



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 38 OF 2013

BETWEEN

MBATHA KANGE'THEAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal against the Judgment in High Court of Kenya at Machakos (Makhandia J.)

In

CR.A NO. 197/2011)

JUDGMENT OF THE COURT

The appellant, **MBATHA KANGETHE**, appeals of this Court from a judgment of the High Court (Makhandia, J., (as he then was) dated 28th September 2012 whereby his appeal against conviction and sentence of 20 years' imprisonment imposed by the Resident Magistrate's Court at Tawa on 5th July 2011 was dismissed.

That conviction and sentence followed a trial for the offence of defilement of a child contrary to **Section 8(1) (4)** of Sexual Offences Act, No 3 of 2006. The particulars of that offence were that on the 15th day of April 2011 at **[particulars withheld]** Village, Kalimani Location in Mbooni District of Makueni County, the appellant intentionally caused his penis to penetrate the vagina of MKV, a child aged 17 years.

He was also convicted on the alternative charge of indecent act with a child contrary to **Section 11(1)** of the same statute in that he intentionally and unlawfully did an indecent act to the same child by touching her private parts. For this offence he was sentenced to two years' imprisonment, which term was to run concurrently with the sentence on the main court.

We find and hold at the outset that the conviction and sentence on the alternative charge is untenable.

Once a conviction has been returned on the main count, it is not open to a court to proceed to enter a conviction on the alternative count. Conviction can only be entered on an alternative charge upon acquittal on the main charge. This would be the case even where a court quite properly goes as far as to make a finding that the alternative charge was proved beyond reasonable doubt. It may do so but cannot convict. See **OBANDA Vs. REPUBLIC** [1983] KLR 507. The appellant's conviction on the alternative count is accordingly quashed and the sentence thereon set aside. This has no bearing on the conviction and sentence on the main charge which is the subject of this appeal.

Before the trial court the evidence led by the prosecution through some six witnesses was that the complainant, MKV, (PW2) was on the material night asleep with her grandmother, (PW3) when, in the dead of night, she was awakened by the sound of an intruder in the house. That person ordered PW2 and PW3 to remain silent or else he would kill them. PW3 switched on her torch and the two recognized a panga-wielding appellant, who was a neighbour, as the intruder who proceeded to demand sexual intercourse with PW2. When PW2 did not oblige, the appellant jumped on to the bed and attempted to restrain PW2 so he could have his way with her. In the ensuing struggle he cut her with the panga. He subdued her, yanked off her skirt and panties and proceeded to forcefully penetrate her. He violated her for some brutish five minutes then, his lust assuaged, he left after warning the two not to mention the incident to anyone. He left his panga behind.

Early the next morning at 6.00am, PW2 went to the house of M M (PW4), another neighbour, and reported her ordeal. She was still bleeding from the cut wound on her thumb. PW4 called a village elder and together they went to PW3's house where they saw a jerrican the appellant had used to hoist himself through the eaves into the house for his dark deed. They then proceeded to Mbumbuni Police Station carrying with them the panga as they reported the incident to **CPL. DAVIS SIGEI** who took charge of the panga and investigated the case, recorded statements from witnesses and issued a P3 Form to PW2 who took it to **GEOFREY MUTIA** (PW1) a clinical officer.

Using the treatment notes brought to him by PW2 after initial treatment, and upon examination, PW1 recorded that PW2 had a broken hymen and had a whitish vaginal discharge while a high vaginal swab showed the presence of spermatozoa consistent with penile penetration and intercourse. PW2 also had a cut wound on the left thumb as well as a post-nail scratch on the side of the neck which was tender.

Placed on his defence, the appellant testified an oath denying the charge and asserting that the case against him was a frame up by PW4. He called a witness, **KENYATTA MULWA**, (DW2), whose testimony was to the effect that he had taken the appellant to the police station for causing a disturbance, only to learn that he was being sought for the offence of defilement.

