



IN THE COURT OF APPEAL

AT NYERI

(CORAM: GITHINJI, WAKI & NAMBUYE, JJ.A)

CRIMINAL APPEAL NO. 122 OF 2014

BETWEEN

FRANCIS MAINA KAMAU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from a conviction, judgment, decree, order or as the case may be of the High Court of Kenya at Nyeri (Wakiaga, J) dated 15th October, 2014

in

H.C.CRA. No. 196 of 2009)

JUDGMENT OF THE COURT

The appellant Francis Maina Kamau was arraigned before the Principal Magistrate’s court at Mukurweini for the offence of defilement of a girl contrary to **section 8(1) (2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the 23rd day of October 2007 in Nyeri District within Central Province he committed an act which caused penetration with S.W.M. aged 4 years. In the alternative, on the same date and place he did commit an indecent act with a child **c/s 11(1)** of the **Sexual Offences Act No. 3 of 2006**, in that he unlawfully and intentionally touched the private parts of S.W.M.

The appellant denied both counts prompting a trial in which the prosecution called six (6) witnesses in support of its case, while the appellant called two (2) witnesses in support of his defence. The brief facts were that on the 23rd day of October 2007 S.W.M. left for [Particulars Withheld] primary school where she attended class (1) then. According to her mother PW2, the minor usually got home by about 3.30 p.m. On the material date she had not shown up by 6.00 p.m. P got concerned and set out in search of her taking the same route S.W.M used to take on her way to and from school.

Meanwhile Mercy Nyambura (M) PW4 a local resident was on her way home from Muthuthini centre when she met the appellant whom she knew well headed in the opposite direction. Behind him was S.W.M. who was crying and walking with difficulty. On reaching where S.W.M was M inquired from her why she was crying and she pointed to the appellant and said in Kikuyu, “it is that man.” Mercy did not know whose child S.W.M was. However shortly thereafter, J W G (J) also a local resident appeared.

She too (*J*) also saw when the child pointed to the appellant whom she also by passed. On reaching where Mercy was *J* told Mercy that she knew the child as a daughter to her sister in law PW2. The two (*Mercy* and *J*) said the child looked filthy, walking with difficulty and had a foul smell around her.

PW2 eventually traced her daughter with *Mercy* and *J* and in the condition described above. She was assisted home by *J*. On reaching home the two examined the child and found that she had been defiled as blood was oozing from her private parts and the anal area. There was also faeces mixed with blood on the same private parts. Upon inquiry by PW2, the minor narrated that she had met a man she did not know who led her to the river where he defiled her and abandoned her. She followed him behind and that is how she pointed out him out to *Mercy* who confirmed to PW2 that the minor had pointed out the appellant to her when she inquired from the minor as to why she was crying. *J* also confirmed seeing the child pointing at the appellant. According to S.W.M. the assailant had identified himself to her as a *Mwangi* while *Mercy* thought that the man she had met and to whom S.W.M pointed as the reason for her crying was called *Muthiora* but she was corrected by *J* when *J* said that it was *Maina* a brother to *Muthiora*.

PW2 reported the incident to the area AP camp on the same night and was referred to police. At the police station she reported to PC William Migwi (*PC William*) PW 6 who booked the report in the OB on the 24th day of October 2007, issued PW2 with a P3 form and referred them to hospital. PC William also noticed the child walking with difficulty and had to be carried to hospital. At the hospital, the minor was received by a Dr. Macharia who examined her, prescribed the treatment and later filled the P3 form produced on his behalf by Dr. Kimani Samuel (*Dr. Samuel*) as an exhibit.

The appellant was arrested five (5) months after the incident and arraigned in court. When put to his defence he gave unsworn evidence and called two witnesses namely *Mary Wambui Maina (Mary)* DW2, his wife and *Bernard Mwangi Kamau (Bernard)* DW 3 a brother. The sum total of their testimonies was that the appellant had been home throughout on the material date of 23rd October 2007 as he was not feeling well. He denied any knowledge of the commission of the offence.

