



IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 67 OF 2015

BETWEEN

LABAN MUTUAAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Mombasa

(Nzioka, J.)delivered on 6th November, 2012)

in

(H. C. Cr. App. No. 105 of 2011)

JUDGMENT OF THE COURT

On 5th December, 2008, **KM** (PW1) the mother to the victim left home very early in the morning to go to work. She left behind the victim aged 2 years with her other siblings including **MK** (PW2) aged 10 years in the custody, care and control of the appellant, her husband. The appellant however was not the biological father of PW1’s children. At about 10.00 a.m. PW 2 suddenly appeared at PW1’s place of work crying and informed her that she had been sent by the appellant to tell her to come home immediately as there were visitors. When she was asked why she was crying PW2 informed PW1 that she had left the victim bleeding. That the appellant had earlier sent her together with her other siblings to fetch water from a well and upon their return they found the appellant holding the victim as she bled from her genitals. On reaching home however, PW1 found that the appellant had taken the victim to Mwaluphamba Dispensary. She followed him there and found the appellant with the victim who was still crying. When PW1 sought to know what had happened the appellant was reluctant though he had already undressed the victim. She examined the victim and noted that she was bleeding a lot from her private parts. The victim could not be treated at the dispensary or the nearby Shimba Hills Hospital because of the severity of the injuries. Accordingly she was referred to Msambweni District Hospital where she was admitted and treated for a month. The victim was thereafter examined by **John Murei** a Clinical Officer, though **Stanley Chepkirwa** (PW3) a fellow Clinical Officer at the same facility testified on his behalf.

Upon examination he classified the injuries sustained by the victim as maim, noted that the hymen was broken or perforated and sores on upper posterior minora and swelling on labia majora.

The case was then reported at Diani Police Station. The report was received by **P.C. Kenneth Muriithi** (PW4) who immediately commenced investigations. All along both PW1 and PW2 had suspected the appellant as the perpetrator of the crime and stated as much to PW4. Following further investigations, the appellant was arrested by PW4 when he came visiting PW1 and the victim at Msambweni District Hospital on 12th December, 2008. He was subsequently charged before the Senior Resident Magistrates Court at Kwale with a single count of defilement of a girl contrary to **section 8(1)** of the Sexual Offences Act, brief particulars being that he, on 5th December 2008 in Msambweni District of the Coast Province, defiled the victim, a girl aged 2 years.

The appellant denied the charge and in his sworn statement of defence stated that on the material date, he was away doing some work. When he came back home, he found the incident having happened and sent for PW1. He then took the victim to hospital and she was admitted. He kept visiting the victim and PW1 in the hospital until he was, during one such visits, arrested and subsequently charged for an offence he knows nothing about. Nonetheless he attributed his arrest to a family grudge.

The trial court was not convinced by the appellant's defence and by its judgment dated and delivered on 17th April 2011, found the appellant guilty, convicted and sentenced him to a period of 30 years imprisonment. Obviously this sentence was illegal given the provisions of **section 8(2)** of the Sexual Offences Act.

Aggrieved by the conviction and sentence aforesaid, the appellant lodged an appeal in the High Court of Kenya at Mombasa. The appeal was in due course heard and in a judgment delivered on 6th November 2012, **Nzioka, J.** dismissed the same. However, the appellate court, and correctly so in our view, set aside the illegal sentence imposed as aforesaid and substituted it with the proper and legal sentence of life imprisonment.

The appellant is still aggrieved by his conviction and sentence, and has preferred this second and perhaps last appeal in which he asks us to vacate the findings and orders of the High Court. His appeal revolves around claims of a defective charge, failure to determine the age of the victim, failure to conduct *voir dire* examination, the need for DNA testing pursuant to **section 36** of the Sexual Offences Act and the inadequacy of the evidence tendered.

In support of ground one, the appellant through his written submissions pointed out that to the extent that the charge sheet omitted the penalty section as drafted, it was defective and therefore his conviction could not stand. With regard to the age of the victim, the appellant submitted that it was mandatory that the victim's age be established beyond reasonable doubt to enable the trial court to determine the appropriate sentence to be meted out and that was a requirement of the law. However in this case, he argued, there was no such proof, the assessment or birth certificates having not been tendered in evidence. Accordingly, in his view, the sentence imposed by the trial court and subsequently enhanced by the 1st appellate court cannot be justified.

With regard to *voir dire* examination, the appellant submitted that the victim was not subjected to *voir dire* examination before, the court reached the conclusion that she was too young to testify. Yet such examination was a mandatory edict so as to meet the requirements of **section 19** of the Oaths and Statutory Declarations Act; he submitted

On DNA testing the appellant submitted that it was a legal requirement pursuant to **section 36** of the Sexual Offences Act, that a person charged under the Act should be ordered by court to undergo DNA testing in order to ascertain whether or not such person committed the offence. This having not been done in the circumstances of this case, the appellant submitted, the case against him was not proved.

Finally on the question of weight of evidence, the appellant submitted that his conviction turned on the

evidence of PW1, PW2 and PW3. However, in his view, that evidence was full of contradictions. Further, he contended, the evidence was purely circumstantial and did not irresistibly point to him as the only person who could have committed the crime. Had the first appellate court subjected the evidence taken by the trial court to exhaustive re-examination and evaluation, he submitted, it would have appreciated the foregoing and reached the verdict that the case against the appellant was weak and incapable of founding a conviction.

The appeal was opposed by **Mr. Ayodo**, Senior Principal Prosecution Counsel. In urging us to dismiss the appeal, he submitted that the charge was not defective at all as the appellant, on the basis of the evidence led knew the offence that he was confronted with. The High Court, he argued, had in any event sufficiently addressed the concern and finally that the omission if at all did not occasion any prejudice to the appellant.

With regard to the age of the victim and lack of *voir dire* examination, counsel submitted that the victim was a minor aged 2 years, which fact was proved beyond reasonable doubt. It was also established that the victim could not speak and with the permission of the court testified through her mother. In the circumstances, *voir dire* examination was not necessary.

On DNA, counsel submitted that it was not necessary. In any event, he continued, there was other evidence that pointed to the appellant as the culprit in the crime. Regarding contradictions in the prosecution case, counsel urged that there were none and even if there were, they were minor and did not go to the root of the prosecution case.

In a second appeal, our mandate is restricted by dint of **section 361** of the Criminal Procedure Code to consider only matters of law. Moreover, we cannot interfere with the concurrent findings of the courts below unless we find such findings to be perverse. All these principles have been stated in a host of decisions of this Court such as **Obedi Kilonzo Kerero v Republic (2015) eKLR**, where this Court delivered itself thus:

“The law is that on a second appeal the Court of Appeal is restricted to consider only points of law This Court has also stated in many previous decisions that it will not interfere with concurrent findings of fact by two courts below unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching the decision.”

These are the injunctions that will guide us in determining the appeal before us. We are satisfied though that all the grounds urged by the appellant are matters of law and accordingly our jurisdiction has been properly invoked.

The first issue is with regard to the alleged defects in the charge. The appellant’s argument as already stated is that the charge preferred against him was based on **section 8(1)** of the Sexual Offences Act. To the appellant that section alone does not create any offence to the extent that **section 8(2)** of the same Act was not included in the charge. Of course **section 8(1)** creates the offence of defilement whereas **section 8(2)** is the penalty section. Ideally both sections ought to be cited in the charge sheet. However, we do not think that failure to include **section 8(2)** in this case rendered the charge fatally defective. The law relating to the framing of the charges is captured by **section 147** of the Criminal Procedure Code. All that is required is that, the accused is informed in a clear and simple language the offence charged and the particulars thereof. We are satisfied that the requirement was achieved in this case. In any event the appellant is not faulting the particulars of the charge. He is simply faulting a section of the law not quoted. The appellant was not prejudiced at all by the omission. He understood the charge and that is why he participated effectively in the trial. His cross-examination of the witnesses availed by the prosecution during the trial and his defence leaves no doubt at all that he understood what he was confronted with.

Dealing with the issue, the trial court stated:-

“... The court notes that the accused was charged with descriptive section (8) of the Sexual Offences Act. I find this does not occasion any injustices to accused. He was aware of the charges he faces and even offered a defence”

As for the High Court it stated:-

“... I concur with the observations of the State Counsel and the findings of the trial magistrate respectively. I find that, the charges were read to the appellant, he took a plea of “not guilty.” Witnesses were called, they testified in chief and he cross-examined them. He then offered his defence. How can he say the charge upon which he defended himself was null and void I find no prejudice was occasioned to the appellant, and in this case therefore, the charge sheet was not null, nor void nor fatally defective ...”

We respectively agree with these concurrent findings of the two courts below.

On the question of the age of the victim, it is conceded that documents in support thereof, such as birth certificate and or age assessment report, were not tendered in evidence. The record however shows that the prosecutor when dealing with the issue addressed the court as follows; **‘The complainant is only two years old. She is not able to speak. I ask that the mother do give evidence’** The appellant raised no objection. In response the court stated **‘... I have seen the child in court. Indeed she is a young child. She is not able to speak in court. I rule that the mother may give evidence’** When PW1 gave evidence she categorically stated that the victim was aged 2 years. The victim’s sister PW2 too emphatically stated that the victim was aged 2 years. There was also the evidence of PW3 who put her age as 2 years in the P3 form he tendered in evidence. The age bracket that the appellant fell foul of defiling the victim is 11 years or below. It is not suggested that the victim was over 11 years. It was also not lost to the courts below that the appellant was a stepfather to the victim and lived with her. The appellant did not raise any objection nor did he cross-examine the three witnesses on that question. Infact when he was cross-examined on his defence by the prosecutor he stated; **‘she is my step daughter 2 years old’**. On what basis then should the appellant question the age of the victim? On the whole we are satisfied, just like the two courts below, that the age of the victim was proved to the required standard.

The appellant’s complaint that the trial court erred in not conducting a *voir dire* examination on the victim is equally baseless. **Section 19** of the Oaths and Statutory Declarations Act provides that, before the court can proceed to receive the evidence of a child of tender years, the court must first satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and that the child understands the duty of speaking the truth. The trial court had the benefit of seeing and observing the victim. It concluded that the victim was aged 2 years and could not speak or communicate. How then was she expected to go through the *voir dire* interview? Indeed she never testified. Instead her evidence came through her mother pursuant to the provisions of **section 31** of Sexual Offences Act. PW1 did not require to undergo *voir dire* examination.

DNA testing pursuant to **section 36** of the Sexual Offences Act is not a mandatory requirement. The section merely provides that, where a person is charged with committing a sexual offence, the court may direct that appropriate sample be taken from the accused for purposes of scientific testing including a DNA test, in order to gather evidence and to ascertain whether or not the accused committed an offence. As can readily be seen, the section can only be invoked at the instance of the court. Courts as arbitrators rarely descend in the arena of conflict. This may inform the discretionary nature of the wording of the section. Further this Court has stated in **George Kioji v Republic, CR APP. No. 270 of 2012 (UR)** that:-

“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 relief.”

The foregoing notwithstanding, did the appellant suffer any prejudice? We do not think so. During the trial, the circumstantial evidence implicating the appellant was cogent and clear. The fact that the evidence of PW1 and PW3 was not corroborated by DNA evidence did not weaken the prosecution evidence. Again from the record, it is clear, that both the trial court and the first appellate court were satisfied with the evidence tendered that it was the appellant who defiled the victim. We find no fault with these concurrent findings.

Lastly, the question is whether or not there was sufficient evidence upon which the appellant was convicted. Indeed there was no direct evidence linking the appellant to the crime. It was all circumstantial. Of course there is nothing wrong basing a conviction on circumstantial evidence. Indeed it has been said that it is perhaps the best evidence ever, provided the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt of the accused. See **Mwangi v Republic (1983) KLR 522**. The two courts below concurrently found that PW1 left home early in the morning to go to work. She left the children including the victim in the care of the appellant. Later the appellant sent the other children to fetch water from a well. The appellant was subsequently found holding the victim as she bled from her genital area. The two courts did not also believe the appellant’s defence that he had left home with PW1 that early morning and only came back at midnight when the incident had already happened. Indeed the appellant admitted to having sent PW2 to fetch PW1. If he came home in the evening as he claims, how, we may ask, could he at the same time be asking PW2 to go and get PW1 at 10.00 a.m.? Further, the appellant conceded to sending PW2 to tell PW1 that there were visitors at home when there were none. That immediately on receiving the information PW1 rushed to the house only to find that the appellant had left for hospital with the child. Yet when the appellant reported the incident at the police station he stated that PW1 and himself had gone to visit a friend and on coming back, found the victim bleeding from her genitalia which was a lie. Then there is the evidence of PW1 regarding the victim’s trauma whilst at the hospital. The evidence which was not challenged at all was that whenever the appellant would come visiting PW1 and the victim in the hospital, the victim would recoil and hide from him out of fear. Indeed the doctor attending to her noticed this strange behavior and asked PW1 for the explanation.

We also note that the appellant called his mother as his defence witness. Her evidence was equally a pack of lies calculated, we think, to save the skin of her son. She testified that she did not see the appellant at 6.00 a.m. when she woke up yet the appellant himself testified that he had left his mother in the house on his way to work. She also testified that PW1 came back home after the incident and the appellant was away. Shortly thereafter the appellant re-surfaced and they took the victim to hospital. This cannot possibly be true as from the evidence on record PW1 did not accompany the appellant to hospital initially. Secondly, the incident happened in the early hours of the morning. Yet the appellant claims to have come home at midnight. How could he have been at home at about 10.00 a.m. to send PW2 to go and look for her mother, take the victim to the nearby dispensary, meet PW1 thereafter and at the same time claim to have come back home at midnight when the incident had already happened?

Given the testimony on record and falsehoods of the appellant and his mother in their testimonies, it does not surprise us at all that the two courts below concurrently agreed that the entire evidence and indeed the circumstances irresistibly pointed to the appellant as the defiler and that there were no other co-existing factors that could weaken the inference.

The upshot is that the appeal lacks merit and is accordingly dismissed.

Dated and delivered at Mombasa this 27th day of May, 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