



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MAKHANDIA, OUKO, & M'INOTI, JJ.A.)**

**CRIMINAL APPEAL NO. 114 OF 2014**

**BETWEEN**

**MORRIS MUTIE THOMAS.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Mombasa*

*(Muya, J.) dated 14<sup>th</sup> February 2014*

*in*

*H.C.C.R.A. No. 76 of 2013)*

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**JUDGMENT OF THE COURT**

The appellant, ***Morris Mutie Thomas***, has preferred this second appeal in a bid to overturn his conviction and sentence of life imprisonment by the Principal Magistrates Court, Taveta for the offence of defilement contrary to ***section 8(1)*** as read with ***section 8(2)*** of the ***Sexual Offences Act***. The conviction and sentence was upheld by the High Court (***Muya, J.***) in the appellant's first appeal.

The particulars of the offence stated that on 14<sup>th</sup> February 2013, at 7.30 pm at [particulars withheld] Village, Taita Taveta County the appellant intentionally caused his penis to penetrate the vagina of SJ, a child aged seven years. He also faced an alternative charge of indecent assault of a female contrary to ***section 11(1)*** of the same Act.

The prosecution case was that on the material day and time, SJ, a class one pupil aged 7 years and her younger brother were sleeping in their single room house at [particulars withheld], which was lit by electric lights. Their parents were not at home. The appellant, who was their neighbour and known to SJ sneaked into the house, switched off the lights and after removing her pants, which were torn in the process, defiled and sodomized her. He stayed in her room until about 11 pm when he fled after her parents came back. SJ did not report to her parents what had happened because upon getting home, her father picked up a quarrel with her mother and beat her up. Indeed because of the domestic violence, SJ had to spend the rest of the night in the home of a neighbour, ***PW5***.

When SJ went to school the next morning, her teacher, **PW2** noticed that she had difficulties walking. Upon inquiry, SJ informed her that the appellant had defiled her the previous night. PW2 examined SJ and noticed that her private parts were dirty and her pants were torn. She took her to [particulars withheld] Police Station, reported the defilement and a P3 Form was issued before SJ was taken to Taveta District Hospital for examination.

At the hospital, **Joto Nyawa**, a clinical officer, (**PW4**) examined SJ and noted that her underpants was soiled and torn. The labia parts were bruised, swollen and tender. The hymen was absent and she had a whitish discharge. Although a vaginal swab did not reveal presence of spermatozoa, her urine was found to be infected. PW4 concluded that SJ was probably defiled.

When he was put on his defence, the appellant elected to give unsworn evidence and called no witness. The gist of his defence was that on the material day and time, he was at home at [particulars withheld] village, having retired to sleep with his wife. The next day he went about his business as usual until 16<sup>th</sup> February 2013 at 4.30 pm, when he was arrested by the village elder and a policeman for alleged defilement. Subsequently he was charged with the offence of which he knew nothing.

As we have already intimated, Muya, J. dismissed the appellant's first appeal on 14th February 2014, thus precipitating this appeal, which the appellant opted to prosecute through written submissions. He relies on four grounds of appeal to contend that he was denied a fair trial due to failure to provide him with witness statements as required by **Article 50 (2) (c) and (j)** of the **Constitution**; that his identification was not safe; that the fact of penetration and the age of SJ were not proved beyond reasonable doubt; and that there was no medical evidence to link him to SJ's defilement.

Expounding on the above grounds, the appellant submitted that his right to a fair trial was violated as he was not afforded sufficient time and facilities to prepare his defence and that he was neither informed in advance of the evidence the prosecution intended to rely on nor was he allowed access to that evidence. Due to the violation, he argued, he was not able to effectively cross-examine the prosecution witnesses.

As regards his identification, he submitted that it was not safe because SJ testified that she was asleep when she was defiled. Accordingly she could not have been able to positively identify him as the perpetrator of the defilement. The trial court was faulted for failing to warn itself of the danger of relying on the evidence of SJ alone to identify the appellant.

Next the appellant submitted that he should not have been convicted of the offence of defilement because penetration as well as the age of SJ were not proved as required by law. As regards the age of SJ he contended that no evidence was led on the year of her birth and the birth certificate was not produced. He contended further that the prosecution bore the burden of proving those two elements under the Sexual Offences Act beyond reasonable doubt, which it failed to do. He claimed that the P3 form and the age assessment reports were produced in violation of **section 77** of the **Evidence Act**.

Lastly the appellant submitted that there was no medical evidence to link him with SJ's defilement. In the absence of such evidence, it was his view that all that remained were bare allegations, which could not sustain a conviction.

**Mr. Monda**, Assistant Director of Public Prosecutions opposed the appeal contending that the appellant's conviction and sentence was based on sound and cogent evidence. He submitted that at the first date of the hearing, the appellant asked for copies of the charge sheet and witness statements, which the court ordered to be supplied to him. He never raised the issue again before the court, suggesting that he was supplied with the statements.

As regards the age of the SJ, Mr. Monda urged that there was consistent evidence that SJ was 7 years old, including from a medical assessment report that was produced as an exhibit. On penetration, counsel submitted that the same was sufficiently proved by the evidence of SJ and the medical evidence.

