



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI (PCA), MARAGA & J. MOHAMMED, JJ.A)**

**CRIMINAL APPEAL NO. 32 OF 2013**

**BETWEEN**

**FAPPYTON MUTUKU NGUI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Machakos (Ngugi, J.) dated 28<sup>th</sup> September 2012*

*in*

**H.C.C.R.A. NO. 296 OF 2010**

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**JUDGMENT OF THE COURT**

1. The appellant, **Fappyton Mutuku Ngui**, was charged on the 23<sup>rd</sup> October 2009 before the Senior Resident Magistrate’s Court, Kithimani, with the offence of defilement contrary to **section 8(1) and (2)** of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence were that on the 16<sup>th</sup> October 2009, at Kangode Location in Masinga District within Eastern Province, he intentionally and unlawfully caused the penetration of his genital organ (penis) into the genital organ (vagina) of M.M (**PW2**), a child aged 5 years. He was also charged with an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the Sexual Offences Act, the particulars of which were that on the 16<sup>th</sup> day of October 2009 at Kangode Location in Masinga District within Eastern Province, he committed an indecent act with a child, by touching the private parts (vagina) of M.M., a child aged 5 years.
2. In brief, the case against the appellant as established by the evidence led before the trial court, was that on the 16<sup>th</sup> October 2009, **PW2** (the complainant) went to look for firewood near a river with M N (**PW1**). While there, the appellant called **PW2** to his house. He removed her clothes and underpants and then defiled her. **PW2** later emerged from the house and narrated her ordeal to **PW1** who saw blood coming out of **PW2**’s genitalia. **PW1** then accompanied **PW2** to her grandmother **A T K (PW3)**, and reported what had happened.
3. **PW2**’s grandmother saw her granddaughter walking with difficulty and on examining her, saw

- bruises between her legs. She massaged the bruises with hot water and salt. She also noticed that **PW2**'s vaginal area looked yellowish and bruised. She then suspected that **PW2** had been defiled and asked a lady called Anne to examine the child and take her to hospital. **PW1** also informed her that **PW2** had been defiled by the Appellant.
4. **A M M, (PW4)** who is **PW2**'s mother's aunt, was called by **PW3** on suspicion that **PW2** had been defiled. A M M examined **PW2** and noticed a yellowish substance from her vagina. She reported the matter to the area councillor who organized transport to take the child to Kikumini Police Station. After filing a report, she accompanied the girl to Kikumini Dispensary where she was treated, then referred to Matuu District Hospital for further treatment.
  5. **PW2** was examined and treated by **Alfred Toronke**. He was unable to attend court so his report was given by **Benjamin Maingi, (PW5)** a Clinical Officer. The medical evidence was that **PW2** had a torn hymen with fresh margins, a foul smell from her vagina, spermatozoa, pus and an infection - all of which led to the conclusion that there had been sexual contact and forceful penetration. The doctor also examined the appellant nine days after the alleged offence and found no injuries or abnormalities in his genitalia.
  6. **Corporal Desterio Omukaga (PW6)** received the appellant at Matuu Police Station from Kikumini Police Post, and charged him before the court. He testified that he had seen no need to conduct an identification parade because **PW2** positively identified the appellant as the person who had defiled her.
  7. When put on his defence, the appellant gave an unsworn statement and called no witnesses. His defence was that he was not in the neighbourhood on the material day. On the 14<sup>th</sup> October 2009, he left for his home to deliver some money to his mother who wished to purchase seeds and returned home. He remained home and only left on the 18<sup>th</sup> October 2009. On the evening of the following day at about 5.00 p.m., he was sent to the market to pick some items for a man who he said approached him. Finding no goods to collect, he was arrested as soon he got to the market. The appellant remained in custody at Matuu Police Station for five days before he was charged with any offence.
  8. On the 31<sup>st</sup> August 2010, the trial court found the appellant guilty of defilement contrary to **section 8 (1) and (2) of the Sexual Offences Act, 2006**, convicted him and sentenced him to life imprisonment.
  9. Being aggrieved by the judgement of the trial court, the appellant lodged an appeal in the High Court, contending that the court based his conviction on uncorroborated evidence of a minor and identification evidence. He also argued that he was illegally detained for more than 24 hours after his arrest and that his trial was unfair and probably unconstitutional.
  10. On the 28<sup>th</sup> September 2012, the High Court (**Ngugi, J.**) dismissed the appeal, sustained the conviction of the appellant and upheld the sentence, thus precipitating the present appeal.
  11. The appellant's memorandum of appeal, dated the 29<sup>th</sup> October 2012, sets out four grounds of appeal as follows:

***“a) The entire trial was a nullity due to a technical defect in the charge sheet whereby the Appellant was wrongly charged under section 8(1)(2) of the Sexual Offences Act, 2006 which is non-existent.***

***b) The Appellant's fundamental right to a fair and impartial trial as enshrined under Article 25 (c) of the Constitution was violated.***

***c) The learned judge/the trial court failed to make a specific finding in relation to the burden of proof, more specifically the trial court failed to address the following issues:***

- i. ***The physical evidence obtained from the medical examination i.e. prosecution failed to prove the origin of the spermatozoa, the origin of the pus cells and what/whom caused the infection to the victim.***
- ii. ***The prosecution failed to give an explanation of why the appellant was medically examined nine (9) days after the alleged offence.***

iii. *No tangible evidence was found/presented to the court linking the Appellant to the commission of a sexual act with the complainant.*

*(d) The Appellant's fundamental rights to freedom was violated as he was unlawfully detained in police custody for four (4) years [sic] instead of the usual 24 hours and no explanation was offered in this regard.*

12. The appellant further submitted the following supplementary grounds of appeal:

*“(a) The learned appellate judge of the High Court erred in law when he upheld the decision of the trial court yet failed to find that the provisions of Section 2(i)(6) of the Sexual Offences Act 3 of 2006 were not adhered to as required.*

*(b) The learned appellate judge of the high court erred in law when he fully relied on incredible evidence adduced by the prosecutions witness yet he failed to find that the same could be safely impeached under section 163(1)(c) of the Evidence Act Cap 80.*

*(c) The learned appellate judge of the high court erred in law when he made a partial evaluation in the instant case favouring the crown side/prosecution instead of awarding the benefit of doubt to the defence.*

*(d) The learned appellate judge of the High Court erred in law when he acted on evidence presented by incompetent witnesses to uphold the decision of the trial court thus breached the provisions of Section 48 of the Evidence Act Cap 80.*

*(e) The learned appellate judge of the High Court erred in law when he rejected my plausible defence while relying on very weak reasons.”*

13. The appellant presented his appeal in person by way of oral arguments and written submissions. He first argued that he was held in custody for nine (9) days yet he should have been taken to court within twenty four (24) hours of his arrest.

14. The appellant further submitted that there was no evidence to link him to the offence of defilement. He contended that there was no DNA evidence to link him to the offence and that the complainant's medical check-up should have been conducted separately from his. Furthermore, the medical evidence submitted by the clinical officer disclosed that the victim had an infection, yet the appellant was not found to suffer from the same infection and therefore could not be linked to the offence. He also contended that PW5 was not competent to fill in the P3 form and produce the same as evidence as provided for under section 48 of the Evidence Act Cap 80 Laws of Kenya.

15. The appellant concluded his submissions by arguing that he was never given the charge sheet. He further stated that the evidence presented to the court alleges that the offence was committed on diverse dates which were not captured in the particulars of the charge sheet. He added that when the offence was committed, he was away at his home and returned to his duties on the evening of 18<sup>th</sup> October 2009, and that his entire accusation stemmed from a land dispute with the complainant's mother.

16. **Mr. Monda**, learned counsel for the respondent, in opposing the appeal, submitted that any defect in the charge sheet was curable under Section 382 of the Criminal Procedure Code.

17. As to whether the appellant's constitutional right to be brought to court within twenty-four hours of his arrest had been breached, learned counsel relied on the judgement of this Court in ***Julius Kamau Mbugua v Republic (2010) eKLR*** which established the principle that a violation of the constitutional provisions stipulating the time within which an accused person must be produced in court does not give rise to an automatic acquittal because one can be adequately compensated by way of damages.

18. Learned counsel also submitted that the trial court and the High Court reviewed the evidence of the complainant and asserted that ***‘the two witnesses testified with the innocence of children. Their evidence remained consistent even in cross-examination.’*** As a result, both courts determined that though there was no need for corroboration of the testimony given, sufficient

corroboration was availed in the evidence by the prompt report made by both PW1 and PW2 to PW2's grandmother.

19. Learned counsel further argued that there were concurrent findings by both lower courts that the complainant was assaulted by the appellant. No DNA testing was required as the appellant was linked to the defilement through the evidence presented to the court.
20. Learned counsel further submitted that the High Court found the prosecution's evidence was water tight and upheld the conviction and sentence issued by the trial court. Counsel argued that the appellant did not raise any objection during his trial and first appeal concerning the technical defect in the charge sheet. The appellant was therefore well aware of the charges he was facing as he also participated very vigorously in the trial process including the cross-examination of witnesses. This was therefore a clear demonstration that the appellant had sufficient notice of the charges facing him.
21. We have duly perused the record of proceedings both before the trial court and the first appellate court. We have also considered the submissions of the appellant and learned counsel as well as the authorities they sought to rely on.
22. **Section 361** of the **Criminal Procedure Code** enjoins this Court to consider matters of law only when hearing and determining a second appeal. In *Karingo v Republic [1982] KLR 219*, this Court stated the principle underpinning **section 361** of the **Criminal Procedure Code** as follows:

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

23. The first issue in this appeal is whether the trial court and the first appellate court erred in relying on the evidence of **PW2**, the complainant, and **PW1**, who were both minors, as the basis of the appellant's conviction. **Section 124** of the **Evidence Act** as amended by **Act No. 5 of 2003** and **Act No. 3 of 2006** provides as follows:

*“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*

*Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.* (Emphasis added)

24. The effect of the proviso to **section 124** was aptly captured by this Court in *Mohamed v Republic [2006] 2 KLR 138*, when it stated that:-

*“It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”*

25. In the present appeal, the trial magistrate conducted a *voire dire* examination of both **PW2** and **PW1**. The court directed that **PW2** should give unsworn evidence. **PW2** identified the appellant as the person who had defiled her. On the other hand, **PW1** testified on oath after the *voire dire* examination revealed that she knew the meaning of an oath. From the trial record, evidence from both witnesses was clear and concise. Both **PW1** and **PW2** knew the appellant prior to the incident. They knew his name as Mutuku and that he worked for a man known as Mati. **PW2** testified that the appellant had sexually assaulted her before, while both **PW1** and **PW2** spoke of his ox-drawn cart which the appellant used to ferry children in. Both **PW1** and **PW2** had plenty of

- time to see, decipher and discern the appellant. They both reported to a third party, PW3 (the grandmother), that it was the appellant who had assaulted PW2.
26. The trial magistrate was convinced that both witnesses were truthful and found no reason why they would testify falsely against the appellant. He specifically recorded that their evidence remained consistent even in cross-examination. In our opinion, this evidence was cogent and credible in placing the appellant at the scene as the person who had committed the crime.
27. The appellant's second major ground was that there was no tangible medical evidence adduced to link him with the defilement of PW2. He also argued that a DNA examination was not conducted to link him to the defilement. In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who had defiled her.
28. In ***Aml v Republic [2012] eKLR (Mombasa)***, this Court upheld the view that:

***“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”***

This was further affirmed in the case of ***Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa)*** where the court stated:

***“... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”***

The evidence of the minor witnesses squarely placed the appellant as the one who defiled PW2. It cannot therefore be said that there was no evidence that would link him to the crime. This ground of appeal is therefore baseless and is accordingly rejected.

29. We do not think much turns on the appellant's complaint that PW5 was not competent to fill in a P3 form under section 48 of the Evidence Act. PW5 is a clinical officer who testified on behalf of his colleague, Alfred Toronke who examined and treated PW2 at Matuu District Hospital. In our opinion a clinical officer is qualified to fill in a P3 form. This is an area of his competence. (***See Raphael Kavoi Kiilu v Republic Cr. App. No. 198/2008; Section 2 of the Clinical Officers Act (Training, Registration and Licencing) Act, Cap 260 (LOK)***).
30. We now turn to the issue of the defective charge sheet. The appellant argues that he was charged contrary to 'section 8(1) (2)' of the Sexual Offences Act when in fact there is no such section. We note that the appellant did not raise this issue in his first appeal. Despite this, the High Court addressed it in its judgement in light of any prejudice or miscarriage of justice that the appellant may have faced as a result. The High Court relied on **Section 382 of the Criminal Procedure Code** which provides that:
- “...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, judgement 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.”***
31. The first appellate court was of the opinion that this defect was curable under section 382 cited above; the appellant had participated fully in his trial because he knew the charge that was facing him, and the trial process was fair. There was no prejudice that faced the appellant. We concur with the High Court and learned counsel for the respondent that the appellant was well aware of the charges he was facing, he had sufficient notice of the charges facing him and that he participated vigorously in the trial process. Furthermore, the charge sheet outlines the essential ingredients and particulars of the offence. We therefore find no merit in this ground of appeal and dismiss it.
32. Finally, the appellant raised a constitutional issue regarding his detention, after his arrest, for more than the twenty-four hours required by law; and that he was not afforded a fair and impartial trial.

**Section 72(3)(b)** of the former **Constitution** stipulated that a person arrested for an offence other than a capital offence, should be arraigned in court within twenty-four hours of his arrest.

33. This issue has been the subject of several decisions of this Court. The correct position in law was set out in ***Julius Kamau Mbugua v Republic (2010) eKLR***, where the Court stated that the violation of the appellant's right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights. On this basis, the first appellate court did not consider the issue fatal to the prosecution, and we would agree. This ground of appeal too, lacks merit and fails.

34. In ***Adan Muraguri Mungara v Republic, Cr. No. 347 of 2007 (Nyeri)***, this court set out the circumstances under which it will disturb the concurrent findings of fact by the trial court and the first appellate court, in the following terms:

***“As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.”***

35. The circumstances that would allow us to interfere with the concurrent findings of the lower court do not obtain before us here. We are satisfied that the appellant was properly convicted of the offence of defilement contrary to **section 8(2)** of the **Sexual Offences Act, 2006**. This appeal is bereft of merit and the same is accordingly dismissed as we so order.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of May, 2014.**

***P. KIHARA KARIUKI (PCA)***

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***JUDGE OF APPEAL***

***D. K. MARAGA***

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***JUDGE OF APPEAL***

***J. MOHAMMED***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**