



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, J.J.A)**

**CRIMINAL APPEAL NO. 280 OF 2012**

**BETWEEN**

**STANLEY NKUNJA..... APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J.)*

*dated 9<sup>th</sup> December, 2010*

**in**

**H.C.C.R.A. NO. 59 OF 2008)**

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**JUDGMENT OF THE COURT**

1. **Stanley Nkunja**, the appellant herein, was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act**, No. 3 of 2006, in the Principal Magistrate's Court at Maua. The particulars of the offence were that on 12<sup>th</sup> February 2008 in Igembe North District within the then Eastern Province, the appellant had unlawful and intentional penetration of VM a child under the age of 11 years.
2. The prosecution called a total of 5 witnesses in support of its case. It was the prosecution's case that on 12<sup>th</sup> February, 2008 at around 3:00 p.m., PW2, CM (C), sent her daughter, PW1, VM (V), to go and pick a *sufuria* from their hotel which was 100 metres from their home. Upon reaching the hotel V found the appellant who had rented a room at the hotel, washing clothes. He followed her to the kitchen, grabbed her by her neck, and covered her mouth. He then placed her on top of a table, lifted her skirt upwards, and removed her panty. The appellant proceeded to remove his trousers, lay on top of V and penetrated her vagina with his penis. V tried to scream but the appellant had held her mouth. After the appellant was through he got up and left.
3. C got concerned that V had not returned and decided to go to the hotel to check on her. As she arrived at the hotel, she saw the appellant come out of the kitchen, followed by V who was carrying a *sufuria*. V told her what had happened. She inspected her daughter and found spermatozoa on her thighs. C reported the incident to PW3, John Muhidi (John), the community policing officer, who arrested the appellant and took him to (Particulars withheld) Police Post

- where he was re-arrested by PW5, PC Mumo Mutua.
4. PW4, Ali Gebaba (Ali), a clinical officer at Nyambene District Hospital produced a P3 form filled on 14<sup>th</sup> February, 2008 by one Banis Mutie. According to Ali, V had a bruised *labia minora* with a partially broken hymen. He testified that as per the P3 form, there was no bleeding of the vagina at the time of examination and that there was evidence of attempted vaginal penetration but that the penetration was not complete. At the time of commission of the said offence, V was 9 years old.
  5. The appellant, in his defence, gave an unsworn statement. He denied committing the offence and stated that the charges were a fabrication. He testified that V father held a grudge against him for demanding Kshs. 490/= for the miraa he had harvested.
  6. Being convinced that the prosecution had proved its case to the required standard, the trial court convicted the appellant and sentenced him to 20 years imprisonment. Aggrieved with the trial court's decision the appellant filed an appeal in the High Court. The High Court vide a judgment dated 9<sup>th</sup> December, 2010 dismissed the appellant's appeal and enhanced his sentence to life imprisonment. It is against that decision that the appellant has filed this current appeal based on the following grounds:-
    - *The learned Judge erred in law when re-evaluating the evidence by failing to hold that section 72(3) of the former Constitution had been violated.*
    - *The learned Judge erred in law by failing to hold that the prosecution's evidence that was contradictory and could not be relied upon.*
    - *The learned Judge erred by failing to hold that PW1 was never medically examined from Mau General Hospital where the police took her.*
  7. During the hearing of this appeal, the appellant, who appeared in person, relied on his written submissions that were filed on the 24<sup>th</sup> June, 2013. He submitted that his rights under **section 72(3)** of the former **Constitution** had been violated because he was arrested on 12<sup>th</sup> February, 2008 and he was arraigned in court on 15<sup>th</sup> February, 2008. He contended that the prosecution had not given an explanation for the delay. The appellant submitted that the prosecution's evidence was full of contradictions, in that V testified that the incident took place on 12<sup>th</sup> February, 2007 while the charge sheet indicated that the incident took place on 12<sup>th</sup> February, 2008; V indicated in her testimony that the incident occurred at [Particulars withheld] Market while the charge sheet indicated that the incident occurred at ([particulars withheld] Location; and that V testified that she went home and told her mother about the alleged defilement while C testified that she went to the hotel where she saw the appellant coming from the kitchen followed by V who told her what happened. The appellant further submitted that V was never sexually assaulted because the evidence on record showed that she never bled. He complained about his sentence being harsh.
  8. Mr. K.M. Lugadiru, Senior Public Prosecution Counsel, in opposing the appeal maintained that the appellant's conviction was safe and based on overwhelming evidence produced before the trial court. He submitted that the appellant never raised the issue of the alleged contravention of his rights under **Section 72(3)** of the former **Constitution** before the trial court and the High Court. He argued that this being a second appeal, this Court was bound by the concurrent findings of the two lower courts. While admitting that the appellant was not given notice that his sentence would be enhanced, Mr. Lugadiru submitted that the learned Judge was correct in enhancing the sentence to correct the illegal sentence issued by the trial court.
  9. This being a second appeal and by dint of **Section 361(1)** of the **Criminal Procedure Code**, Chapter 75, Laws of Kenya, this Court's jurisdiction is limited to matters of law only. In **Chemagong vs. Republic (1984) KLR 213** at page 219 this Court held

*'A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)'*

10. We have considered the grounds of appeal, submissions by the appellant and the state counsel and the law. The appellant contends that his fundamental rights under **Section 72(3)** of the former **Constitution** were violated because he was not arraigned in court within 24 hours of his arrest. From the charge sheet on record it is clear that the appellant was arrested on 12<sup>th</sup> February, 2008 and was arraigned in court on 15<sup>th</sup> February, 2008, three days after his arrest. **Section 72(3)(b)** of the former **Constitution** stipulates that a person arrested for an offence other than a capital offence, should be arraigned in court within 24 hours of his arrest. Therefore, was the delay of three days in arraigning the appellant a violation of his rights and did the same warrant his acquittal? **Section 72(3) (b)** of the former **Constitution** further stipulates if a suspect is not arraigned within the requisite period, the prosecution may be required to explain that the delay was necessary and not unreasonable. In this case this issue is being raised in this Court for the first time. In **Peter Kihia Mwaniki -vs- Republic- Criminal Appeal No. 280 of 2005**, this Court held,

*'Neither the appellant nor the prosecution raised any issue concerning the delay in bringing the appellant to court. Nor was the issue raised before the superior court on first appeal. It was in either of those courts that the issue should have been raised so that an inquiry would be made regarding the issue, when both sides would possibly call evidence on the matter. The 14 days duration under section 72(3)(b) is not absolute. Circumstances may exist which militate against presenting a suspect before court within that period. The framers of the Constitution must have had that in mind when they provided that the duty of explaining the delay lay with the person who alleges there was no delay in bringing the accused to court. By raising the issue at this late stage the appellant has, in a way denied the prosecution the constitutional opportunity to explain that delay.'*

We find that the issue having being raised at this stage, we are unable to determine if the delay in arraigning the appellant was unreasonable. In any event, this Court has stated more than once that failure to arraign an accused person within the constitutional time limits, the consequence is not an automatic acquittal but an action in civil remedy for damages. See **Julius Kamau Mbugu -vs- Republic- Criminal Appeal No. 50 of 2008**. Consequently, this ground of appeal must fail.

11. On the issue regarding inconsistencies in the prosecution's evidence outlined by the appellant, namely that V testified that the incident took place on 12<sup>th</sup> February, 2007 while the charge sheet indicated that the incident took place on 12<sup>th</sup> February, 2008; V indicated in her testimony that the incident occurred at Particulars withheld) Market while the charge sheet indicated that the incident occurred at [Particulars withheld] Location; and that V testified that she went home and told her mother about the alleged defilement while C testified that she went to the hotel where she saw the appellant coming from the kitchen followed by V who told her what happened, we find that the same are curable under **section 382** of the **Criminal Procedure Code**, which provides;

*“Subject to the provisions herein-before 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 **Joseph Maina Mwangi vs. Republic - Criminal Appeal No. 73 of 1993**, this Court held:-

*“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the*

***Appellant or they are inconsequential to the conviction and sentences.”***

12. The appellant contended that the prosecution failed to prove that V had been defiled and therefore, the learned trial Judge (Lesiit, J.) erred in convicting him for the offence. The medical evidence indicated that V was not bleeding during examination and according to the appellant this proved that V was never sexually assaulted. **Section 8(1) of the Sexual Offences Act** provides that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. Penetration under the said Act is defined as,

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

It was Ali's uncontroverted evidence that V who was 9 years had a bruised labia and a partially broken hymen when she was examined. He further testified that the vaginal penetration was not complete. From this evidence we are satisfied that the prosecution proved to the required standard that V had been defiled. We have also looked at the record and find no reason to interfere with the concurrent findings of the two courts below that it was the appellant who had defiled V.

13. Lastly, we wish to deal with the issue of whether the learned Judge erred in enhancing the appellant's sentence, without prior notice to him. The appellant was sentenced to 20 years imprisonment by the trial court. Subsequently, the High Court on a first appeal, enhanced his sentence to life imprisonment. It is not in dispute that the appellant was not served with a notice of enhancement of sentence by the respondent. **Section 8(2) of the Sexual Offences Act** prescribes a mandatory sentence of life imprisonment for the offence of defilement of a child below 11 years old. In this case V (victim) was 9 years old. Therefore, we find that the learned Judge was correct in holding that the sentence issued by the trial court was illegal. Consequently, was the appellant required to be served with a notice of enhancement of sentence in respect of the illegal sentence? While it is prudent, and fair, to warn the appellant and give him notice of enhancement, we are of the view that such a notice is not required in respect of an **illegal** sentence. This is because by virtue of the provisions of **Section 347(2) of the Criminal Procedure Code**, appeals to the High Court may be on a matters of facts and law. Illegality of a sentence is a matter of law and therefore, the learned Judge was correct in enhancing the sentence to life imprisonment. In ***Kingsley Chukwu -vs- Republic- Criminal Appeal No. 257 of 2007***, this Court, on a second appeal enhanced an illegal sentence that was issued to the appellant despite the fact that a notice of enhancement of sentence was not given to the appellant.

14. The upshot of the foregoing is that this appeal lacks merit and is hereby dismissed.

**Dated and delivered at Nyeri this 25<sup>th</sup> day of July, 2013**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**