IN THE COURT OF APPEAL AT NAIROBI

CORAM: GITHINJI, KARANJA & M'INOTI, JJ.A

CRIMINAL APPEAL NO. 155 OF 2013

BETWEEN

NYAMAI MUSYOKA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from a conviction & sentence of the High Court of Kenya at Machakos (Ngugi, JJ.) dated 28th September, 2012

in

H.C.CR.A. NO. 213 OF 2009)

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JUDGMENT OF THE COURT

Nyamai Musyoka (appellant) was charged before the Kitui Principal Magistrate's Court with the offence of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act No. 3 of 2006** with an alternative charge of indecent act with a child contrary to **Section 11(1)** of the same Act.

He is said to have committed the said acts against a child (who we shall refer to as **A.P.** for purposes of protecting her identity pursuant to the Children's Act), who was aged thirteen (13) years. He denied both the main and the alternative charges. After a trial in which a total of five witnesses testified for the prosecution, with the appellant tendering sworn evidence, the appellant was found guilty, convicted and sentenced to serve a term of twenty (20) years imprisonment.

Apparently, although the learned magistrate convicted the appellant on both the main and the alternative charges, which in itself was erroneous, she pronounced only one sentence. It is not clear whether the same was on the main or on the alternative count. This error was nonetheless corrected on appeal before the High Court (Ngugi, J.) and we shall not therefore dwell on it.

In his first appeal before the High Court, the appellant proffered seven grounds of appeal. He complained *inter alia* that some crucial witnesses had not been called to testify; that **Section 211** of the **Criminal Procedure Code** had not been complied with; identification was not foolproof and that the evidence adduced fell short of proving the charges against him beyond reasonable doubt.

From the contents of the judgment rendered by the High Court, it is manifest that the Judge re-

evaluated and reconsidered afresh the entire evidence presented before the trial court in great detail. He then considered individually each and every ground of appeal and the law in point and upheld the conviction and sentence on the main charge of defilement. As stated earlier on, the learned Judge set aside the conviction on the alternative count.

Still dissatisfied with the conviction, the appellant moved to this court on second appeal. He has raised three main grounds of appeal through his memorandum of appeal filed on 3rd November 2012. In paraphrase, the grounds are that the learned Judge did not "adequately resolve" the question of the defects in the charge sheet; that there was paucity of evidence in that no DNA test was done on him to establish guilt;and that the defects in the charge sheet could not have been cured by invoking **Section 382** of the **Criminal Procedure Code (C.P.C).**

At the hearing of the appeal, the appellant who appeared in person informed us that he was relying on the said grounds and the written submissions which he filed that morning - which basically only expounded on the said grounds. He urged us to allow his appeal.

In opposing the appeal and supporting both the conviction and sentence Mr. Orinda, learned Assistant Deputy Prosecuting Counsel, submitted that the appellant was positively recognized by the complainant as the person who defiled her and that identification was based on recognition and was therefore very reliable. Learned counsel submitted that the appellant was a close neighbour who the complainant was used to seeing and thus she knew him well. Citing the evidence of the complainant's mother (PW2), learned counsel went on to submit that the act of penetration was proved as evidenced by the fact that there was blood trickling down the complainant's legs after the incident. In response to the appellant's contention that his defence had not been considered, learned counsel asserted that the defence was considered but was found insufficient to displace the prosecution evidence.

On the issue of the defective charge sheet, counsel was in concurrence with the learned Judge that the defect was curable under **Section 382 C.P.C.** and that no prejudice had been visited on the appellant by the apparent defect. He urged us to dismiss this appeal. This being a second appeal, only points of law fall for our determination. It is trite however that conclusions drawn from the analysis of facts are indeed points of law. It is therefore necessary for us to briefly revisit the facts as presented before the trial court to enable us determine whether the two courts below arrived at the proper conclusions.

The brief circumstances of this case were that the thirteen (13) years old child was on her way to the river to fetch water on the material date and time. She met the appellant who according to her was a neighbor who was very well known to her before this encounter. After exchanging greetings, the appellant gave her ksh100/=, got hold of her and defiled her. He is said to have warned her that he would kill her should she disclose to anyone what had befallen her. When she went home, her mother **A (P.W.2)** noticed that her clothes were torn and soiled. There was also some blood trickling down her legs. They reported the matter to the police station where they gave the name of the appellant. The child was taken to hospital where she was examined by the clinical officer **Martin Njue (P.W. 5)**, who found her hymen broken with a perennial tear. His conclusion was that the child had been defiled. In his defence the appellant denied the offence and said that he had been framed up by the complainant's father. As stated earlier, the learned magistrate after considering this evidence found the charge proved and convicted the appellant, a conviction that was upheld by the first appellate court following what we have found to have been an exemplary re-scrutiny of the evidence on record. We find no fault whatsoever with the concurrent findings of fact by the two courts below.

We now come to the other points of law which arise in this matter and which call for our determination. These are:

1) ***Whether the identification of the appellant was watertight;***

2) ***Whether the appellant was prejudiced by the errors in the charge sheet?***

3) ***Was the error merely a technicality and is it capable of being cured or did it occasion a miscarriage of Justice?***

4) Whether the evidence adduced was sufficient to support the conviction.

Whether the identification of appellant was watertight;

This Court has variously restated that it is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. The predecessor of this Court in **Abdala Bin Wendo & Another. vs R. [1953] 20 EACA at P.168** expressed itself as follows:

> ***"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can be accepted as free from the possibility of error."***

(See also **Kiilu & Another V. Republic [2005] 1 KLR 174).**

Evidence of a single identifying witness as is in this case, must be examined with considerable circumspection to ensure that it cannot but be true before a conviction is founded on it.

The only evidence implicating the appellant was that of the complainant. Was it water-tight and such as could not but be believed, or did it leave room for doubt? We note that the offence herein was committed at around 11:00 am which was in broad daylight. The complainant testified that she knew the appellant before the incident because he was her neighbour. She had plenty of time to see his face during her ordeal. The possibility of mistaken identity was as the learned Judge put it, 'virtually nil'.

The learned judge also observed that the appellant was known to the complainant prior to the attack and that identification was by recognition as opposed to mere visual identification. As this Court pronounced itself in the often cited case of **Anjononi & Others vs Republic, [1976-80] 1 KLR 1566** at page 1568,

> ***"…recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

As to whether the uncorroborated evidence of the complainant on the identification of the appellant was sufficient to support a conviction, we reiterate our findings in **Mohamed v Republic [2006] 2 KLR 138,** where we stated:-

> ***"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."***

In the present appeal, the trial magistrate conducted a *voire dire* examination of

the complainant, and was satisfied that the child was a truthful witness. Similarly the first appellate court which re-evaluated the evidence was satisfied as to the truthfulness of the complainant's testimony. We have no basis for interfering with these concurrent findings of the two Courts below.

The appellant's other contention was that there was no tangible medical evidence adduced to link him with the complainant's defilement since no DNA test was conducted on him and the complainant. This Court has had occasion to address this issue on several occasions before. See for instance **Aml v**

Republic [2012] eKLR (Mombasa), where we expressed the view that;

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

This holding was further affirmed in the case of **Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa)** where this 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."***

From the foregoing, our finding is that the appellant was properly identified as the complainant's defiler. We find the identification watertight. This ground of appeal therefore fails.

Was the appellant prejudiced by the errors in the charge sheet?

The answer to the question as to whether the appellant was prejudiced by the error in the charge sheet as the learned Judge pointed out must begin with **Section 382** of the **Criminal Procedure Code** 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, 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."***

The test for whether a charge sheet is fatally defective is a substantive one. So we must ask ourselves whether the accused was charged with an offence known to law. In this case as was rightly pointed out by the learned Judge, the appellant was charged under **Section 8 (1) (3)** of the **Sexual offences Act**. This was evidently a misdirection of the section creating the offence and it is apparent to us that the police intended to charge the appellant under section **8 (1)** as read with section **8 (3)** of the **Sexual offences Act**. The prevailing question however is whether this prejudiced him in any way. It is our finding that this was a minor technical defect and it is clear from the record that all other procedures were followed to the letter and the appellant was accorded a fair hearing and he understood the charge that was facing him. His full participation in the trial process vindicated that position. If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes into the root of the charge distorting it in a way that the accused cannot understand the charge, then the Court ought to be reluctant to apply **Section 382 C.P.C.** to cure the defect. In this case, we agree with the learned Judge that the defect did not prejudice the appellant in any manner and the invocation of **Section 382 C.P.C**. was proper in the circumstances.

In conclusion, we are satisfied that the appellant was properly convicted on the charge of defilement. His appeal before the High Court was properly dismissed, and the instant appeal is totally devoid of merit. We dismiss the same.

Dated and delivered at Nairobi this 10th day of October, 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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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