



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: KIHARA KARIUKI PCA, MAKHANDIA, & M'INOTI, JJ.A.)**

**CRIMINAL APPEAL NO. 121 OF 2014**

**BETWEEN**

**FRANCIS KAHINDI MWAIHA..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 30<sup>th</sup> July, 2014*

*in*

*H.C.Cr.A. No.22 of 2012)*

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**JUDGMENT OF THE COURT**

On 29<sup>th</sup> August, 2010, the complainant, **MSK** then alleged to be aged about 13 years was home alone when two ladies, **Amina John** and **Mamake Chali** came calling. They persuaded her to accompany them to some home where they were to collect some money. For her effort, she was to be paid Kshs.100/-. The two ladies were persons well known to her. They proceeded to a house in which they found two men, one of whom was the appellant. Soon thereafter the two ladies excused themselves promising to return later to pick her. In the house MSK was served with black tea by the appellant. Immediately she took the tea, she became groggy then comatose and in that state she was repeatedly sexually assaulted in turns by what she thought were the two men she had been left with in the house, that is, the appellant and one **Ramadhan Kahindi Kai** (Kai). When she came around the following day, she was at home, bloodied and with pain in her genitalia. On being asked by her father, **RKS (PW2)** what had transpired, she volunteered that she had been defiled by the duo when in a stupor. PW2 immediately took her to Malindi Police Station where she lodged with **PC Bilhah Chimiso (PW5)** a complaint of sexual assault. She was then issued with a P3 Form and proceeded to Malindi District Hospital where she was received and examined by **Ibrahim Abdulahi (PW3)**, a registered clinical officer. He concluded after examination that indeed MSK had been defiled.

Armed with this evidence, the police raided the homestead of the appellant on 5<sup>th</sup> September, 2010 and arrested him together with **Kai** subsequently they were arraigned before the Chief Magistrate's Court at Malindi to answer to a single count of defilement of a girl contrary to **Section 8(3)** of the Sexual Offences Act. The particulars thereof being that on 29<sup>th</sup> August, 2010, at [*particulars withheld*] village in Malindi,

the duo intentionally and unlawfully caused penetration of their male genital organs into the female genital organ of MSK, a girl of 13 years.

The appellant and Kai denied the charge and they were subsequently tried. In defending themselves, they pleaded and maintained their innocence. Though they had initially admitted to committing the offence at the police station, they contended they had done so under duress. The learned magistrate having carefully considered the prosecution as well as defence evidence on record and having appraised herself of the law, found that the prosecution had proved its case against them, convicted them and thereafter sentenced each one of them to ten (10) years imprisonment.

Aggrieved by the conviction and the sentence, only the appellant lodged an appeal in the High Court. Apparently, Kai was quite happy to see out his term of imprisonment. The appeal was heard by **Meoli J.** In a reserved judgment delivered on 30<sup>th</sup> July, 2014, she found the conviction of the appellant for the offence charged unsafe as the evidence tendered had instead established that the appellant had intentionally administered an unknown laced substance into the tea that MSK took with the intent of stupefying her to enable them engage in sexual intercourse. She accordingly quashed the conviction for the offence of defilement and substituted therefor a conviction for the offence of administering a substance with intent contrary to **Section 27** of the Sexual Offences Act. Upon such conviction, the learned Judge retained the sentence which had been imposed for the initial offence of defilement by the trial court.

Undeterred, the appellant has now come to this Court by way of a second and perhaps last appeal complaining that the two courts below erred in failing to take into account the fact that crucial witnesses were not called to testify; there was non-compliance with the mandatory provisions of **Sections 213** and **310** of the Criminal Procedure Code; amending the charge sheet at the judgment stage without affording the appellant a chance to defend himself and relying on the evidence of the clinical card when it was not formally produced in evidence.

At the hearing of the appeal, the appellant with the permission of the court opted to urge it through written submissions. He submitted that the two ladies alleged to have lured MSK to his house were not called to testify though they were crucial witnesses. That the trial court had an obligation to order the prosecution to avail those witnesses but failed to do so. That failure according to the appellant breached **Section 150** of the Criminal Procedure Code. The appellant further submitted that during the hearing of the appeal, he was requested to file written submissions but was not allowed to highlight them. That a trial cannot be said to be complete unless the record shows that both parties were granted an opportunity of addressing the Court on merit. Accordingly, his right to a fair trial was violated.

With regard to the charge sheet, the appellant submitted that though the conviction for the offence of defilement was quashed, the learned Judge however maintained the same sentence which according to him simply meant that the High Court amended the charge sheet without his knowledge and without being called upon to plead afresh in terms of **Section 214(1)** of the Criminal Procedure Code.

Responding, **Mr. Musyoki**, Learned Senior Principal Prosecution Counsel submitted that this was a second appeal. This Court was therefore bound by the concurrent findings of the two courts below. Further, that the jurisdiction of this Court in a second appeal was limited to hearing matters of law only. According to counsel, all the grounds raised except ground 2 dealing with amendment and or substitution of the charge were all matters of fact that were adequately addressed by the two courts below. On ground 2, counsel submitted that the Judge was right in convicting the appellant of the substituted count since it was a cognate offence in terms of **Section 179** of the Criminal Procedure Code. That the initial sentence imposed by the trial court was illegal. Had the court imposed a proper sentence then the substituted charge could have been minor and cognate.

As already intimated, this is a second appeal. By dint of the provisions of **Section 361(1) (a)** of the Criminal Procedure Code, our duty is not to consider matters of fact unless we are satisfied that the first appellate court and the Chief Magistrate's Court failed to consider matters they should have considered or considered matters they should not have or looking at both decisions, they were plainly wrong in which

case such matters cease to be matters of fact and become matters of law thereby attracting our jurisdiction.

We have no doubt at all that the issues raised by the appellant in his grounds of appeal are all matters of law contrary to the submissions by Mr. Musyoki. Accordingly, we have jurisdiction to entertain them.

The appellant claims that there was non-compliance with the mandatory provisions of **Section 150** of the Criminal Procedure Code. This is with regard to failure to call crucial witnesses, being the two ladies who apparently lured MSK to the lion's den. Though the prosecution was bound to call those witnesses, for reasons that are not readily apparent on record they failed to do so. The appellant takes the view that since the prosecution had failed in its duty to call the witness, the task now fell on the court under the aforesaid provision to compel their attendance. The provision is in these terms.

**“A Court may at any stage of a trial or other proceeding under this Code, summon or call any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine a person already examined and the court shall summon and examine or recall and re-examine such person if his evidence appears to be essential to the just decision of the case...”**

As can readily be seen, this provision is not couched in mandatory terms. Rather it is permissive. It has been said time without number that proof of a fact is not dependent on the number of the witnesses called but rather on the weight and cogency of the evidence adduced (no matter the number of witnesses). It is only where the prosecution calls evidence that is barely adequate or marginal that a court may be entitled to draw an adverse inference that if certain relevant evidence which should have been tendered was not tendered or is withheld, then such evidence if tendered would have been adverse to the party who should have otherwise tendered it, in this the case, the prosecution. See **Bukenya & Others v Uganda [1972] E.A. 549**.

In the circumstances of this case, we cannot discern such an impropriety. All that the ladies would have perhaps testified to was to confirm that they led MSK to the house. But in doing so, they would have opened themselves to all manner of criminal possibilities, if the evidence of PW1, PW2, PW4 and PW5 is anything to go by. However, MSK gave the reason why she accompanied them. She was to be paid and was indeed paid Kshs.100/-. They would also have confirmed that they left MSK in the company of the appellant and Kai. However, the crime was committed long after she had been left with the appellant and Kai. We note though that Meoli, J. properly directed herself on this aspect of the appellant's lamentation but did not make any definitive conclusions. But as we already stated, we doubt whether these witnesses were really essential given what we have already stated above.

The appellant has also raised concerns with regard to non-compliance with **Sections 213** and **310** of the Criminal Procedure Code by both courts below. **Section 213** deals with the order of speeches in the trial court. That is to say that the prosecutor or his advocate and the accused and his advocate are entitled to address the court at the conclusion of the case in the same manner and order as in a trial under this Code before the High Court.

We have perused carefully the proceedings before the trial court and we are unable to appreciate the nature and basis of this complaint. The appellant was taken through every motion during the trial. When paraded before court and called upon to answer to the charge, he pleaded not guilty and was thereafter released on bond. During the trial, he cross-examined all the witnesses and when put on his defence, he elected to make a sworn statement of defence and opted to call no witnesses. Soon after the close of his defence, the court directed that the judgment would be delivered on 16<sup>th</sup> November, 2012. The record does not show that the prosecution was allowed to address the court but the appellant was denied that right. Nor does the record show that the appellant requested to be allowed to address the court and he was denied the right. The address contemplated would ordinarily be submissions. If the prosecution and defence did not offer to submit, why should the trial court be assailed for their failure?

**Section 310** of the Criminal Procedure Code deals with the prosecutor's reply. It provides:-

**“If the accused person, or any one of several accused persons, adduces any evidence, the advocate for the prosecution shall subject to the provision of Section 161, be entitled to reply...”**

Again, we are unable to detect any anomaly in the conduct of the case before the trial court as would elicit this complaint. The appellant gave a sworn statement and did not call any witness. The prosecution did not even bother to cross-examine him. The right in this provision accrues to the prosecutor and not an accused. The prosecution has not complained that it was denied this right.

Turning to the proceedings in the High Court, it is self-evident that the appellant opted to ventilate his appeal by way of written submissions. The record shows that on 4<sup>th</sup> June to 5<sup>th</sup> June, 2014 respectively and without prompting by court the appellant informed the court thus:

**“Appellant: I have prepared my submissions and on 5<sup>th</sup> ...**

**Appellant: I wish to amend....of appeal per my notice of motion filed. I rely on my submissions.”**

The record also shows that after the oral reply to his submissions by **Mr. Nyongesa**, learned state counsel, the appellant did not offer to reply. Though entitled, the appellant merely went quiet on that aspect of the matter. The High Court could not have forced him to reply against his wish. Accordingly, the appellant cannot be heard to complain that he did not go through a fair trial in the High Court merely because he was not called upon to highlight the submissions or offer rebuttal by way of a reply to the state’s oral submissions.

We now turn to consider the problematic question of amendment and or substitution of the charges. As the record no doubt shows, the appellant was initially charged with defilement of a girl aged 13 years. The trial court was convinced that on the evidence adduced, the offence had been committed. However, upon appeal and re-evaluation of the evidence afresh by the High Court, it was left in doubt as to whether the offence charged was committed by the appellant and Kai. This was informed by MSK’s own testimony that after taking the laced tea, she became comatose and did not actually see the appellant defile her. According to the High Court:-

**“:.....These descriptions of the complainant’s state in my view required careful examination to confirm if indeed the complainant was in any position to identify the person who sexually assaulted her on the material night....The complainant having admittedly passed out, and not having been proved to have been collected from the appellants house later that night or early on the next day, even the circumstantial case against the appellant collapses...”**

It is instructive to note that there is absolutely no evidence at all as to how MSK eventually found herself in her parent’s home the following day. All that there is, is that she was left in the house of the appellant the previous night, she was then rendered comatose, defiled and the next day found herself at home. Did she sleep walk or simply wandered to her parent’s home comatose? If that be the case, where is the assurance that it was the appellant and Kai and nobody else who sexually assaulted her? We would therefore agree with the High Court that had the trial court examined the admitted semi-conscious state of the complainant during the sexual encounter to satisfy itself on the events that allegedly happened to her in that state, we do not think that the evidence of her alleged defilement could have been believed. In that case, the trial court in our view, would have arrived at a different conclusion just like the High Court held.

Having disavowed the conviction of the appellant on defilement, the High Court took the view that the facts proved by the prosecution established that the appellant had intentionally administered in her tea an unknown laced substance with intention of stupefying her so as to engage in sexual intercourse which ran contrary to **Section 27** of the Sexual Offences Act. The appellant has attacked the above course taken by the High Court on the grounds that the High Court amended the charge sheet without his knowledge and without him being called upon to plead afresh contrary to **Section 214 (1)** of the Criminal Procedure

Code.

Although the High Court did not indicate under what provisions of the law it had so acted, we would want to assume that it was pursuant to **Section 179** of the Criminal Procedure Code which *inter alia* provides:-

**“(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**

**(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”**

Under this provision, it is quite clear that in altering the finding in an appeal against conviction and substituting therefor a conviction for an offence other than that charged initially, the High Court in its appellate jurisdiction can only act within the above provision and the substituted conviction can only be for a minor and cognate offence to that charged. That action does not require the appellant being called upon to plead nor do the provisions of **Section 214(1)** come into play. As stated by this Court in **Kalu v Republic [2008] 1KLR (1207):-**

**“.....there was no law which would authorize a Judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading ‘convictions for offences other than those charged’ and beginning with Section 179 to Section 190, deal with situations in which a Court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus.....it is permissible to convict a person charged with murder under section 203 of the Penal Code, with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is a minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be outrageous for a trial court to convert that charge into murder simply because the evidence on record proves murder.....”**

The emphasis here therefore appears to be that before a court invokes the provisions of **Section 179** of the Criminal Procedure Code to substitute the initial charge with another, the court must be satisfied first of all that the evidence tendered does not disclose or support the offence charged but instead proves the commission of a lesser offence of the same genus. In other words, the substituted offence must be both a minor and cognate offence to the one charged. As it were, **Section 179** looks downwards to lesser offences than that charged.

In the circumstances of this case, the offence for which the appellant was called upon to defend himself attracted a sentence of ten (10) years. The substituted charge similarly attracted a sentence of not less than ten (10) years. As can readily be seen, both offences attracted the same penalty. Accordingly, it cannot be said that the offence for which the appellant was subsequently convicted of by the High Court was minor nor cognate to the offence for which he was called upon to defend himself initially. It is instructive that **Mr. Musyoki** admitted in his submissions that based on the sentence imposed, the substituted charge was neither a minor or cognate offence. Indeed, we would go further and state that the offence was totally different and even fell under a different specie. Accordingly, the learned Judge fell into error when she undertook the course aforesaid.

Could the learned Judge however have found solace in **Section 186** of the Criminal Procedure Code? That section provides *inter alia*:

**“When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is**

**guilty of another offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it....”**

As it is apparent, for a court to resort to this provision, it must be satisfied on the evidence that the complainant was under the age of fourteen years. One of the reasons that disturbed the Judge and caused her to revert to the impugned course was with regard to the age of MSK. This is how she delivered herself on the issue:-

**“.....Secondly, none of the two witnesses gave any evidence relating to the complaints (sic) age. It is true that the P3 Form indicated the estimated age of the complainant to be 13 years, but the court placed reliance on the irregularly produced vaccination card as proof of age....**

In the absence of credible evidence regarding the exact age of MSK, again this section cannot apply.

In the upshot, we find merit in this appeal which we accordingly allow it, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held.

***Dated and delivered at Mombasa this 16<sup>th</sup> day of October, 2015***

**KIHARA KARIUKI**

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**PCA & JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**