



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI (PCA), KARANJA & AZANGALALA, JJ.A)**

**CRIMINAL APPEAL NO. 44 OF 2016**

**BETWEEN**

**MWEA FRANCIS.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Machakos (Jaden, J.) dated 13<sup>th</sup> November 2014***

***in***

***H. C. Cr. A. No. 179 of 2012)***

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**JUDGMENT OF THE COURT**

(1) Mwea Francis (hereinafter referred to as the appellant) was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars of the charge were that on the 24<sup>th</sup> March, 2011 between 2:00 pm and 5:00 pm at Kavata sub location, Kitui County, intentionally and unlawfully caused his penis to penetrate the vagina of RW, a child aged 2 years and 8 months. After conviction, the appellant was sentenced to life imprisonment as provided by law.

(2) After his conviction, the appellant filed an appeal to the High Court. That appeal was dismissed with the result that the Court upheld the conviction and affirmed the sentence.

(3) The concurrent findings of the Magistrate’s Court and the High Court were as follows: on the 24<sup>th</sup> March 2011, at about 2:00 pm, F N M (F) (PW1) left the complainant, RW, and her two siblings at home under the care of the appellant, who was working at their home as a domestic worker. F returned home at about 5:00 pm and sent the appellant to the nearby posho mill. She then took RW to take a bath, where RW informed her that she was feeling pain on her private parts. F checked RW’s private parts and noted that she was bleeding. RW told her mother that the appellant had defiled her. F and the complainant reported the matter to PC Margaret Kwamboka (PW4) of the Kitui Police Station. P.C Kwamboka escorted the complainant and her mother to the Kitui District Hospital where the complainant was treated by Dr. Patrick Mutuku (PW3). His examination revealed that the complainant had bruises on her labia majora and that her hymen was absent. In his opinion, there was evidence of penetration of her genital

organ. The complainant also underwent an age assessment which established that she was about 3 years old.

(4) The appellant is aggrieved with the conviction and sentence, and has asked this Court to set them aside. In a second appeal, this Court will consider only matters of law. In addition, the Court will not normally interfere with the concurrent findings of fact of the courts below unless those findings are perverse. These considerations are now well settled and were reiterated in the decision of this Court in **Boniface Kamande & 2 Others V Republic [2010] eKLR (Criminal Appeal 166 of 2004)** in the following terms:

***“On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision on it.”***

(5) In his memorandum of appeal and his supplementary grounds of appeal, the appellant faults the first appellate court for: failing to consider that the provisions of Article 50 of the Constitution were not complied with; failing to note that the provisions of sections 150 and 211 of the Criminal Procedure Code were not complied with; and for failing to properly reconsider and re-evaluate the evidence on record.

(6) In addition to these grounds, the appellant also filed written submissions wherein he expounded on his grounds of appeal. In these submissions, the appellant claims that he was not afforded a fair trial because he was neither given access to the evidence on which the prosecution relied during trial, nor was he afforded the services of an advocate to represent him during trial. The appellant further submits that the trial court erred and contravened section 150 of the Criminal Procedure Code when it failed to call certain witnesses whom he claims were essential to trial, especially as regards the circumstances of his arrest. He further submits that section 211 of the Criminal Procedure Code was not complied with because after the close of the prosecution case, the substance of the charge against him was not explained to him. The appellant's final submission concerns the trial court's evaluation of the facts before the court. The appellant submits that the medical evidence was not properly evaluated because the medical examination showed that there was no spermatozoa on the complainant, but the doctor stated that he had found spermatozoa.

(7) Mr. Moses O'Mirera, the learned Senior Assistant Director of Public Prosecutions, opposed the appeal on behalf of the State. Urging us to dismiss the appeal, he submitted that both courts below properly analysed the evidence before them. Counsel contended that the appellant received a fair trial because the appellant was afforded every opportunity to take copies of the witness statements, and at no time did he ever complain that he needed more time to go through them. In addition, learned counsel argued that the appellant was well aware of the charge that he was faced with as he adequately cross-examined the mother of the complainant. For these reasons, Mr. O'Mirera urged that the evidence against the appellant was sufficient and the courts below were right to rely on it to uphold the conviction and sentence.

(8) The first issue of law raised by the appellant is that he was not accorded a fair trial. The appellant alleges that the evidence that the prosecution had against him was never availed to him. In particular, he alleged that the prosecution never availed the witness statements to him. We have considered the record of appeal and we note that on the 21<sup>st</sup> September 2011, when the trial came up for hearing, the appellant informed the court that he had no witness statements as he had no money to make photocopies. The prosecution objected, after which the court ordered that the prosecution avail the witness statements to the appellant and that the matter proceed for hearing at 11:30 am that day.

(9) Later on that day, at 12:10 pm, the appellant informed the court that he had been given the witness statements. The hearing proceeded when F, the complainant's mother, testified. Thereafter, the record shows that the appellant cross-examined this witness at length. In fact, he cross-examined all the other prosecution witnesses as the hearing progressed. We therefore reject the appellant's contention that he did not have reasonable access to the evidence that the prosecution led against him.

(10) We have considered the appellant's allegation that he was at a disadvantage because he could not remember the charge against him and that section 211 of the Criminal Procedure Code was contravened. That section reads as follows:

***“(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any). (2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.*”**

(11) The record shows that on the 6<sup>th</sup> June 2012, the prosecution closed its case, and the court ruled that a *prima facie* case had been established against the appellant which warranted him being placed on his defence. At this juncture, the appellant indicated that he would be making an unsworn statement and would not be calling any witnesses. From the record, section 211 of the Criminal Procedure Code was fully complied with as the learned Magistrate recorded as much. This section does not require the court to read out the charge afresh to the appellant. We are persuaded that the appellant was well aware of the charge against him, especially when we consider the defence that he mounted. This ground of appeal therefore fails.

(12) We have also considered the appellant's complaint that he was not afforded an advocate at state expense, contrary to Article 50(2)(h) of the Constitution which provides that every accused person has the right to a fair trial, which includes the right:

***“(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;”***

(13) We have carefully scrutinized the record and we discern no injustice that was occasioned to the appellant. The appellant cross-examined each of the witnesses who testified.

This Court in the case of ***Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v Republic [2015] eKLR (Criminal Appeal No's 44, 45 & 76 of 2014)*** adopted a similar approach. In those appeals, the appellants who had been convicted of aggravated robbery, and sentenced to death, all alleged that their right to a fair trial had been jeopardized by the fact they had not been given representation at state expense. The Court dismissed this ground of appeal in the following terms:

***“They actively participated in their trials and subjected to intense cross-examination the witnesses availed by the prosecution. We therefore discern no substantial injustice occasioned to the appellants by the State's failure to accord them legal representation. This ground must of necessity therefore fail.”***

This ground of appeal must also therefore fail.

(14) Similarly, the appellant's complaint that vital witnesses were not called to testify is baseless. Section 143 of the Evidence Act is clear on the fact that no specific number of witnesses is necessary to prove a fact. That section provides that:

***“143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”***

(15) This provision of the law was reiterated by this Court in **Collins Akoyo Okwemba & 2 others v Republic [2014] eKLR (Criminal Appeal No. 684 of 2010)** which rendered itself as follows:

***“The prosecution is under no obligation to call any number of witnesses so long as they bring before the court evidence sufficient to prove their case to the required standard.”***

(16) We see no prejudice in the fact that the complainant’s siblings were not called to testify. The evidence led by the prosecution witnesses was cogent and clear, and pointed to the appellant as having defiled the complainant. Accordingly, we reject this ground of appeal.

(17) Upon duly considering all the grounds of appeal raised by the appellant as well as the rival submissions of the appellant and the State in conjunction with the law, we find no reason to interfere with the concurrent findings of the two courts below. In the circumstances, we find this appeal to be devoid of merit and we accordingly order that it be and is hereby dismissed.

**Dated and Delivered at Nairobi this 7<sup>th</sup> day of October, 2016.**

**P. KIHARA KARIUKI, PCA**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**