IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO.153 OF 2013

BETWEEN

SAMUEL KILONZO MUSAU…….....…….……APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

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

in

MACHAKOS H.C.CR.APP. NO. 269 of 2010)

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JUDGMENT OF THE COURT

On 3rd June, 2010, the appellant, **Samuel Kilonzo Musau** was convicted by the **Senior Resident Magistrate, Kithimani**, of the offence of defilement contrary to **section 8(2) of the Sexual Offences Act, No 3 of 2006**, and sentenced to life imprisonment. He was acquitted of an alternative charge of indecent act with a child contrary to **section 11(1)** of the same statute.

Aggrieved by his conviction and sentence, the appellant lodged an appeal before the High Court in Machakos, contending that his constitutional rights had been violated when he was detained beyond the prescribed period before being charged in court; that his conviction was based on mistaken identity and that he was not afforded an opportunity to recall and examine witnesses upon amendment of the charge, as required by **section 214 of the Criminal Procedure Code**. The appeal was heard and dismissed by **Ngugi, J**. on 28th September 2012 after he found the same bereft of merit.

Further aggrieved by the judgement of the first appellate court, the appellant lodged the second appeal now before us, in which he has raised eight grounds of appeal which we shall consider shortly.

The particulars of the charge that the appellant was convicted of were that on 16th March, 2008 at **Mbusyani sub-location,** Ndithini Location in Yatta District, Eastern Province, he intentionally and unlawfully did an act which caused penetration of his genitals (penis) into the genitals (vagina) of **MN**, a girl aged 7 years. The prosecution case was constructed around the evidence of 6 witnesses,

including the minor victim, MN. Briefly, the evidence adduced by the prosecution before the trial court was as follows.

On the material day at about 5.00 pm, **MN (PW1)** was returning home from the neighbourhood posho mill, when she encountered the appellant on the road. Without any ceremony, the appellant grabbed her by the throat, put stones into her mouth and led her into a forest off the road. In the forest, the appellant laid MN on the ground, removed her underpants and defiled her. Before running away the appellant warned MN that he would kill her should she inform anyone.

On arrival at home, MN gathered the courage to tell her mother, **T W N (PW2)** what had happened. MN informed PW2 that she had been defiled by a man who worked at the nearby quarry, but whose name she did not know. She recognised her assailant, she said, having seen him every day as she went down to the river. PW2 examined her daughter, who looked weak and found substance on her underpants which she suspected to be semen.

Outraged and determined to bring the culprit to justice, PW2 and her fellow villagers formed a kind of "posse" to track down and identify MN's assailant. Their approach, which has been the centre of attention in this appeal, was aptly described by the first appellate court as "makeshift identification parade innovatively performed by villagers". It entailed summoning all quarry workers and standing them in a circle to enable MN, who was in the middle of the circle, see whether she could identify her assailant. In the first group of quarry workers which did not include the appellant, MN had no difficult in saying that her assailant was not among them.

Some of the appellant's fellow workers, noticing his absence, asked for him to be brought too. When the appellant joined the group, it was dark and lamps and torches had to be used for purposes of the identification. This time round, MN picked the appellant as her defiler. The workers retreated to a room and rearranged themselves, with the appellant in a different position in the circle. MN was called in and again she picked the appellant as her defiler. Satisfied that they had the culprit, the villagers escorted the appellant to the **Ndithini Police Post.**

The next day a report on the defilement was made at the police post before MN was examined and treated at Thika Hospital. The medical evidence which was adduced by **Alfred Toronke, PW6** was that MN's hymen was broken, her vulva was swollen, there were lacerations on her vaginal area and she had a fungal infection. From these findings PW6 expressed the opinion that MN had been defiled.

Put on his defence, the appellant gave an unsworn statement and called no witness. The gist of his defence was that at the time of the commission of the offence, he was away at Kiatineni, where he was with his employer from about 5.00 pm to 8.00 pm. As he walked back home at night, he was set upon by unknown people who beat him up, knocked off his tooth and stole from him Kshs 1,200/-. His attackers then took him to Ndithini Police Post where he was detained for three days. Subsequently he was detained at Yatta Police station for another seven days before he was charged with an offence which he knew nothing about.