The trial court weighed this evidence and convicted the appellant which the first appellate court affirmed, provoking the present appeal in which the appellant complains in his homegrown Memorandum of Appeal, Supplementary Grounds and submissions that;

- (a) The learned Judge erred in believing the evidence of PW2 taken contrary to Section 151 of the Criminal Procedure Code which amounted to a grave violation of his right to a fair trial under the Constitution.
- (b) The judgment of the trial court was unprocedurally delivered for not being dated or read in open court contrary to Section 169(1) of the Criminal Procedure Code.
- (c) His alleged identification/recognition by PW2 and PW3 should not have been relied on.
- (d) The learned Judge failed to discharge his duty of evaluating the evidence and drawing his own conclusions.

This Court's jurisdictional remit on a second appeal by statute is limited to a consideration of matters of law only. See **Section 369(1)** of the Criminal Procedure Code, Cap 75, Laws of Kenya.

That being the case, complaints such as raised by the appellant as to the believability or otherwise of any witness who testified before the trial court would not ordinarily fall for our determination. Once the trial court's findings of fact, made with that court's advantage of seeing and hearing the witnesses as they testified are confirmed by the first appellate court doing its statutory duty to re-evaluate the evidence, re-appraise it and arrive at its own independent conclusion, it would be a big thing for this Court to upset those concurrent findings. The Court is bound by those findings unless they were shown not to be based on evidence as was stated in **NJOROGE Vs. REPUBLIC** [1982] KLR 388.

Having perused the record before us, we are satisfied that the learned Judge properly directed his mind to his duty as the first appellate court and that he subjected the entire evidence to a fresh and thorough evaluation before arriving at the conclusion that the appellant was guilty of the offence charged. The appellant did in fact defile the complainant on the material night. He was well and properly recognized as the perpetrator by not just his victim (PW2) but her grandmother, (PW3) as well, who witnessed the entire criminal episode. Evidence of recognition of a person well known to the witnesses is of course more certain and more assuring than the evidence of identification of a total stranger. See **ANJONONI & OTHERS Vs. REPUBLIC** [1980] KLR 59. As far as the evidence goes, therefore, we find and hold that the learned Judge cannot be faulted for upholding the appellant's conviction.

On the question whether the trial court complied with **Section 151** of the Criminal Procedure Code, Cap 75, Laws of Kenya, which requires that every witness in a criminal case or matter shall give evidence on oath, the appellant's grievance is that even though the learned trial magistrate conducted *a voir dire* examination of PW2 and found that she did understand the nature of an oath, she did not in fact administer the oath. On our own perusal of the record, we find the complaint to be without merit. It seems clear to us that the trial court was fully cognizant of the need of an oath hence the voir dire examination of the minor complainant. Having ordered "witness to give sworn statement" whereafter her testimony is preceded with the record "witness proceeds", it follows from that record itself, that the evidence tendered was sworn testimony. At any rate, evidence by PW3, as well as the medical evidence taken together with the testimony of PW2 all go to form an iron clad case that PW2, was defiled, and the appellant was the defiler.

The appellant's final complaint, again on a technicality, is to the effect that the judgment of the learned trial magistrate was never dated nor read in open court contrary to **Section 169(1)** of the Criminal Procedure Code. This too, is devoid of merit. The record shows that the trial Magistrate reserved judgment for 5th July 2011. In his Petition of Appeal to the High Court, the appellant categorically stated that he was appealing against the conviction and sentence passed on him "by the Resident Magistrate's Court at Tawa on 5th July 2011". In the detailed Grounds of Appeal he subsequently filed before the High Court, he did not complain about the judgment being undated. It is clear from the record that it was dated and delivered on that day. Indeed, even had it not been dated, in the circumstances of this case it would only have amounted to an irregularity curable under **Section 382** of the Criminal Procedure Code.

The totality of our consideration of this appeal is that it lacks merit and is accordingly dismissed.

Dated and delivered at Nairobi this 24th day of April, 2015.

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

