IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, G.B.M. KARIUKI & MURGOR JJ.A)

CRIMINAL APPEAL NO. 157 OF 2013

BETWEEN

MUTUA KIVAYA NTHENGE….. APPELLANT

AND

REPUBLIC…….……..RESPONDENT

(Appeal from judgment of the High Court of Kenya at Machakos (Waweru, J) dated 12th September 2012 and delivered on 28th September 2012,

in

H.C.CR.A No. 183 of 2009)

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JUDGMENT OF THE COURT

This is a second appeal from a conviction and sentence to life imprisonment imposed on **MUTUA KIVAYA NTHENGE**, **the appellant**, for the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006 with the alternative charge of indecent acts to a child contrary to Section 11(1) of the Sexual Offences Act.

The brief facts are that, on 29th February 2008, while the

complainant, JKM a minor aged 7 years was returning home from school at about 1 pm, she met with the appellant who was carrying a panga. He told her that he wanted to send her, but instead, got hold of her, took her into a trench and defiled her. He threatened to kill her if she reported the matter.

The next day the complainant's mother, **Wayua (PW2)** noticed that the complainant was unwell, and bought her some medication. On 3rd March 2008 she took her to Mbembani dispensary where the complainant was treated for a urinary tract infection. It was on 10th March 2008, when PW2 noticed that the complainant was bleeding from her vagina that the complainant told her that she had been defiled by the appellant. PW2 reported the sexual assault to Yatta Police Station, where she was given a P3 form. On 13th March 2008, the complainant was examined by **Benjamin Maingi (PW4),** a clinical officer at Matuu District Hospital who completed the P3 form which indicated that the complainant's hymen was torn, though the tear was not fresh, and that the complainant had been

defiled. PW4 also produced the complainant's treatment notes from the Mbembani dispensary.

The appellant was arrested by **AP. Cpl. Pius Muoki Karoja (PW3)** attached to Kisiiki Chief's camp and charged with this offence. He gave an unsworn statement in his defence, and did not call any witnesses. He testified that on 25th day of the month he was arrested by a police officer and the sub chief, and taken to Kisiiki where he was charged with this offence. He was convicted and sentenced by the Senior Magistrate's court.

Being dissatisfied with the conviction and sentence of the magistrates' court, the appellant filed an appeal at the High Court at Nairobi, where upon re-evaluation of the evidence the appeal was dismissed by Waweru J, in a judgment dated 12th September 2012 and delivered on 28th September 2012, thus provoking this second appeal, which is before us.

In his appeal the appellant advanced four grounds of appeal which when considered together with his submissions are that, the charge sheet was defective as reference was made to a charge under section 8 (1) (2) of the Sexual Offences Act instead of section

8 (1) and (2). Furthermore, that the age of the complainant in the charge sheet was specified as 16 years, which is inconsistent with the evidence where the complainant age is indicated as age 7 years; that the medical report was inconclusive as the complainant was examined 13 days after the offence was committed; that the medical officer and not the clinical officer of Matuu District Hospital

should have examined the complainant; that appellant was not properly identified by the complainant, as he was not named as the defiler, who was named Musyoki was Kalekye, and finally that the prosecution did not prove its case.

Mr. Orinda, Assistant Deputy Public Prosecutor**,** opposed the appeal, and countered that this is a second appeal, and this court was only mandated to consider points of law. The High Court reevaluated the evidence as required, and the evidence produced before the trial court was sufficient to prove that the appellant was involved, and that he was known to the victim. Regarding the contention that a medical officer should have testified, and not the clinical officer, Counsel contended that, though the judge observed that the P3 form required to be completed by a medical doctor, the court concluded that this was not fatal, and was satisfied that in accordance with section 124 of the Evidence Act, the child's evidence was sufficient to convict the appellant; that despite the charge sheet specifying the child's age as 16 years, all the evidence indicated that the complainant was 7 years.

This being a second appeal only matters of law may be considered – **see section 361(1)(a)** of the **Criminal Procedure**

Code. It is trite law that in a second appeal the appellate court will not normally interfere with concurrent findings of fact by the two courts below unless it is apparent that on recorded evidence no reasonable tribunal could have reached that conclusion – **see M'Riungu v. R. [1983] KLR 455**; and **Karingo v. R. [1982] KLR**

213. It is also trite law that an appellate court would not normally interfere with the findings by the trial court which are based on credibility of witnesses unless it be shown that no reasonable court could have made such findings - see **Republic v. Oyier [1985] KLR 353.**

Guided by these principles, we turn to the question of the defective charge sheet, where the appellant was charged under section 8 (1) (2) of the Sexual Offences Act, which provision did not exist under the Act, and also that, the charging provisions preferred should have been under section 8 (4) of the Sexual Offences Act, as the charge sheet specified the complainant's age as 16 years.

From a consideration of the provisions of the Sexual offences Act, clearly section 8 (1) (2) does not

exist, and as a consequence no charge could be preferred under a nonexistent provision. Nonetheless, we consider that a reading of the charge sheet would indicate, that the provisions were erroneously referred to as "section

8 (1) (2)" instead of section 8 (1) and (2) where the word, "… and…"was inadvertently omitted.

