IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 178 OF 2012

BETWEEN

AMEDI OMURUNGA ……..……. APPELLANT

AND

REPUBLIC …….. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 19th June, 2012

in

H.C. Cr. A. No. 37 of 2011)

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JUDGMENT OF THE COURT

Mwana Juma Kenga "*the complainant*" was in April, 2010 aged 13 years. She was in class 4 at Opeoni Primary School and lived with her family at Maweni area of Malindi town. On 4th April 2010 there was Malindi cultural Festival along the beach in which her mother **Sophia Juma** (PW2) was participating. PW2 had instructed her and her twin sister, **Mwana Tumbo Kenga**, to finish up with the house chores and then later join her at the beach for the festivities. They did so and at about 7 p.m as the complainant and twin sister immersed themselves in the celebrations, they soon lost each other due to the large crowd present. The complainant shortly thereafter started looking for her twin sister, all in vain. In the process she bumped into a man whom she later identified as the appellant who volunteered to take her home. It is apparent that the complainant obliged. However, instead of the appellant keeping his word, he pulled her into a secluded area on the beach, away from the crowd and into the bush. He then pushed her to the ground, undressed her and proceeded to have sexual intercourse with her, three times despite her screams and protestations. When done and as they walked along the beach at about 9 p.m. they met three police officers; **P.C. Richard Rena (PW4), P.C. Obed Munyao (PW6)** and **P.C. Tukweyo**, who were on normal patrol duties around Baobab area.

The police officers stopped the duo and asked them to identify themselves. The appellant identified himself and passed off as the father of the complainant whom he was taking home. Immediately the complainant denied any relationship with the appellant and indeed went ahead to file a complaint with the officers to the effect that the appellant had just defiled her three times. The police officers immediately

swung into action and arrested the appellant, proceeded to the scene of crime, thence to the police station. PW2 was immediately informed of what had transpired but requested her neighbor, Mwaka to assist in taking the complainant to hospital as she had an infant to take care of and could not leave her alone at that late hour of the night.

In the meantime, **Cpl Mwanachengoni Salim (PW5)** of the Malindi Police Station Gender and Children Desk took over the case from **P.C. Soi**. After recording the complainant's statement she took her to Malindi Hospital for examination. She was duly examined by **Ibrahim Abdulahi, (PW3)** a clinical officer at the time based at Malindi Hospital. According to PW3, the complainant had told him she had indulged in sex with her boyfriend previously. Nonetheless her hymen was broken and tenderness on the vaginal orifice was noted. She also had beach sand in the posterior and anterior of her genitalia. PW3 concluded that penetration had been achieved. On the basis of the foregoing information, PW5 preferred a charge of defilement of a girl against the appellant contrary to **section 8(3)** of the sexual Offences Act. The particulars given were that:

> "*Amedi Omurunga, on the 4th day of April 2010 at 9.00 p.m. at Jetty Point Beach within Malindi District of Coast Province intentionally and unlawfully caused your male genital organ to penetrate into the female genital organ of one Mwajuma Kenga a girl aged 13 years …*"

The appellant denied the charge and soon thereafter his trial commenced in earnest.

Put on his defence, the appellant in a sworn statement claimed that his prosecution was a frame-up. That behind his prosecution were committee members of Kids Alive, a community based organization he had founded. Having discovered gross mismanagement of the affairs of the organization by the committee, he had decided to disband it. That action did not sit well with the members. One of them, Swaleh Abdalla contacted the appellant and arranged for the meeting with him on 4th April, 2010 in the evening to discuss the matter. On the fateful day, the appellant went to the National Library and asked the concerned officials to meet him there. At about 7 p.m. he left the library after speaking with Swaleh Abdalla on phone. After walking for about 20 metres he heard a voice ordering him to stop. In fact it was PW6 who was ordering him. He complied and when asked where he was from and his national identity card, he explained that he was from the Library but that he did not have his identity card. PW6 was accompanied with three other police officers and a girl. PW6 then distanced himself and made a call in Kikamba giving descriptions of the appellant. As the group moved on Swaleh and a P.C. Rena joined them and he was thereafter taken to Malindi Police Station. He was booked in the cells without any explanation while the complainant was escorted to hospital. He was subsequently charged with an offence he knew nothing about. As far as he was concerned he was framed in the case by Swaleh who was closely working in cohoots with PW6.

The trial magistrate in a reserved judgment delivered on 8th March, 2011 carefully considered the evidence before her and the law and reached the conclusion that the appellant was guilty as charged. In so finding, the learned magistrate rendered herself thus:-

> *"… I am satisfied that the accused person is the one who defiled PW1 at Jet Point beach. Jet point beach is the beach near the Law Courts. I am satisfied that he was arrested shortly after he had finished committing the offence by police officers on patrol. The accused had no grudge with any of the prosecution witness that would make them frame him for this offence. He deliberately defiled a girl aged 13 years …"*

Upon that conclusion and having taken into account the appellant's lengthy mitigation, the learned magistrate sentenced the appellant to 20 years imprisonment.

Aggrieved by the conviction and sentence, the appellant moved to the High Court at Malindi by way of an appeal. The appeal was heard by **Meoli, J** and in a judgment delivered on 19th June, 2012 dismissed the same holding thus:-

> *"… In conclusion, this Court is satisfied that the Court acted on proper evidence and the*

conviction is safe. The appeal therefore has no merit and is accordingly dismissed …"

Undeterred, the appellant has moved a step further and has come to this Court for a second and perhaps last appeal. He has advanced six grounds in a bid to upset his conviction and sentence aforesaid. He claims that the charge sheet was defective, medical evidence did not connect him to the offence; the High Court failed in its mandatory obligation to re-examine and re-evaluate the entire evidence presented so as to reach its independent conclusions; that he had been held in police custody for a period in excess of the permitted 24 hours; vital witnesses were not called to testify; and that his defence was not given due consideration.

At the plenary hearing of the appeal before us on 5th March, 2014, the appellant sought and was allowed to rely on his written submissions that he had filed in Court earlier. He however orally emphasized that his conviction was founded on a defective charge, since he had been charged under the penalty section as opposed to the section creating the offence as well as the penalty section. Because of the omission, he had suffered prejudice as the charge was defective. For this submission the appellant relied on the High Court decisions in the cases of **Samuel Fondo Gona v Republic MLD Cr. App. No. 119 of 2009 (UR),** and **Mutinda Mwai Mutana v Republic MSA CR. App. No. 282 of 2008 (UR).** In both decisions **Odero** &**Meoli**, **JJ** held that charging an accused person under the penalty section as opposed to both the section creating the offence and penalty section renders the charge fatally defective. The appellant further submitted that his grounds of appeal were not captured nor considered by the High Court. Finally, he submitted that the evidence tendered against him was contradictory and did not support the charge.

The appeal was opposed. **Mr Oyiembo**, Senior Assistant Director of Public Prosecutions submitted that there was medical evidence that the complainant was penetrated. There was also beach sand on the external genitalia of the complainant. That it was not in dispute that the appellant was arrested in the company of the complainant. That contradictions in the prosecution evidence in so far as to when the complainant was taken for medical examination was explained away by PW5. With regard to the charge sheet, much as it would have been desirable to have the appellant charged under both the sections creating the offence and the penalty, the appellant suffered no prejudice by the omission. He participated in the trial and cross-examined the witnesses extensively. In any event, counsel submitted, the appellant was raising the issue for the first time in this appeal.

We are keenly aware that this is a second appeal and under the provisions of **section 361** of the Criminal Procedure Code, we are confined to considering only matters of law unless it is demonstrated to us that the two courts below failed to consider matters that they should have or considered matters that should not have or that looking at the entire decision as a whole, the decision was plainly wrong in which case the entire issue becomes a matter of law. In the case of **M'Iriungu v R [1983] KLR 455** at page 466, this Court stated:-

> *"In conclusion we would agree with the views expressed in the English case of **Martin v Glyneed Distrbutors Ltd (t/a MBS Fastenning**). The times of March 30, 1983 – that where a right of appeal is confined to questions of law only, an appellate Court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law … unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law. We, here, have resisted the temptation."*

In this case there are concurrent findings by the two courts below that the complainant was defiled and she was so defiled by the appellant. Indeed all the evidence on record point to the appellant as the perpetrator of the crime. He was arrested soon after the incident. He was with the victim and when asked by PW4 and PW6 as to what was going on between the two, the appellant lied to them that the complainant was his daughter and he was taking her home. If his being with the complainant at that time and place was an innocent act, why then lie? It took the complainant to personally inform the aforesaid police officers that the appellant was infact lying before they swung into action and had him arrested. The complainant was immediately taken to hospital and upon examination, she was found to have been penetrated. PW3 also found that the complainant had sand in the posterior and anterior of her genitalia

which was consistent with the complainant's narration of the events that preceded before her being defiled. She was pulled and dragged into a bush on the beach by the appellant and thereafter had sexual contact with him. Small wonder the presence of sand since the incident happened on the beach. The two courts similarly dismissed the appellant's defence that the appellant was framed in the case by one, Swaleh due to their difference with regard to the management of Kids Alive, an NGO, he had founded. The two Courts found that such defence was unsustainable as it had proved difficult to choreograph such script. In any event he admitted in evidence that neither PW1 nor her mother PW2 or the two police officers he encountered knew him before. That being the case, they would have no reason to gang up and bear false testimony against the appellant. As already stated, all these were concurrent findings of the two Courts below and we have no reason(s) to disturb such findings. In any event they are findings of fact that we are barred from considering as a second appellate Court.

Perhaps the only issues of law that arise in this appeal are the alleged defective charge-sheet, failure to re-examine and re-evaluate the entire evidence as required, by the High Court, arbitrary detention of the appellant in police custody for more than 24 hours, failure to call certain witnesses and finally failure to consider the appellant's alibi defence.

Dealing with the first aspect, we would disagree with Mr Oyiembo that this issue is being raised for the very first time by the appellant in this appeal. The appellant raised it in the High Court. Unfortunately, it appears that the High Court did not address it. It is true that the appellant was charged under **section 8(3)** of the Sexual Offences Act. That section is to the effect that:

> "*Any person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term not less than twenty years …*"

Clearly this section provides for sentence upon conviction for the offence of defilement. However the offence is created by **section 8(1)** of the same Act which is to the effect that:

> "*A person who commits an act which causes penetration with a child is guilty of an offence termed defilement*."

A proper framing of the charge should have made reference to both sections. Ideally the appellant should have been charged with defilement contrary to **section 8(1)** as read with **section 8(3)** of the sexual Offences Act. Can it however be said that a charge is fatally defective on account of the fact that it was predicated upon a penalty section as opposed to the section creating the offence? We think not. Of-course an accused person must fully understand the nature of the offence he is facing so that he pleads to it with full knowledge. It is without doubt preferable that the statement of offence contains a reference to the section creating the offence as well as that prescribing the punishment. In the instant case and as already stated there was only reference to the punishment section. Would this defect vitiate the proceedings and the conviction entered as submitted by the appellant? The answer lies as to whether the defect occasioned a failure of justice and thereby prejudiced the appellant. This test is provided for under **section 382** of the Criminal Procedure Code; which states *inter-alia:-*

> *"Subject to the provisions hereinbefore 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, warrant, charge, 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."*

Going through the entire proceedings, there is no doubt at all that the appellant was well aware of the offence confronting him. During the plea, the particulars of the offence were read and explained to him in the language of his choice which had all the elements of the offence of defilement as contemplated by

section 8(1) of the Sexual Offences Act. He pleaded not guilty and his trial ensued. During the trial, he cross-examined at length all the witnesses proffered by the State. From these lengthy cross-examination, one can easily tell that this was a man who fully understood the offence facing him and the particulars thereof. He asked all the relevant questions for this kind of offence. He submitted in his defence and even challenged the morality of the complainant which elicited the response from the complainant that she had previously engaged in consensual sex with her boyfriend, Ali.

Given the foregoing it would be fallacious for the court to hold that the appellant was prejudiced by the failure by the prosecution to charge him under the section creating the offence as well. It is also instructive that the appellant did not raise the issue with the trial court. He cannot cling on the ruling by the trial court on 22nd June, 2010 when it made reference to the need to charge an accused under the correct sub-section of **section 8** of the Sexual Offences Act. What the trial magistrate was making reference to was the need for the prosecution to be sure of the complainant's age before preferring charges. For if an accused was to be charged under the wrong age bracket of the victim, the charge-sheet would be deemed to be defective in that regard. We entirely agree with that proposition since the age of the complainant of sexual assault is a critical component. It forms part of the charge which must be proved in the same way as penetration. We have said all these because of the proviso to **section 382** of the Criminal Procedure Code aforesaid. The appellant had opportunity to raise the issue very early in the proceedings but opted not to do so. To our mind, we are satisfied that the irregularity in the charge-sheet did not imperil the appellant or occasioned him a failure of justice. Given the foregoing, the decisions of the High Court that the appellant sought to rely on were decided without subjecting the conclusions to the test of whether that omission occasioned a failure of justice and thereby prejudiced the appellant. To that extent they do not represent good law and ought to be discarded or disregarded.

With regard to failure by Meoli, J. to re-evaluate and re-examine the evidence on record afresh so as to reach her independent conclusion, we think that this accusation has no merit at all. The learned Judge expressly stated her duty on a first appeal and specifically cited the well-known case of **Okeno v Republic (1972) EA 32**. That case is what sets out the duty of a court hearing a first appeal. The learned Judge then proceeded to set out in summary the evidence of each witness who testified on behalf of the Republic. She then set out the sworn evidence of the appellant and his submissions. The Judge then reviewed the issues for determination as framed by the trial court and reached her own conclusions having also taken into account the appellant's alibi defence. In the face of these very clear conclusions by the High Court, we are at a loss to understand the complaint that, that court failed to analyse and re-evaluate the evidence on record. The case of Okeno (supra) does not set down any particular manner or format in which a first appellate court is to discharge its duty on a first appeal. In our view, the High Court did a splendid job as required by law. It reached the same conclusion as the trial court did. There was overwhelming evidence to support the concurrent findings made by the two courts and there can be no basis in law upon which this Court can interfere.

The other ground of appeal concerns delay in presenting the appellant to the trial court after his arrest. **Section 72(3)(b)** of the retired Constitution stipulated that a person arrested for a non-capital offence should be brought before a court as soon as reasonably possible but not later than 24 hours after being arrested. Beyond that the prosecution were required to offer proof to show that the delay beyond that period was not unreasonable. It is common ground that the appellant was arrested on 4th April, 2010 but was presented before the Chief Magistrate's Court at Malindi on 8th April, 2010. The appellant did raise the issue concerning the delay. The response by the prosecution was that the appellant was arrested on a Sunday. The following day was Easter Monday which was a public holiday. The investigating officer was unable to get the P3 form filled on that day as the clinical officer was away from hospital. Thus the filling of P3 form and the age assessment of the complainant could only be undertaken on 7th April, 2010. Once this was done, the appellant was brought to court the following day.

The trial magistrate was satisfied with the explanation for the delay and ruled thus:-

> *"… The accused is charged with defilement of a girl contrary to **section 8(3)** of the Sexual Offences Act … **Section 8 sub-section 1, 2, 3** and **4** all relate to offences of defilement of a girl. The distinction between each of those sections is the age of a girl. Thus it is imperative that the*

age of the girl be confirmed before charges are preferred against a suspect. To charge a suspect under the wrong sub-section renders the charge-sheet defective. I am satisfied that the explanation by the investigating officer is reasonable. The accused was brought to Court within a period reasonably practical considering the circumstances. His constitutional rights as under ***section 72(3)*** *of the Constitution were not violated. The application by the accused to have charges dismissed is dismissed."*

It is unfortunate that the issue of the delay was canvassed before the trial magistrate as it turned on the interpretation of the Constitution which jurisdiction the trial court did not have. It behooved the learned magistrate to refer the complaint to the High Court by way of reference for determination. However, it is instructive that it was the appellant who insisted on making the application before the trial court for the dismissal of the charge on that account. Obviously the trial magistrate had to make the determination. Nor did the appellant seek stay of proceedings in the trial court pending the filing of the reference to the High Court. It is also instructive that the appellant did not argue this ground in the High Court. Considering the reasons advanced by the prosecution for the delay, we doubt that the High Court will have come to any other conclusion other than that delay was justified in the circumstances. In any event **section 84(1)** of the same Constitution provided that the High Court was vested with the original jurisdiction to undertake an inquiry concerning any alleged contraventions of any fundamental rights and upon any such inquiry make appropriate reparation. Therein lay the appellant's remedy but not an acquittal on account of violation of his constitutional rights.

With regard to the alleged failure by the prosecution to summon vital witnesses, the appellant has in mind the complainant's twin sister, Mwanatumbo who had accompanied her to the beach for the festival, Mwaka, the neighbour who escorted the complainant to hospital for examination and Dr Ariba who filled the age assessment report of the complainant. Much as the appellant raised this issue before the High Court, it is unfortunate again that the High Court did not pay much attention to it. In our view the absence of these witnesses was in consequential as they were not vital witnesses. They were peripheral. Mwanatumbo did not witness the defilement. All that she would have confirmed is that she came along with her sister to the festival. This was not in dispute. Mwaka would simply have confirmed that she accompanied the complainant to Malindi Hospital for purposes of medical examination which fact too was not in dispute. As for Dr Ariba he would simply have confirmed that he undertook the age assessment of the complainant, yet age was not made an issue in these proceedings by the appellant. We do not see any loose ends in the prosecution case that these witnesses would have tied up with their evidence. In any event **section 143** of the Evidence Act is emphatic that:

"No particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of an act …".

Further in the case of **<u>Bukenya, & others v Uganda</u> (1972) E.A. 549**, the predecessor to this Court stated that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent. In short, only witnesses necessary to establish a fact need to be made available and not a superfluity of witnesses. The aforesaid witnesses were not necessary to establish any fact. In the premises, nothing turns on this ground.

The final ground of appeal is that the appellant's alibi defence was not given due consideration by the two courts. We do not think that the appellant is serious with this accusation. A perusal of the judgment of the trial court and that of the High Court clearly show that the defence advanced by the appellant was given due consideration and at the end of the day was found wanting. This is how the trial court delivered itself on the issue:-

"… In his defence the accused claims he was framed by Swaleh and PW6. When cross-examined by the witness none of them knew of Swaleh. PW4 and PW6 decided (sic) that PW6 received a call that night. Infact PW6 said he did not have a mobile phone, that night. PW1, PW4 and PW6 denied that they stopped severally while waiting for some people on the way to the police station. PW6 said he did not even know about a man called Swaleh. I find the accused person false and I dismiss …"

How about the High Court? This is how it delivered itself:-

> *"… The appellant was had pressed in his testimony to explain PW1's involvement in the alleged conspiracy hatched by Swaleh to fix him due to some disagreements. His testimony suggesting that the police officers PW4 and PW6 specifically procured PW1 as a complainant in order to execute the conspiracy fell flat on its face because he admitted that neither PW1 nor her mother (PW2) or the two police officers knew him before. In a half-hearted way he claimed that PW2 was related to Swaleh his nemesis but did not know how …"*

There is no doubt therefore that the appellant's defence was given extensive coverage and consideration. It is instructive to note that the appellant's initial defence was one of a frame-up and not an alibi.

Thus in our view, the two courts below came to a proper conclusion supported by overwhelming evidence. The High Court, as we have indicated above, carried out its duties as is required by law and analysed the evidence a fresh, evaluated it and came to the inevitable conclusion to which we also come with the consequence that this appeal cannot stand. It has no merit. It is dismissed.

Dated and delivered at Mombasa this 3rd day of April, 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

……..……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR