



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 76 OF 2014

BETWEEN

FRANCIS MUSYOKA NZAUAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Conviction of the High Court of Kenya at Meru (F. Gikonyo,J) dated 22nd October, 2013

in H.C.CRA No. 78 of 2008

JUDGMENT OF THE COURT

Introduction and Background.

1. The appellant **Francis Musyoka Nzau** was tried and convicted on the 30th day of May, 2008 by the Principal Magistrate at Meru (**W.K. Korir**) on the main charge of defilement contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act No.3 of 2006. It was alleged that on the 21st day of November, 2006 at Kadhiko area of Meru Central District within the Eastern Province he defiled **A.F.** a child who was at the time aged 8;
2. The brief facts are that on 21st November, 2006, **MK** (PW3) (**M**) left the complainant **A.F.** in the company of two other children **CG** PW2, (**C**) and **K**. At around 3.00pm the three children met with the appellant who, after engaging them in a conversation, offered to buy them *mandazi*. He told Cand **K** to remain behind while he went with **A.F.** to bring the two *mandazi*. They obliged. Instead of fulfilling that pledge he led **A.F.** across the river where he defiled and abandoned her at the scene. Two unknown women found her, carried her to her grandmother, **M** and then left. **M** and her daughter **JK**, PW4 (**J**) took **A.F.** to the police station, where **Sgt. Harriet Kinya** PW5 (**Harriet**) received the report from them and referred them to hospital. PW6, (**Henry**) filled the P3 form and concluded that **A.F.** had been defiled.
3. The appellant was arrested on 19th December, 2006 and charged with the offence to which he raised an alibi defence that he never left his place of work on the material day and secondly that the charge had been fabricated against him because he declined **M's** request that he continue cohabiting with **A.F's** mother. The learned trial Magistrate after assessing the evidence found the

prosecution's case proved beyond reasonable doubt, dismissed the appellant's defence, found him guilty as charged on the main count of defilement and sentenced him to life imprisonment. The appellant was aggrieved by that decision. He appealed to the High Court (*F.G. Gikonyo J.*) which in its judgment of 22nd day of October, 2013 dismissed the appeal. The appellant is before us on a second appeal in a home made amended memorandum grounds of appeal raising five (5) grounds, namely:- that the learned Superior court Judge erred in law:

- ***in not appreciating and observing that the instant matter was based on an incurably defective charge and therefore on a vacuum contrary to section 214 of the Criminal Procedure Code and the Sexual Offences Act No. 3 of 2006 and hence of serious derelictions of justice.***
- ***in not considering that the appellant's fundamental and constitutional rights under section 72(3) through 84 of the former Constitution and section (sic) 49 and 50 of the new Constitution were violated and continue to be by my incarceration.***
- ***in not considering the lasting grudge and frosty relationship between PW1s mother and PW3 (PW1s) (sic) mother and the accused and hence the obvious blatant frame up as already in the instant matter.***
- ***in failing to consider the accused's conduct was not in tandem with a guilt conscious mind and hence mens rea not proved.***
- ***in not considering that the prosecution failed to prove its case beyond reasonable doubt to meet the required thresh hold of proof occasioning a serious dereliction of justice.***

Appellant's submissions.

4. The appellant contended in his written submissions that the evidence adduced was at variance with the particulars of the charge and therefore fatal to the prosecution's case as the complainant's name in charge sheet was "AF" as opposed to the name given in evidence as "AF". He relied on the decision in the case of *Yongo versus Republic [1983] KLR 5* for the proposition that "a charge is defective under section 214 of the Criminal Procedure Code Cap 75 Laws of Kenya when it does not agree with the evidence.", and on *Nelson Mbaya & another versus Republic H.C.CR.Appl. 348/89* at Nairobi for the proposition that "Where the charge is at variance with the evidence adduced, it is a defective charge."
5. On ground 2, the appellant urged that his fundamental rights were infringed by the prosecution's failure to arraign him in court within 24 hours thereby rendering the entire prosecution case a nullity. He relied on the case of *Ann Njogu & five others versus Republic Misc. CR. Appl. No. 551 of 2007* for the proposition that:

