree, that the appellant was responsible for defiling **MK** on the three consecutive days. Though the charge sheet was not amended to omit the dates between 22nd July and 30th July 2010, we find that to the extent that no evidence was adduced against the appellant on these dates there was a variance between the charge sheet and the evidence. But guided by the decision in **Kimeu versus Republic** (supra), which observed that the prosecution’s case is not vitiated

where no discernible prejudice has been occasioned against an accused person by such variance, having found that the appellant committed the offence between 19th and 21st July 2010, we find such variance did not occasion him any prejudice. We would add that the defects of misdescription of the charging provisions and the omission to amend particulars to omit the offence to the dates between the 19th and 21st July 2010 were in any event curable under section 382 CPC and did not vitiate the prosecution's case.

With regard to issue number seven, according to the appellant, the mere conjectures, suspicions, and gaps in the prosecution evidence arose from the prosecution's failure to adduce evidence to prove the perpetration of the defilement beyond the three consecutive days alluded to by **MK**. The existence of doubts arose from the failure of parents of **MK** to promptly file a report with the police regarding the perpetration of the defilement and to take **MK** for medical checkup soon after its disclosure on the 26th day of July, 2010. The existence of contradictions and inconsistencies arose from the testimony of the complainant who stated in the examination-in-chief that on all the three consecutive days she had been threatened with death by the appellant if she either screamed during the perpetration of the defilement against her or disclosed it thereafter to anyone, only for her to change in cross-examination that she did not know what the appellant had done to her that made her just to follow him to his house where he would defile her and then release her to go home.

The position in law on mere conjectures and suspicion is that, suspicion however strong can never found a conviction. See **Sawe versus Republic [2003] KLR 364**. The position in law on doubts, gaps, inconsistencies, discrepancies and contradictions is that, these are bound to occur in a criminal trial. See **Njuki & 7 others versus Republic [2007] KLR 771**. The role of the Court where these are alleged to exist is to reconcile them and determine whether they are inconsequential to an accused persons' guilt or whether they are fundamental and therefore vitiate the trial. See **Vincent Kasyula King'oo versus Republic Nairobi Criminal Appeal No. 98 of 2014**.

The findings of the learned Judge reflected above did not address the issue of the variance between the particulars of the charge and the evidence adduced by the prosecution. Neither did it highlight any of the conjectures, suspicions, doubts and gaps complained of by the appellant as highlighted above. We are therefore obligated in law to reconcile these. We have reconciled all the above and it is our finding that, issues of conjectures and mere suspicion did not arise as **MK** was presented to Court and gave evidence, which as put by the learned SADPP, **Mr. O'Mirera**, the two courts below found her a truthful witness and therefore believable. It is her testimony as corroborated by the medical evidence that, the two courts below acted on to found and affirm the conviction and sentence against the appellant. It is now trite that it is the trial Court which is in a better position to form a correct impression on the demeanor of a witness. We find nothing on the record to suggest that there was a misapprehension by the trial Court of the correct demeanor of **MK**. We therefore affirm the concurrent findings of the two courts below that she was a believable witness.

The doubt related to the failure of **MK's** parents to file a report of defilement against the appellant soon after the disclosure of the perpetration of the defilement on the 26th day of July, 2010. It is our view, that such prompt action is desirable but we cannot vitiate the prosecution on account of this apparent dilatory conduct on the part of the parents of the minor **MK** as we have judicial notice of the fact that, there is no time limitation for laying a criminal charge. It is also our view that filing a complaint within three months cannot be said to be an inordinate period of time. The action was therefore taken within a reasonable time. Gaps inconsistency, contradictions and discrepancies related to the misdescription of the provision of law under which the charge was laid and the variance between the particulars of the charge and the evidence tendered matters we have already made findings thereon when determining issue No.s 5 & 6 above. We reiterate our findings with regard to those issues as applicable to issue number 7 as well.

In the result, we find no merit in the appeal. It is dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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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