Lastly, Mr. Monda submitted that there was sufficient evidence on record from which the two courts

below concluded that it was the appellant who defiled SJ. He accordingly urged us to dismiss the appeal.

We are satisfied that the issues raised by the appellant properly fall for consideration as issues of law under section 361 of the Criminal Procedure Code. (See ***Karani v. Republic [2010] 1 KLR 73***). It cannot be disputed that under Article 50 (2) (c) and (j) of the Constitution the appellant is entitled to sufficient time and facilities to prepare his defence. He also has the right to be informed in advance of the evidence the prosecution intended to rely on and the right to access that evidence. The first point to note however, is that the appellant is raising this issue for the first time in this second appeal. It was never an issue placed before the High Court for consideration and decision thereon.

Secondly, and as the respondent submits, at the first date of the hearing on 7<sup>th</sup> March 2013, the appellant is recorded making a request to be given a copy of the charge sheet and the witness statements. The trial court adjourned the hearing to 18<sup>th</sup> March 2013 and directed the prosecution to avail copies of the charge sheet and witness statements to the appellant. We have perused the record and nowhere does it show the applicant ever raising the issue again, which suggests that he was duly supplied with the documents as ordered by the court. Nor is there any record of appellant making an application for adjournment, which was rejected. Going by the record, because this is a court of record, we have no basis to hold that the appellant's constitutional rights were violated as he claims.

Turning to the identification of the appellant, we are equally satisfied that, as concurrently found by the two courts below, he was identified on proper and cogent evidence. The following issue stands out as regards his identification. The appellant was well known to SJ as a neighbour. From the evidence on record, his home was about half a kilometre from that of SJ and the two homes were separated by only one other home. Although the offence was committed at 7.30pm the house in which it was committed was lit by electric lights. The appellant stayed in the house for considerable time until about 11.00 pm when he fled after SJ's parents returned. There was also evidence that the appellant had defiled SJ previously but got away with it. He was clearly well known to her, which makes this a case of recognition rather than identification of a stranger. As this Court stated in ***Anjononi & Others v. Republic [1976-80] 1 KLR 1566***, such evidence is more reliable and assuring.

As regards the age of SJ and the fact of penetration, we are equally satisfied that there is no merit in the complaint. The victim, her mother, PW3, and the Clinical Officer, PW4, all testified that SJ was 7 years old. In addition, the age of SJ was assessed at 7 years old in the age assessment report dated 3<sup>rd</sup> April 2013 that was produced in evidence by PW6 as Exhibit No. 3. On penetration, the evidence of SJ was, although strictly not necessary, corroborated by the medical report prepared by the clinical officer, (PW4) who examined SJ the day after the defilement and expressed the opinion that she was probably defiled.

Lastly, it was not necessary to link the appellant medically with SJ's defilement. As this Court stated in ***George Kioji v Republic, CR APP. No. 270 of 2012 (Nyeri)***:

***“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”***

There are two issues in this appeal that have caused us concern, even though the applicant did not raise them. The first is the manner in which the trial court dealt with the appellant's alibi defence. The court expressed itself thus:

***“The principle that emerge from the definition of the term alibi is that for an accused to sustain it as a defence, he must have raised it at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought. It is clear***

***from the evidence however, that the accused failed to put it forth at the earliest stage leave alone suggesting it in his close (sic) examination. Therefore this defence do not amount to an alibi.”***

Clear that was a misdirection. While it has for long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi (see for example ***R. V. SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939) 6 EACA 145***, and ***WANG’OMBE v REPUBLIC [1976-80] 1 KLR 1683***), an alibi defence put up late in the trial cannot be ignored. As this Court stated in ***GANZI & 2 OTHERS V. REPUBLIC [2005] 1 KLR 52***, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence. Despite the misdirection, we are satisfied that the evidence adduced by the prosecution completely displaced the appellant’s alibi defence and nothing turns on the misdirection.

The other issue is how the trial court handled the application by the prosecution to amend the charge on 25<sup>th</sup> March 2013. On that day, immediately after SJ had testified and was subjected to cross-examination, the prosecutor applied to amend the charge and add an alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The application was granted and the new charge was read over to the appellant who denied both counts. A plea of not guilty was entered in respect of both counts.

Instead of starting the trial afresh, the trial magistrate informed the appellant that he had the right to recall SJ, which right the appellant exercised. When SJ however took the stand, the appellant opted not to cross-examine her further. Ideally after the charge was amended and the appellant had pleaded not guilty to it, SJ should have given her evidence afresh. In the circumstances of this appeal however, we note that the effect of the amendment of the charge was to retain the first count of defilement intact and merely add the second count of indecent act with a child. SJ’s evidence in respect of the first count had been given moments before the amendment of the charge, and did not change in anyway. In addition the appellant was given the opportunity to subject her to further cross-examination, which he declined to do. We find that the lapse in procedure did not occasion the appellant any prejudice.

Having carefully considered the appellant’s appeal, we are satisfied that it has no merit. Accordingly the same is dismissed in its entirety. It is so ordered.

**Dated and delivered at Mombasa this 22<sup>nd</sup> day of April 2016**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**