"every minute beyond the permitted 24 hours an accused person continues to be detained before being arraigned in court is an unmitigated, illegality and therefore null and void irrespective of the weight of the evidence that the police might have in respect of the case"

6. In support of ground 3, the appellant invited us to find that the whole prosecution's case was a frame up. He relied on *Maina versus Republic [1970] EA 370* for the proposition that:

"In a case of alleged sexual offences, it is really dangerous to convict on the evidence of a woman or girl alone because human experience has shown that girls and women sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to unravel, fabricated for all sorts of reasons and sometimes for no reason at all and that it is prudent for the court to direct its mind to the evidence given by the appellant in regard to his previous relationship with the victim."

7. On ground 4, the appellant urged that his conduct of not absconding from the locality after the

alleged commission of the alleged offence went to negate the element of *mens rea* in the absence of which his conviction would not stand.

8. On ground 5, he submitted that we should draw an adverse inference from the prosecution's failure to tender the evidence of the arresting officer, the two women who allegedly took A.F. to her grandmother and the other child who was in the company of A.F. and C. To buttress this argument, he relied on the decision in the case of *Juma Ngondia versus Republic [1982-1988] KAR 454* for the proposition that:

“Although the prosecution in general has a discretion whether to call someone as a witness if it does not call or summon a vital reliable witness without a satisfactory explanation, it runs the risk of the court presuming that the evidence which could be and is not produced would if produced have been unfavourable to the prosecution”.

9. He also cited **section 146(4)** of the Evidence Act Cap 80 Laws of Kenya; **section 150** of the Criminal Procedure Code; the cases of *Bukenya versus Uganda [1972] EA 549*; and in *Charles Kibara Muraya versus Republic CR.APPL. No. 33 of 2001* at Nyeri for the proposition that;

“the more serious the charge the heavier the burden of proof on the prosecution”.

Lastly, he relied on *Woolmington versus D.P.P[1935] A.C. 462* for the proposition that:

“it is the duty of the prosecution to prove the prisoner's guilt and if at the end of the whole case there appears any reasonable doubt created by the evidence brought forward by the prosecution the doubt should be resolved in favour of the prisoner.”

The Respondent's submissions.

10. **Mr. M. Moses Kahiga Mungai**, senior prosecution counsel, urged us to dismiss the appeal on the grounds that the possible confusion in the spelling of the complainant's name as stated in the charge sheet and the evidence tendered did not prejudice the appellant. The evidence on the record indicated clearly that the victim was A.F. granddaughter of M whose mother had previously cohabited with the appellant, who was very well known to the victim. **On ground 2**, that the appellant's remedy lies in a civil suit for a claim for damages. **On ground 3**, that the evidence of the victim was sufficiently corroborated by the evidence of C who saw the appellant leave with the victim pursuant to a promise that he was going to buy them *mandazi*; and second, by the testimony of C, M, J and Harriet and 5 who saw the victim and her clothes covered in mud and blood with a swollen face and could not even talk, and lastly that **section 124** of the Evidence Act did away with the requirement of corroboration in Sexual offences. A court can base its conviction on the testimony of the victim alone so long as it gives reasons for believing her story. **On ground 4**, that *mens rea* was proved as the appellant planned and executed the offence by luring the victim with a promise of *mandazi*, taking her to a lonely place, defiling her and then abandoning her there. As for **ground 5** none of the alleged uncalled witnesses would have given adverse evidence to the prosecution's case as the appellant did not dispute that he was indeed arrested which is the only evidence the arresting officer could have given. The two women who brought the A.F. to M were not known and therefore could not be traced. As for the other child she could only have given evidence similar to that of C.

Analysis & determination.

11. This is a second appeal. By dint of the provision of **section 361(1)** of the Criminal Procedure Code, we are enjoined to consider matters of law only. As was stated in the old case of *Rex versus Hassan Binsaid [1942] EACA 62*:-

“(1) A second appeal lies only upon questions of law. In such a case this Court is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings though it may think it possible or even probable

that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the findings of fact. This being a question of law.”

12. It was correctly contended by the appellant that the charge sheet gives the complainants name as “**AF**” while in the evidence it is given as “**AF.**” The two courts below made no mention of this variance. We agree with the respondent’s assertion that the variance arose in the spelling of the names of the victim and that no prejudice was caused to the appellant as there was no confusion as to who the victim was. What was crucial before the court was not the names of the victim but whether she was the one who had been defiled by the appellant. The totality of the evidence on the record irresistibly pointed to her as the victim of the defilement. This ground fails.
13. On violation of the appellant’s fundamental rights, we wish to associate ourselves fully with the stand taken by this Court in ***Julius Kamau Mbugua versus Republic Criminal Appeal No.50 of 2008*** thus:-

“In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violation of the rights to personal liberty which happened before the criminal court assumed Jurisdiction over the accused. However, the trial court can take cognizance of such pre-charge violations of personal liberty, if the violation is linked to or affects the criminal process. As an illustration where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial i.e where an accused has suffered trial related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by section 72(6) expressly compensatable by damages.”

This ground also fails.

14. The complaint in ground 3 is an invitation for us to re-assess and re-evaluate the facts. This is a no go zone for a second appellate court unless the parameters for exceptions are shown to exist. We decline the invitation, more so when the appellant did not challenge his conviction before the High Court. This ground also fails.
15. On ground 4, it is trite that *mens rea* constitutes the criminal element in the a crime. The elements vary from crime to crime. See ***Halisbury’s*** Laws of England Volume 11(1) fourth Edition Re issue pg.22 paragraph 10. Herein, the two courts below believed the prosecution evidence as truthful and consistent. The fact of luring the victim, leading her to a lonely place, arming himself with a knife, which he used to threaten her with and failure to buy the *mandazi* as promised and his conduct of abandoning her at the scene of the crime, were all consistent with the existence of *mens rea* which was not dislodged by the appellant’s failure to abscond from the locality soon after the commission of the offence. We find no merit in this ground and it is also dismissed.
16. On ground 5, **section 143** of the Evidence Act (*supra*) provides:

“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.”

The uncalled witnesses on the basis of which the appellant has invited us to draw an adverse inference against the prosecution comprised the arresting officer, the mother of the victim, the two unknown women who took the victim from the scene of the crime to **M** and the 3rd child who was with **A.F. & C.** The first appellate court had occasion to address this issue. Upon setting out the principles in ***Bukenya and others versus Uganda*** (*supra*), the learned trial Judge reasoned thus:-

“But in the same vein, the court was categorical to state that the prosecution is not

expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be so inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.”

17. We agree with the state counsel that all that an arresting officer would have told the court would have been that it is **M** who pointed out the appellant for arrest, an arrest which the appellant himself concedes happened. As for the two women, they did not witness the incident nor find the appellant at the scene. They only found the victim and carried her to **M**. The victim appeared to have been in shock as she was not talking. She therefore divulged nothing that the two women could have told the court by way of consistency. The two women not having witnessed the incident, in all probability they would only have testified on the condition the victim when they first saw her which condition was ably covered by the testimonies of **A.F.** herself, and the other witnesses. As for the other child, we doubt that her testimony would have been different from that of **C**. At all events the two courts below were obliged to uphold the evidence if they believed it as truthful which they did, and then give reasons, which they did. We find no merit in this ground as well. It is dismissed.

18. The upshot of the above assessment is that we find no merit in the appeal. It is dismissed.

Dated and Delivered at Nyeri this 9th day of July, 2015.

P.N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

Copy of the original.

DEPUTY REGISTRAR