In the grounds of appeal prepared by himself for the purposes of this appeal, the appellant has raised eight issues, which allege that the first appellate court erred by:

i) Finding that the appellant did not suffer any miscarriage of justice due to technical defect in the charge sheet;

ii) Holding that the appellant was not prejudiced when he was not informed of his right to recall witnesses after amendment of the charge;

iii) Holding that the appellant was sentenced to 20 years imprisonment while in fact he was sentenced to life imprisonment;

iv) Failing to nullify the trial of the appellant on account of his detention beyond the prescribed period;

v) Treating the appellant's identification as a case of recognition;

vi) Rejecting the defence without any cogent reason;

vii) By relying on an illegal rather than an official identification parade conducted by the police;

viii) By imposing an excessive and harsh sentence.

The appellant further expounded on the above grounds of appeal in his written submissions filed in Court on 15th July 2014 which we shall consider as we evaluate each of his grounds of appeal, in so far as they do not introduce new issues not raised in the grounds of appeal.

The first ground of appeal relates to competence of the charge. This issue was not raised by the appellant before the first appellate court; it was raised by the court itself and addressed towards the end of the judgement "for purposes of fairness and completeness". As framed, the charge read **"defilement contrary to section 8 (1) (2) of the Sexual Offence Act, No 3 of 2006."** The learned judge held that there was no such provision, but nevertheless upheld the appellant's conviction after he found the irregularity was curable under **section 382 of the Criminal Procedure Code**. In arriving at that conclusion, the learned judge found that the appellant was charged with an offence known in law; that the offence was sufficiently disclosed to give him notice of the charges that he faced and that the appellant was not occasioned any prejudice or miscarriage of justice.

As will be readily apparent, section 8(1) is the offence section; it creates the offence of defilement constituted by committing an act which causes penetration with a child. Section 8(2) is the punishment section and prescribes life imprisonment when the child defiled is aged eleven years or less. The charge would have been properly framed if it charged the appellant with defilement contrary to section (8) (1) as read with sections 8(2) because **section 137 of the Criminal Procedure Code** requires the statement of the offence to describe the offence in ordinary language and if the offence is one created by enactment, it shall contain a reference to the section of the enactment creating the offence.

In this case, the statement of offence, though lumping section 8(1) and (2) together, contained the ingredients of the offence and the prescribed punishment. The irregularity was one that was, in our view, curable under **section 382 of the Criminal Procedure Code**. That provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice. In **GEORGE NJUGUNA WAMAE VS REPUBLIC**, **Crim. App No 417 of 2009** this Court stated as follows regarding the effect of section 382 on defects alleged in the charge:

"By dint of this provision, to reverse the findings of the courts below on account of an error, omission, or irregularity in the charge, we must be satisfied that such error, omission or irregularity has occasioned a failure of justice, and in making that determination, we must consider whether the issue being raised now could have been raised at an earlier stage in the proceedings. We are of the considered opinion that there was no failure of justice and that the appellant did not suffer any prejudice arising from the manner in which the statement of offence was framed in the charge sheet. The offence with which he was charged was clearly disclosed as robbery with violence contrary to section 296(2) of the Penal Code...More importantly, this is the kind of objection which, under the provision to section 382, should have been taken at the earliest opportunity before the trial court if the appellant considered the charge to be defective or otherwise lacking in clarity."

We are satisfied that in this case, the appellant was not occasioned any prejudice and that there was no

miscarriage of justice. As noted by the trial court, the appellant fully appreciated the offence with which he was charged as is evident from his cross-examination of the prosecution witnesses.

The second ground of appeal relates to the amendment of the charge, the appellant claiming that he was never advised of his right to recall witnesses who had already testified, to give their evidence afresh or for further cross examination as required by **section 214 (1) of the Criminal procedure Code**. On 12th December, 2009, after PW1 and PW2 had testified, the prosecution applied to amend the charge to include the words **"intentionally and unlawfully"** in the particulars of the offence. The appellant did not object to the application and the amendment was allowed.

As required by the proviso to section 214, the trial court, called upon the appellant to plead to the amended charge, after which he pleaded not guilty and a plea of not guilty was duly entered. The applicant did not indicate that he wished to have either or both of the witnesses who had already testified recalled, and so the trial proceeded. Before us, like before the first appellate court, the appellant took issue with the failure of the court to recall the two witnesses. The relevant part of section 214 (1) (ii) provides as follows:

"Where a charge is altered under this subsection <u>the</u> <u>accused may demand that the witnesses or any of them</u> <u>be recalled and give their evidence afresh or be further</u> <u>cross-examined by the accused or his advocate</u>, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

We agree with the first appellate court that under the above provision, the recall of witnesses is at the instance or request of the accused person. There is no automatic right for recall of witnesses. To the extent that the appellant did not request for any of the witnesses to be recalled, the trial court cannot be faulted for failure to recall them. While it may be good

practice for the court to inform the accused person, particularly one who is not represented by counsel, that he has such a right, that is not mandatory and failure to do so of itself cannot vitiate a trial. We note too that the amendment that was allowed was to ensure technical compliance of the charge and that it did not impinge on the appellant's defence. As far as we can deduce, the appellant's defence was all along that he had not committed an act that caused penetration of MN. It was not his defence that penetration had occurred, but unintentionally or otherwise lawfully. We do not see any merit in this ground of appeal too.

The appellant is certainly right in regards to the third ground in which he complains that the learned Judge wrongly stated that the appellant had been sentenced to 20 years imprisonment. The record is clear that the trial court sentenced the appellant to life imprisonment as required under section 8(2) of the Sexual Offences Act. We cannot fathom where the learned Judge got the idea from that the appellant had been sentenced to imprisonment for 20 years. Be that as it may, nothing in this appeal turns on that erroneous statement by the learned Judge.

The fourth issue raised by the appellant relates to his detention beyond the prescribed period before he was charged in court. Section 72(3) of the former Constitution required a suspect to be brought to court **"as soon as is reasonably practicable"** and where he was not brought to court within 24 hours, the Constitution placed on the prosecution the onus of proving that the suspect had been brought to court as soon as reasonably practicable. This provision has been considered in many judgements of this Court and the position is now settled that an accused person who alleges that he was not brought to court as soon as reasonably practicable is obliged to raise the issue first with the trial court so as to elicit an explanation from the prosecution. Secondly, failure to bring the suspect to court within 24 hours, if it has not implicated on the fairness of the trial, of itself does not vitiate his trial or warrant an automatic acquittal. See **<u>JULIUS KAMAU MBUGUA VS R,</u> Cr App No 50 of 2008.** The proper remedy that is available for such person is a claim for damages. We do not find any merit in this ground of appeal.

Grounds 5 and 7 may conveniently be taken together as they raise issues of identification of the appellant. The appellant complains that the only identification parade known in law is that conducted by the police under the **Police Standings Orders** and that the identification parade he was subjected to was not such an identification parade. In his view, the purported identification parade conducted by the villagers was an illegal identification parade which had erroneously been accepted by the trial and the first appellate courts.

As the Committee on Evidence of identification in Criminal Cases, 1976 (The Devlin Committee), Cmnd, 338 observed, the identification parade is not a scientific test and cannot safely be treated as one. Instead, it is merely the best practical method of achieving an identification without confrontation. The purpose of an identification parade, as explained in **KINYANJUI & 2 OTHERS VS REPUBLIC (1989) KLR 60,** "is to give an opportunity to a witness **under controlled and fair conditions** to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion." It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification.

In this appeal, the trial and the first appellate courts did not rely on the improvised identification parade as the primary or sole method of identification of the appellant. They found it to supplement the identification of the appellant by MN before the parade was conducted. We agree that on its own, the improvised identification parade would not have provided a safe basis for the conviction of the appellant, not the least because members of the parade were drawn from a particular class of workers and there was no indication that they had similar characteristics in terms of age, height, appearance, etc. The later addition of the appellant to the parade could well have also served to draw attention to him alone.

We are however of the view that even when the contentious identification parade is discounted, there was sufficient evidence that MN had the opportunity to properly and safely identify the appellant as her assailant. Before her evidence was taken, the trial court conducted a voire dire and determined that she understood the nature of an oath and the duty to tell the truth. Her evidence was taken on oath and she was subjected to cross-examination by the appellant. On how MN stood as a witness, the trial court stated:

"PW1 had no reason to lie against the accused person. Her evidence remained consistent even in cross examination by the accused. There was no evidence of a bad relationship or differences between her, her family and the accused. She testified with the innocence of a child and struck the court as an honest witness."

The two courts below considered a number of things before concluding that MN had properly identified the appellant. First, she informed her mother immediately after the defilement that she had been assaulted by a person who worked at the quarry. This evidence was corroborated by PW2. It later transpired that the appellant was indeed a quarry worker. Secondly, she also testified that although she did not know the name of her assailant, she had been seeing him every day as she went to the river. Thirdly, the defilement was committed at 5.00 pm, when there was plenty of light and opportunity for MN to see the appellant. Fourth, the encounter at the road, the walk to the forest and the actual defilement, meant that MN and her assailant were in close proximity for a reasonable period of time, in sufficient light, to enable her identify the appellant.

The learned Judge reminded himself of the duty of a first appellate court to submit the whole evidence to fresh and exhaustive examination as well as the obligation to exercise the greatest caution and circumspection before convicting on identification evidence of a single witness.

Ultimately however, the first appellate court reached the same conclusion as the trial court and we now have before us concurrent findings of two courts that the appellant was properly identified as MN's defiler.

In **Boniface Kamande & 2 Others vs R (Criminal Appeal No 166 of 2004)**, this Court stated as follows regarding concurrent finding of the courts below:

"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."

In this appeal we do not find any basis for the invitation by the appellant to interfere with the concurrent findings of the two courts.

Before we leave this issue, we would also like to refer to **Section 124** of the **Evidence Act** as amended by **Act No. 5 of 2003** and **Act No. 3 of 2006**. That section 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,thecourt issatisfiedthatthealleged victim is telling the truth." (Emphasis added).

The effect of the proviso to **section 124** is to create, in cases of sexual offences, an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence of a child of tender years. (See **DENIS OBIRI VS REPUBLIC**, **Cr App No 279 of 2011 JACOB ODHIAMBO OMUMBO v REPUBLIC, Cr. App. No 80 of 2008 (Kisumu)**, and **MOHAMED VS REPUBLIC (2006) 2 KLR 138**. In the latter case, this Court stated emphatically:

"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."

The record is clear enough that the trial magistrate recorded them reasons why he believed MN was telling the truth. Under section 124 of the Evidence Act, the appellant could be properly convicted on the evidence of MN alone.

The next ground of appeal is that the appellant's defence was rejected without cogent reasons. The appellant's defence was basically an alibi, that at the time of the commission of the offence, he was away at Kiatineni and as he came back from there he was attacked by unknown people and ended up detained by the police for ten days.

From his evidence, he was never at the improvised parade held after the defilement of MN. Yet there was evidence from MN, PW2, PW3 and PW4 that the appellant was at the parade. Moreover, from the evidence of PW2, Kiatineni is a mere one and half hour's walk from the scene of the offence, meaning that if he was really there, he could easily have walked there after the offence. From the record, the two courts below considered the appellant's defence and found it not credible and the alibi effectively displaced by the evidence adduced by the prosecution.

By presenting a false alibi, the appellant was in a sense supporting the evidence of his identification. As was stated in **R. VS TURNBULL (1977) QB 224**, identification evidence may sometimes be supported by the fact that the accused person has put forward a false alibi. This is particularly the case where the court is satisfied that the sole reason for the false alibi is to deceive it on the issue of identification.

The last ground of appeal relates to sentence which the appellant describes as excessive and harsh. Under section 361 (a) of the Criminal Procedure Code, the jurisdiction of this Court in a second appeal is limited to questions of law only and the Code is expressly clear that severity of sentence is a question of fact. We therefore decline the appellant's invitation to delve into issues of severity of the sentence.

Ultimately we have come to the conclusion that the appellant was properly convicted of the offence with which he was charged. The appeal has no merit and the same is hereby dismissed.

Dated and delivered at Nairobi this 3rd 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

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