On whether the charging provision should have been section 8 (4) which appertains to a child aged between 16 and 18 years, and not section 8 (1) and (2) which concerns a child under the age of 11 years, when the evidence is taken into consideration, it is uncontroverted that the complainant was a child aged 7 years at the time of the sexual assault. When this evidence is considered in the light of the charge preferred against the appellant, clearly the charge sheet properly specified the applicable charge, save that the age of the child was specified as 16 years in error.

Having said that, we consider that, such errors on the charge sheet are curable under Section 382 of the Criminal Procedure Code which provides that,

> **"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."**

In the circumstances, we find that the errors and defects on the face of the charge sheet were not material and were curable by section 382 of the Criminal Procedure Code. In any event, we are satisfied that, the appellant was able to understand the substance and the essence of the charges against him, and was in no way prejudiced by these defects. Consequently, this ground fails.

The next issue was that the medical report was inadmissible as PW4, a clinical officer was not competent to issue the P3 form or to testify in respect of the medical report, which is the preserve of a qualified medical officer, and further that the medical report was of no consequential value, as it was carried out 13 days after the incident.

PW4, a clinical officer, examined the complainant on 13th March

2008, and completed and signed the P3 form as the "Medical officer/practitioner". During his testimony, he produced the P3 form together with the treatment notes from Mbembani Dispensary.

This Court in the case of **Raphael Kavoi Kiilu vs R (2010) eKLR,** stated thus;

> **"The challenge touching on the clinical officer's qualifications is in our view taken care of by a scrutiny of the Act governing the affairs of clinical officers bearing in mind that the appellant did not lay any factual basis for his allegation in the first place. Under Section**
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> **2 of the Clinical Officer Act (Training, Registration and Licensing Act Cap 260 (LoK) a clinical officer means:-**
>
> "a person who, having successfully undergone a prescribed course of training in

> an approved training institution, is a holder of a certificate issued by that institution and is registration under the Act……..”
>
> **“Section 7(4) of the states:-**
>
> “A person who is registered by the council shall be entitled to render medical or dental services in the medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.”
>
> **The Act goes further to provide that such officers may engage in provision private practice “in the practice of medicine, dentistry or health work for a fee.” It follows that the clinical officer did testify in this case on his area of competence.**
>
> **We have examined the provision of Sexual Offences Act. <u>There is no requirement that a P3 form must be produced only by a medical doctor</u> (emphasis ours).”**

services, we are satisfied that the production of the P3 Form in court, and his testimony were admissible. On the delay in the conduct of the medical examination, the trial court considered the evidence of PW4 together with the P3 form, and found this to be conclusive evidence that the complainant had indeed been defiled. When this evidence is considered in conjunction with the evidence of PW1 and PW2, the courts below arrived at a concurrent finding that, it was the appellant that committed the offence. We consider that the medical examination being carried out 13 days after the defilement did not in any way obscure or negate the fact that the complainant was defiled by the appellant. Consequently, this ground fails.

Regarding the issue of whether the appellant was properly identified, the appellant contends that the complainant identified the defiler as Musyoki wa Kalekye, and that though PW2 had testified that there was no other Kalekye known by that name in the village, apart from the appellant’s mother, the complainant did not positively identify the appellant.

On the issue of identification of the High Court stated thus,

> “**The defilement took place in broad day-light at about 1pm. The Appelant, a neighbor, was well known to the complainant by the name Musyoki was Kalekye. The complainant had seen him frequently as he always passed by her home on his way to the river. The complainant had led her mother to the home of the Appellant. It was significant, as testified by the mother, that, in their village, there was not any other Kalekye apart from the Appellant’s mother. There cannot therefore be any doubt regarding the identification (in this case by recognition) of the Appellant by the complainant.”**

Given the circumstances of the case, the question of mistaken identity of the appellant cannot be said to arise. The appellant who was a neighbor, was known to the complainant as Musyoki wa Kalekye. She informed PW2, her mother, that she had been defiled by Musyoki wa Kalekye. She led PW2 and PW3 to his house, and did not hesitate in pointing him out to as the defiler. We agree with the learned judge that the appellant was properly identified by way of recognition by the complainant, and we find that this ground lacks merit.

Finally, we consider that based on the complainant’s evidence which was found to be cogent and was believed by the courts below, as well as the testimony of PW2 and PW4 supported by the medical evidence, the prosecution’s case was proved and the conviction was safe. We see no reason to interfere with the concurrent findings of fact of the courts below, and find that this ground is without merit.

Accordingly we dismiss the appeal and uphold the conviction and confirm the sentence.

DATED and DELIVERED at NAIROBI this 3rd day of OCTOBER,

2014.

J. MWERA

….....

JUDGE OF APPEAL

G.B.M. KARIUKI

….....

JUDGE OF APPEAL

A. **K. MURGOR**

….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR