IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 39 OF 2015

BETWEEN

JAMES NGANGA NDUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Mary Gitumbi, J.) dated 15th November, 2013 **in HC. CR. A. No. 40 of 2011**

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JUDGMENT OF THE COURT

The appellant **James Nganga Ndungu** was charged with the offence of defilement of a girl between age of 12 and 15 years contrary to section **8(1)(3)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the 25th day of August, 2009 at *[particulars withheld]* in the then Kiambu West District he intentionally and unlawfully caused his penis to penetrate the vagina of "M.W.N." a girl aged 13 years. There was an alternative charge of indecent act with a child contrary to **section 11(1)** of the said **Act** particulars being that he caused his genital organ to touch that of the said child.

A trial took place before the Resident Magistrate, at Kikuyu and in a judgment delivered on 7th February, 2011 the appellant was convicted of the main offence and a sentence of 20 years' imprisonment was imposed. A first appeal to the High Court of Kenya at Nairobi (Mary M. Gitumbi, J.) failed in a judgment delivered on 15th November, 2013 and that provoked this appeal. Being a second appeal and by dint of **section 361(1)(a) Criminal Procedure Code** we are mandated to consider only issues of law but not matters of fact which the two courts below have considered and made findings on unless it is shown that either the trial court or the High Court on first appeal have abdicated their judicial duties. For judicial pronouncements on these principles that we act upon in second appeals see the case of **John Gitonga Alias Kados v Republic (Nyeri) Criminal Appeal No. 149 of 2006 (unreported)** and **M'Riungu v Republic [1983] KLR 455.**

In the recent case of **Dzombo Mataza v Republic [2014] eKLR** this Court stated:

> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see Okeno v Republic (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."***

We shall consider the facts as presented to the trial court and as reviewed on first appeal by the High Court purely for purposes of establishing whether the two courts carried out their judicial functions properly and particularly whether the first appellate court reappraised the evidence to come to its own conclusions on the facts of the case and the law.

On 25th August, 2009 **M.W.N. (PW1)** was with her sister **G.N.N. (PW2)** when they went to a church in Kamangu for choir practice. There were many other children at the said session which was conducted by the appellant as their teacher. At the end of the session at about 5.30 p.m. the children left but the appellant called M.W.N. back and told her to take a jug and cups to a kitchen within the church. She complied. When she entered the kitchen area the appellant who had followed her got hold of her, made her lie down on a seat and in her own words,

"he lifted my skirt up and inserted his penis into my vagina. He also tore my underwear."

He then told her to go home. She reached home crying and reported the incident to her mother **M.N. (PW6).** A report was made at Kikuyu Police Station immediately and the girl child was taken to Orthodox Hospital in Kamangu and thereafter to Nairobi Women's Hospital. The witness stated that she was 13 years old at the time of the incident and this was confrimed by her mother M.N. who produced her birth certificate in court.

Dr. Nzisa Liku (PW3) of **Nairobi Women's Hospital** produced medical evidence showing that the complainant had been sexually assaulted, that there was a small hymenal tear at the 9 o'clock position and a swab showed presence of spermatozoa. This was confirmed by **Dr. Goerge Kungu Mwaura** (PW5) of **Kinoo Medical Clinic** who was the first to receive and examine the complainant.

Henry Kiptoo Sang (PW4) a **Government Analyst** at the **Government Laboratory** in Nairobi received items for laboratory analysis. He did a DNA analysis of the complainant's underpants and found that it was stained with human blood. He did not find any match or samples presented to him to match the accused and the complainant.

No. 88345 P.C. Linet Choni (PW7) of Kikuyu Police Station received report and investigated the case and charged the appellant with the offence.

That was the totality of the prosecution case on which the trial court found that there was a case to answer.

In an unsworn statement the appellant stated that he was a bicycle repairer and that he did not know anything about the charges that he was faced with. He further stated that his family and that of the complainant had differences relating to a parcel of land.

The trial court analysed the prosecution case and the defence offered by the appellant and found that the case had been proved against the appellant to the required standards.

The trial court found that the appellant was well known to the complainant and her sister and that it was a case of recognition where the appellant as choir teacher was well known to the complainant. This was also the finding of the High Court on the first appeal.

In the Memorandum of Appeal before us the appellant complains that DNA was extracted from him unlawfully; that the sentence imposed on him was unlawful because it was imposed by a Resident Magistrate; that the evidence of the prosecution was not believable; that the charge sheet was defective; that his constitutional rights were breached; that the two courts below failed to consider an alibi defence and that the High Court erred in failing to appreciate that the standard of proof required was not met.

We have carefully considered the Memorandum of Appeal, the record of appeal and the detailed written submissions by the appellant; the reply by the learned Senior Director of Public Prosecutions Mr. O'Mirera who opposed the appeal. We have also considered the applicable law.

On the issue of a DNA analysis the learned judge on first appeal found that although that analysis did not link the appellant to the fluids found on the complainant the court was satisfied that complainant properly identified the appellant as the man who defiled her. That to us is a correct finding. DNA analysis was not necessary in the case before the trial court where the court needed only to be convinced that the complainant was telling the truth.

Section 124 of the **Evidence Act** as relate to evidence of children who are victims of sexual offences permits the trial court to receive the evidence of the victim and proceed to convict an accused person, if for reasons recorded, the court is satisfied that the victim is telling the truth. The complainant was defiled and ran home crying and reported the incident to her mother immediately. Her sister had witnessed the appellant calling her back into the church compound after the choir practice. The medical evidence produced before the trial court showed that defilement had taken place. The trial court was persuaded that it was the appellant who defiled the complainant because the complainant's evidence was consistent, credible and convincing and that it was elaborate and clear. The High Court found that evidence to have been overwhelming. We can see no reason to interfere with concurrent findings of the two courts on that issue and we should not disturb the same on this second appeal.

On alleged contravention of constitutional rights we have gone through the record of proceedings before the trial court and those of the High Court and we cannot detect any breaches of rights at all. The Memorandum of Appeal alleges breach of constitutional rights but does not specify what rights were contravened. In any event, a breach of constitutional right should have been raised at the first opportunity at the trial court so that the same could be investigated and findings made. There would then be a record of the way the complaint, if made, is dealt with by the trial court and the manner the first appellate court deals with such a complaint. In **Dominic Mutie Mwalimu v Republic Criminal Appeal No. 217 of 2007 (ur)** an allegation was made that the appellant's constitutional rights had been violated because he was not taken to court within the time allowed by law. It was held that an accused person who wished to raise an issue of breach of a constitutional right had to do so at the earliest opportunity to give the relevant court an opportunity to launch an investigation on the complaint raised.

We have perused the record here and cannot see any complaint raised by the appellant before the trial court. That ground of appeal must therefore fail and is rejected.

The appellant also complains that he was charged on a defective charge sheet. We have looked at the same and it is true that the section cited in the charge sheet as **section 81(3)** of the **Sexual Offences Act** is erroneous. It is also stated in the charge sheet that the date of apprehension report to court was made on 27th August, 2010. The appellant took up these issues before the High Court. The High Court recognised that those errors existed and came to the conclusion that the two errors did not in any way cause any prejudice to the appellant as the charges levied against the appellant were known and such errors did not vitiate the prosecution's case in any way. The High Court also found that

those errors did not prejudice the appellant in any way.

The charge sheet on its face was erroneous as it stated that the appellant was charged under **section 81(3)** of the **Sexual Offences Act**, a Section that in law does not exist. The particulars of the charge stated in detail that the appellant, on a stated date at a stated place caused his penis to penetrate the vagina of the complainant and that such action was unlawful.

The charge sheet also showed that the appellant was arraigned in court on 27th August, 2010.

We agree with those conclusions. The correct provision of law that the appellant should have been charged with was **section 8(1) (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge as set out in the charge sheet were clear enough to show the offence that the appellant was charged with. No prejudice was suffered by the appellant by those errors at all. The evidence adduced by the prosecution to prove the charge was overwhelming and we agree with the findings reached by the trial court as confirmed by the first appellate court.

This appeal has no merit and is accordingly dismissed.

Dated and delivered at Nairobi this 7th day of October, 2016.

E.M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR