



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MUSINGA & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 5 OF 2013

BETWEEN

ERICK ONYANGO ONDENG'.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Achode, J.) dated 20th June 2012

in

H.C. CR. APP. NO. 434 of 2010)

JUDGMENT OF THE COURT

This is a second appeal by the appellant, ***Erick Onyango Ondeng'***. His first appeal against conviction and sentence for defilement of a child aged ten years was dismissed by the High Court (***Achode, J.***) on 20th June, 2012.

The appellant was charged on 12th February, 2009 before the Chief Magistrate's Court in Makadara, with defilement of a child contrary to ***section 8(1) and (2)*** of the ***Sexual Offences Act, No. 3 of 2006***. The particulars of the offence were that on 22nd January, 2009 at [Particulars Withheld] in Nairobi within Nairobi Province, he wilfully and unlawfully committed an act which caused penetration of his male genital organ into the female genital organ of

J A O., a child aged ten years.

The appellant 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 22nd January, 2009 at [Particulars Withheld] in Nairobi within Nairobi Province, he committed an indecent act with a child by touching the private parts of ***J A O.***, a child aged ten years.

In outline, the case against the appellant was that he and ***J A O, (PW1)*** were next door neighbours in [Particulars Withheld] for a period of three to four months prior to the incident giving rise to the above charges. ***J A O. (PW2)***, a class 3 orphan girl, aged 10 years old, lived with PW1, who was her aunt. On

the material day, the appellant sent PW2 to buy some cooking oil. When she delivered the oil at about 7 pm, the appellant was alone in his house, which was in darkness. The appellant closed the door and started touching PW2's body. He then removed her pants and his own trousers; bent down and defiled PW2. He covered her mouth to suppress any scream. PW2 maintained that the appellant had defiled her on another occasion by the common sink shared by the tenants in the premises.

Subsequently, PW1 noticed that PW2 was in pain and was walking with difficulty, with her legs apart. When she examined PW2's private parts, she noticed that the same were dirty. It was then that PW2 disclosed to PW1 she had been defiled by the appellant. A report was made at Dandora Police Post on 22nd January, 2009, and on the same day, PW2 was referred to the Nairobi Women's Hospital for examination and treatment. The appellant disappeared from the estate and was only arrested on 9th February, 2009, after which he was charged with the offence.

The medical evidence was adduced by **Dr Muhombe** of the Nairobi Women's Hospital and **Dr Zephania Kamau**, the police surgeon (**PW3**). Dr Muhombe's medical report was produced by **Dr Aden Rilwan (PW5)** who was familiar with Dr Muhombe's handwriting and signature. The report showed that upon examination on 22nd January, 2009, PW2's external genitalia were found to be normal. The hymen however, had old tears around the margins especially laterally and interiorly. Dr Muhombe diagnosed the case as sexual assault. The further medical evidence of Dr Zephania Kamau whose report was dated 10th February, 2009, was that PW2's external genitalia were normal and the hymen was intact.

In his unsworn defence, the appellant stated that he was summoned by PW1's husband to their house on 22nd January, 2009 where PW2 claimed that she had been raped by the appellant. He was asked to accept liability and a man, who he did not identify, held a knife by his neck to force him to admit the offence, which he declined to do. The appellant further stated that PW1 had demanded Kshs 5,000 from him to settle the matter, which he was unable to raise. He claimed that PW1 had a grudge against him because he had spurned her advances for a love affair. On 9th February, 2009, he was arrested by the police and charged with the offence.

On 16th July, 2010, the trial court found the appellant guilty of defilement contrary to **section 8 (2)** of the **Sexual Offences Act, 2006**, convicted him and sentenced him to life imprisonment.

Aggrieved by the judgment of the trial court, the appellant lodged an appeal in the High Court, arguing that the charge sheet before the trial court was incurably defective and that upon amendment of the charge, he had been denied an opportunity to recall and further cross-examine the witnesses who had already testified; that on the date the court ruled that he had a case to answer, the *coram* was not indicated in the record; that the prosecution case was not proved beyond reasonable doubt because the evidence was contradictory and inconsistent; that his defence was dismissed without due consideration; and that his mitigation was not considered.

The appeal was heard by **Achode, J.** who on 20th June, 2012 upheld the conviction of the appellant, affirmed the sentence and dismissed the appeal, thus precipitating this second appeal.

The appellant's memorandum of appeal filed on 8th July, 2012 and the supplementary memorandum of appeal filed on 8th January 2014 raise a total of 11 grounds of appeal. However at the hearing, **Ms Odour**, learned counsel for the appellant challenged the conviction and sentence on the following four grounds:

- i. Contradictions and inconsistencies in the prosecution evidence;***
- ii. Contradictions in the medical evidence;***
- iii. Misapprehension of the evidence by the trial court and the first appellate court; and***
- iv. Violation of the appellant's constitutional right to be represented by an advocate.***

Ms Odour largely prosecuted this appeal as though it was a first appeal in which the Court is concerned with re-evaluation and reconsideration of the evidence. Thus for example, in arguing on the alleged contradictions and inconsistencies in the evidence, learned counsel submitted that there was contradiction on whether the offence was committed on 18th January, 2009 or on 22nd January, 2009; whether it was committed at 3.00 pm, 7.00 pm or 9.00 pm; what day of the week the offence was committed; and whether the offence was committed in the appellant's house or at the communal sink.

Regarding the medical reports, learned counsel again attacked the same on the grounds that they were contradictory because while Dr Muhombe had found that PW2's hymen had old tears, Dr Kamau had found that the same was intact. Counsel submitted that this evidence was inconsistent and that the trial court had erred in relying on the evidence of Dr Muhombe rather than that of Dr Kamau without the benefit of a third medical report.

On misapprehension of the evidence by the two courts below, learned counsel submitted that the appellant's defence was not considered adequately or at all and that the courts had focused only on the love affair proposal that the appellant alleged to have turned down from PW1. The judgement of this Court in ***MICHAEL M'MARANYA VS REPUBLIC, Crim. App. No 126 of 2004 (Nyeri)*** was relied upon for the proposition that where the first appellate court does not adequately consider the defence, an appellant is entitled to an acquittal. Counsel also contended that the prosecution had failed, without explanation, to call Violet as a witness, yet PW2 had testified that the said Violet appeared when she was with the appellant. Relying on ***BUKENYA & OTHERS VS UGANDA (1972) EA 549***, counsel submitted that the prosecution was duty bound to avail all witnesses necessary to establish the truth, even if their evidence may be inconsistent. Counsel invited us to draw a negative inference regarding the failure by the prosecution to call Violet as a witness.

Counsel concluded her submissions by arguing that the appellant's right under Article 50(h) of the Constitution to have an advocate assigned to him by the State and at State expense if substantial injustice would otherwise result, and to be informed of that right had been violated. In counsel's view, the effect of the violation of the right was to render the appellant's trial a nullity. Counsel relied upon the judgement of this Court in ***DAVID NJOROGE MACHARIA VS REPUBLIC Crim. App. No. 497 of 2007*** and that of the South Africa Supreme Court of Appeal in ***LEGAL AID BOARD VS THE STATE (2010) ZA SCA 112*** to emphasise the right to an advocate.

Mr Kivihya, learned counsel for the respondent, opposed the appeal and supported both the conviction and sentence. In his view, the contradictions alleged by the appellant were not material to affect the conviction. The evidence, counsel submitted, had placed the appellant at the scene of the offence and that the identity of the appellant was never in doubt as he was known to PW2. Regarding the two medical reports, counsel submitted that there was no contradiction because both confirmed that PW2's hymen was intact, although the report by Dr Muhombe noted old tears. It was counsel's view that the hymen did not have to be broken to prove defilement and that the evidence of PW2 that the appellant had inserted his penis in her vagina, if believed by the trial court, was sufficient to justify conviction.

On the alleged violation of the appellant's right to an advocate, counsel submitted that the trial had been concluded before the Constitution of Kenya, 2010 came into effect and that there was no retrospective application of the Constitution.

We have perused the record and considered the judgements of the trial court and the first appellate court, the submissions by learned counsel and the various authorities that were relied upon. From the outset we must reiterate that this being a second appeal, the jurisdiction of this Court is limited to consideration of issues of law only. **Section 361 of the Criminal Procedure Code** stipulates that a second appeal to this Court is only on points of law. The essence of that provision is that in a second appeal, the issues of fact will have been settled by the trial and the first appellate courts and that this Court will, except in exceptional circumstances, concern itself only with the application of the law to the facts as settled by the two courts below.

The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and

hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured device for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (*See OKENO VS REPUBLIC (1972) EA 32*).

It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.

It appears to us a point so basic that we should not have to keep repeating it to counsel time and again: at the heart of our appellate system is the self evident and eminently rational proposition that questions of fact must be settled at the lower levels of the judicial system and that as the cases progress through the higher levels, the focus must be on issues of law. It would negate and undermine value addition in our appellate system if all that the second appellate court did was to once again reconsider and re-evaluate the evidence with a view to identifying any possible minute and insignificant inconsistencies. The second appellate court cannot simply deal with issues of fact in exactly the same way as the trial and the first appellate courts.

In *BONIFACE KAMANDE & 2 OTHERS VS REPUBLIC*, Crim. App. No 166 of 2004, this Court emphatically expressed itself thus:

“On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision on it.”

Earlier in *M’RIUNGU VS REPUBLIC (1983) KLR 455* the Court had strongly expressed the same view in these terms:

“Where a right of appeal is confined to question of law, 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 fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law”.

In this appeal the record is clear, and the first appellate court observed as much, that although the charge sheet stated that the offence was committed on 22nd January, 2009, on 8th June, 2009 the prosecution applied and was allowed to amend the charge to indicate that the offence was committed on 22nd January 2009. After the amendment, the appellant pleaded not guilty to the amended charge as required by **section 214** of the **Criminal Procedure Code**. The alleged contradictions on where the defilement took place does not amount to much when it is borne in mind that the charge and the evidence adduced related to the defilement in the appellant’s house, although PW2 had testified that the appellant had “*put his penis in her vagina*” on another occasion at the communal sink.

Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial court, after hearing all the evidence accepted that the offence was committed at “about 7 pm” in

accordance with the evidence of PW2. As noted by the Uganda Court of Appeal in **TWEHANGANE ALFRED VS UGANDA**, *Crim. App. No 139 of 2001, [2003] UGCA, 6* it is not very contradiction that warrants rejection of evidence. As the court put it:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

We note that the trial court, before accepting the evidence of PW2 on oath, conducted a *voire dire* examination and specifically noted that it was satisfied that PW2 understood the nature of the oath. PW2 was subjected to cross-examination after she gave her evidence. We may add that the proviso to section 124 of the ***Evidence Act*** as amended ***Act No. 5 of 2003*** and ***Act No. 3 of 2006*** allowed the trial court to convict the appellant on the evidence of PW2 alone, as the victim of a sexual offence, if for reasons to be recorded, the court was satisfied that she was telling the truth. (See **MOHAMED VS REPUBLIC (2006) 2 KLR 138** and **GEOFFREY KIOJI VS REPUBLIC**, *Crim. App. No. 270 of 2010 (Nyeri)*). The trial court specifically noted in the judgement that it was impressed by PW2 as a witness of truth, who spoke nothing but the truth.

We are satisfied that the trial court and the first appellate court adequately considered the appellant’s defence. On page 4-5 of the judgement of the trial court, the court set out the appellant’s full defence and after considering in totality the evidence that was adduced, believed the evidence of the prosecution to that of the defence, which it found to be not credible.

We are similarly satisfied that the first appellate court properly discharged its duty to analyse and re-evaluate the evidence and come to its own independent conclusion. The learned Judge specifically reminded herself of her duty as the first appellate court and even referred to the decision of the predecessor of this Court in **AJODE VS REPUBLIC (1972) EA 32** on the issue. The learned Judge carefully considered the alleged contradictions in the prosecution evidence, as well as the appellant’s defence before upholding the conviction and dismissing the first appeal.

Regarding the alleged contradictions between the two medical reports, the first appellate court found that there was no contradiction because the report of Dr Muhombe had not indicated that the hymen had been breached, which was consistent with Dr Kamau’s evidence that the hymen was intact. The learned Judge concluded thus:

“The fact of the hymen not being breached does not negate the complainant’s assertion that the appellant inserted his penis into her vagina. Section 2 of the Sexual Offences Act, No 2 of 2006 interprets the act of penetration as follows:

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

We do not share the appellant’s suggestion that Dr Muhombe’s report concluded that there was no hymen whilst that of Dr Kamau concluded that the hymen was intact. Dr Muhombe’s report was that the hymen had some old tears on the lateral and anterior side, suggesting that it was still there. We agree with the first appellate court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence. In **TWEHANGANE ALFRED VS UGANDA** (*supra*) the Uganda Court of Appeal expressed the same view as follows:

“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

The appellant took issue with the fact that one Violet, who PW2 mentioned in her evidence as having

happened by when the appellant was with PW2 was not called as a witness. In **BUKENYA & OTHERS VS UGANDA (supra)**, the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case; and that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case.

While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso ***to section 124 of the Evidence Act*** and the medical evidence must be borne in mind as well ***Section 143 of the Evidence Act (Cap 80)*** which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In this appeal, it is not clear to us what value the evidence of Violet would have added to the evidence of PW2, which the court found trustworthy, as well as the medical evidence. In our opinion, Violet would have been a peripheral witness as she was said to merely have happened by when the appellant was with PW2 on a different occasion.

The last issue raised by the appellant relates to the alleged violation of the appellant's right to an advocate under ***Article 50 (2) (h) of the Constitution***. This Court has had occasion to pronounce itself on that provision, which provides as follows:

“(2) Every accused person has the right to a fair trial, which includes the right-

(a)...

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

In **DAVID NJOROGE MACHARIA VS REPUBLIC (supra)**, this Court held that Article 50(2) (h) did not have retrospective application and could not apply in respect of a trial which had been concluded by the time the provision came into effect. Like in that case, the appellant's trial was conducted and concluded under the former constitution. Section 77(2)(d) of that constitution guaranteed an accused person the right to defend himself before the court in person or by a legal representative of his own choice but expressly provided in section 77(14) that nothing contained in section (2) (d) shall be construed as entitling a person to legal representation at public expense.

The decision in **DAVID NJOROGE MACHARIA VS REPUBLIC** has been followed by this Court in **CHARO KARISA THOYA VS REPUBLIC, Crim. App. No 274 of 2002 (Mombasa)** and in **HASSAN ALI SWALEH VS REPUBLIC, Crim. App No. 253 of 2007.**

We are satisfied that the High Court dismissed the appeal rightly as the appellant was properly convicted of the offence of defilement as charged and accordingly dismiss this appeal.

Dated and delivered at Nairobi this 20th day of June, 2014

E.

M.

GITHINJI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

K.

M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

jkc