The learned trial magistrate F. Kombo SRM found the prosecution case proved to the required threshold, found the appellant guilty of the offence charged in the main count, convicted him and sentenced him to life imprisonment. His appeal to the High Court was dismissed by *Wakiaga, J* on the 15th day of October, 2014. He is now before us on a second appeal. He had initially raised six (6) grounds of appeal which were subsequently substituted with four (4) filed on the 11th day of July 2016. In these he contends that the learned Judge erred in law:

- (1) by upholding the trial court judgment despite the defective charge sheet in form;**
- (2) by acting on evidence of identification that was unsatisfactory and riddled with inconsistencies and contradictions and further an essential witness was never summoned;**
- (3) in affirming the conviction and sentence on the basis of relying on PW1 and PW2 verbal age factor and unqualified clinical officers assessment report and its contents thereon;**
- (4) by failing to give his defence sufficient consideration.**

The appellant handed in written submissions and invited us to adopt these as his submissions in support of his appeal. It is his contention that the charge sheet is defective for lack of inclusion of the words “*unlawfully*” and “*intentionally*”. The particulars too were defective for lack of disclosure of the offence charged. In his view, all these defects were incurable under **section 382** of the **Criminal Procedure Code** Cap 75 Laws of Kenya and are therefore fatal to the entire proceedings as they violated **section 214** of the **Criminal Procedure Code** (*supra*) and without their inclusion no crime known to law had been committed by him.

On identification, the appellant urged that the evidence on the identification of the assailant could not

hold as witnesses gave different names as referring to him and yet no evidence was adduced to show that all these names referred to him. For example S.W.M gave the name of Mwangi, Mercy gave the name of Muthiora, and Mary gave the name of Maina while PC William gave the name of Francis Maina. Also contrary to what Mercy and Mary said S.W.M never mentioned that she was found crying by anybody. The failure to call one Ngure mentioned by S.W.M left a doubt as to the appellant's presence at the scene of defilement. Lastly the failure to hold an identification parade was not only prejudicial to the appellant but also fatal to the prosecution case as all that the prosecution did was to show the appellant to the witnesses after his arrest which makes the evidence on identification worthless and incapable of supporting a conviction.

On ground 3, the appellant took issue with the evidence on proof of the age of the witness because there were discrepancies between the age given by the mother as four (4) years and that given in the P3 form tendered by Dr. Samuel PW5 of four and a half (4½) years. Second, since Dr. Samuel was not the author of the said P3 form it was tendered in evidence contrary to the provisions of **section 77 of the Evidence Act Cap 80 Laws of Kenya**. Third, the evidence on sexual violation was not conclusive because the minor was not examined at the place where she was found to confirm that she had been defiled. It was only after they had reached home that the mother and Mary allegedly examined her and found her defiled. They also noted blood oozing from her private parts and anal area as well as faeces mixed with blood, matters which were never noted in the P3 form. Also no explanation was given as to why no spermatozoa were seen or why she was sent to hospital on the 25th day of October, 2007 when the offence had occurred on the 23rd day of the same month.

Turning to his defence, he urged that his alibi defence which had created a doubt in the prosecution evidence was not properly considered as the burden to prove it was shifted to him contrary to law.

In response to the appellant's submissions Mr. J. Kaigai the learned Senior Assistant Director of Public Prosecutions (SADPP) urged us to dismiss the appeal on the grounds that the evidence against the appellant was overwhelming, clear, consistent and credible; the prosecution witnesses were never impeached on their credibility during cross-examination so as to cast any doubt on the truthfulness of their testimonies on identification; as at the time the appellant was pointed out to M he was the only man on the road walking away from the crying child and visibility was clear and any issue of mistaken identity did not therefore arise.

As for medical evidence, it was Mr. Kaigai's contention that the injuries noted on the minor's private parts by her mother and Mary PW4 were confirmed by medical evidence. There was no contradiction on the age of the minor as given by the mother and the medical evidence because what the mother gave was the correct age while the medical evidence given in the P3 form was the estimated age. Turning to the defence it was Mr. Kaigai's contention that the learned Judge re-evaluated it and rightly found it displaced. The sentence was lawful and it should not be disturbed.

In reply to the respondent's submissions the appellant added that he was never examined in connection with the offence he faced; no blood samples were taken from him for analysis to confirm that he had anything to do with the offence and lastly, that his elder brother Muthoira was the one who was arrested in connection with the offence but later released.

This is a second appeal. By dint of section 361 of the Criminal Procedure Code the jurisdiction of this court is restricted to consider only matters of law. See **Chemagong vs Republic [1984] KLR 213** at page 219 where the court had this to say:

“A second appeal must be confined to points of law and this court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did.”

We have taken into consideration the totality of the record and considered it in the light of the rival arguments set out above. In our view, the issues of law that fall for our determination are those raised by

the appellant in his grounds of appeal. With regard to the charge laid, it is correct as contended by the appellant that the particulars of the charge are *de void* of the words “*unlawfully*” and “*intentionally*”. It was also correctly contended by the appellant that **section 214** of the **Criminal Procedure Code** was not complied with as the prosecution concluded the trial before effecting any amendment to include the said words. We do not however agree with the appellant’s contention that failure to include the said words in the particulars was fatal to the prosecution case and incurable under **section 382** of the same **Criminal Procedure Code**. It provides:-

“Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrants, charge sheet, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

The record before us does not reveal any complaint raised by the appellant against the charge either before the trial court or before the first appellate court. The issue is therefore being raised before us for the first time. In our view, the primary consideration in deciding either way is whether the failure to so include the said words occasioned a failure of justice. Apart from pointing out that the said words were missing from the particulars, the appellant did not allude to any disadvantage he suffered in so far as comprehending the charged faced by him and the proceedings attendant thereto as a result of the absence of the said words in the charge. He knew he faced a charge of defilement. Witnesses called by the prosecution testified to this fact and he cross-examined them on it. There is nothing to show that he was disadvantaged in anyway. It is therefore our finding that a miscarriage of justice was not occasioned to the appellant in this regard.

With regard to the alleged contradictions and inconsistencies in the prosecution evidence, the approach we take is that taken by the court in **Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993** wherein the court stated that:-

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”

See also **Vincent Kasyula Kingoi vs Republic Nairobi Criminal Appeal No. 98 of 2014**, in which the court ruled that its role when faced with such assertions is to reconcile these and determine whether they go to the root of the prosecution case or not. We have accordingly reconciled the alleged inconsistencies and contradictions and in our view we find that they do not go to the root of the prosecution case because in the first instance these related to the disparity in the age as given by the mother, four (4) years, and as given by the estimate in the P3 form, four and half (4½) years. Mr. Kaigai has explained, and rightly so, that the age given by the mother was the correct age as she was in a better position to know the age of her own child, while that given in the P3 form (medical evidence) was the estimated age. It is also our view that no miscarriage of justice was occasioned to the appellant by that age disparity as it did not remove the offence charged from the age bracket falling under **section 8(1) and (2)** of the **Sexual Offences Act** under which the appellant was charged.

As for lack of mentioning by PW1 that she was found crying by PW3 and PW4, it is our view that being a child of tender years she could not be expected to relate events as vividly and with clarity like an adult. Her failure to mention crying when found by the above two witnesses was therefore understandable and inconsequential to the proven fact of defilement that was perpetrated against her. Similarly confusing appellant for his brother Muthiora by M is also excusable as the appellant confirmed in his testimony that he had a brother by that name who was arrested in the first instance in connection with the same offence but released.

On identification the learned Judge had this to say:-

“From the evidence tendered, it is clear that the appellant was placed at the scene by PW1 who pointed him out to PW4 who had met the appellant before she met PW1 crying. This was at 6.00 p.m. PW3 identified PW1 to PW4 and when she was asked what had happened she pointed to the appellant who was still within the area and upon examining her private part together with PW2 they confirmed that she had been defiled. The fact which was confirmed by PW5.

It is therefore clear that the appellant was properly identified and that after the incident the appellant disappeared and was arrested after six (6) months whereas in his defence he stated that he was arrested on 23rd October, 2008. I therefore find that the appellant’s conviction was safe and would therefore dismiss the appeal as lacking merit.”

We find no error in the above conclusions as these were based on material evidence on the record. PW1 who said she did not know the appellant before the incident had no reason to fabricate the “pointing to him” as the perpetrator when she was found crying. Likewise PW3 and PW4 who knew the appellant as a local resident and were not anticipating meeting him at that point in time had no reason to fabricate the identification against him. We therefore affirm the concurrent findings of the two courts below that the appellant’s identification in connection with the commission of the offence was free from error as visibility was clear at 6.00 p.m. and therefore conducive to positive recognition of a familiar face.

It is appreciated that no identification parade was held but as was stated in **Patrick Muriuki Kinyua & Another versus Republic Criminal Appeal No. 11 of 2013**, with the exception of the minor, the holding of an identification parade with respect to PW3 and PW4 would have been superfluous as theirs was a case of recognition. As for the minor this would have been a reasonable thing to do as she said she did not know her assailant before. The failure to hold an identification parade in this regard did not however weaken the prosecution’s case in her favour as this gap was filled in by the evidence of recognition by PW3 and PW4 that the minor pointed out the appellant to them as the perpetrator of the defilement on her and which appellant the two witnesses knew as a local resident.

On the lack of proof of age the court relied on the age as given by the mother and as assessed through medical evidence. In **Kaingui Elias Kasomo versus Republic Criminal Appeal No. 504 of 2010**, the court stated that:-

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the case of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be depended on the age of the witness.”

In **Francis Omuromi versus Uganda Criminal Appeal No. 2 of 2000** the court had this to say:-

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense.”

In the instant appeal the two courts below approved the assessment of the minor’s age both through the mother and professionally through medical evidence tendered through PW5. It is in this regard that we find that the mode of proof of age of the minor as accepted by the two courts below was proper as the same was in line with the principles enunciated in the **Basil Okaron versus Republic [2016] eKLR**. Failure to produce a birth certificate or clinic card to prove the age was therefore not fatal.

As for the mode of production of medical evidence, it is not disputed that it is not Dr. Samwel who examined and treated the minor. This was done by a Dr. Macharia on whose behalf Dr. Samuel tendered the medical evidence in court. Contrary to what the appellant contended, **section 77** of the **Evidence Act** (*supra*) was not breached. It provides;-

“77(1) In criminal proceedings any document purporting to be a report under the hand of a government analyst, medical practitioner or of any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence’

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it;

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistic expert, document examiner, medical practitioner or geologist, as the case may be, and examine him as to the subject matter thereof.”

The above provision permits the reception of an expert report by a court of law through qualified persons other than their makers. It is only where the court of its own motion or through application by an accused that the maker may be summoned. In the instant appeal both the court and the appellant saw no need for Dr. Macharia to be summoned as no such request has been traced on the record. The above being the position the raising of this complaint by the appellant is belated and rejected.

As for failure to examine the appellant in connection with the offence, we agree that the record is clear that no such examination was ever carried out on the appellant. However as stated by the court in **Geoffrey Kionji versus Republic Criminal Appeal No. 270 of 2010** the medical examination of an accused is not mandatory and that the court could convict if it is satisfied even on the victim’s evidence alone that the defilement was perpetrated by the accused person. In the instant appeal, the arrest was effected six (6) months later after the incident. Any attempt to examine the appellant in connection with an offence committed six (6) months earlier would have been an exercise in futility as there was no possibility of tracing any material evidence in connection with the offence charged.

Turning to the alibi defence, the approach we take in resolving this issue is as was set out **Lenyesio Lekupe & Another versus Republic Nakuru Criminal Appeal No. 145 of 2011** where in an alibi was defined as follows:-

“An alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed, at the time of the alleged commission of the offence for which he is charged.”

The position in law with regard to proof or otherwise of an alibi is as was set out in **Anthony Kinyanjui Kimani versus Republic [2011] eKLR** and **Kabele versus Uganda [1999] I EA 148 (SCU)** for the proposition that the prosecution has the burden of negating an alibi. In **Saidi versus Republic [1963] EA 6**, the predecessor of this court laid down the following principle:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”

Further in **Sekitoleko versus Uganda [1967] EA 531** the Chief Justice Sir Udo Udoma had this to say in relation to an alibi defence:-

“(i) as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shows whether the defence set up is an alibi or something;

(ii) The burden of proving an alibi does not lie on the prisoner.....”

The appellant’s alibi was that he never left his home on the material date of 23rd October, 2007. He called two witnesses in support of that assertion. The two courts below evaluated and re-evaluated the

facts and found this alibi displaced by the evidence on identification already affirmed above. The appellant is therefore in essence inviting us to revisit these facts. In **Daniel Kabiru Thiong'o versus Republic Nyeri Criminal Appeal No. 13 of 2002 (UR)** the court held *inter alia* that:-

“An invitation to this court to depart from concernment findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is shown that there are compelling reasons for doing so.”

In the instant appeal we find no compelling reasons to depart from the concurrent findings as we have already affirmed the evidence on identification that it was based on sound evidence, and the possibility of either mistaken identity or fabrication did not arise.

In the result, it is our firm finding that the appellant’s conviction was safe. The sentence handed out against him was lawful. We find no merit in this appeal. It is accordingly dismissed in its entirety.

Dated and delivered at Nyeri this 9th day of November, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR