IN THE COURT OF APPEAL AT NAIROBI

CORAM: KARANJA, MUSINGA & GATEMBU KAIRU, JJ.A.

CRIMINAL APPEAL NO. 132 OF 2008

BETWEEN

ANDREW CAURI NDUNGU ……. APPELLANT AND

REPUBLIC ……. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at

Nairobi (Dulu, J) dated 16th April, 2006

in

HCCR.A NO. 107 OF 2007)

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JUDGMENT OF THE COURT

This is a second appeal from the conviction and sentence of the appellant by the Senior Resident Magistrate's Court at Githunguri on a charge of defilement of a minor, *CB*, a girl aged 13 years, contrary to *Section 8 (3) of the Sexual Offences Act, 2006*. The offence was committed on 2nd November,

2006, at **[Particulars Withheld]** village, Kiambu District, Central Province. The appellant was found guilty of the said offence, convicted and sentenced to 20 years' imprisonment. His first appeal to the High Court was unsuccessful and the appellant preferred a further appeal to this Court.

The brief facts of the case were that on the material day at about 6 pm, the appellant and the complainant were together in the appellant's mother's

home where the complainant was employed as a house girl. The appellant grabbed the complainant, blocked her mouth and proceeded to defile her. After the ordeal, the complainant went out and reported the incident to her mother, PW 2, who took her to Kagwe Police Post to make a report.

The following day, the complainant was examined at Kiambu District Hospital by one Dr Njagi, PW 3, who found that her hymen was broken and the vaginal walls were inflamed. No spermatozoa were traced in her but there was some whitish discharge from the vagina. Laboratory tests showed that there was some infection. The doctor concluded that the complainant had been sexually assaulted.

The appellant gave unsworn statement of defence and denied the charge. He admitted that on the material day he was at their home together with the complainant. The girl, according to the appellant, had been sent by the appellant's mother to a local shop but did not return until after two days.

When this appeal came up for hearing the appellant was unrepresented. He had filed a homegrown memorandum of appeal on 15th August, 2008 and a supplementary one which he filed on the hearing day. The grounds of appeal may be summarized as hereunder:

> *1. The charge sheet was defective in that section 8 (1) of the Sexual Offences Act which defines the offence that was allegedly committed had not been cited.*
>
> *2. The charge sheet was also defective for the reason that it did not describe the part of the appellant's body that penetrated the complainant's genital organ.*
>
> *3. There was insufficient evidence that the appellant had actually defiled the complainant since he had not been subjected to any medical examination that could have linked him to the commission of the offence.*
>
> *4. The appellant's constitutional right to be arraigned in court within twenty four hours of his arrest or as soon as practically possible as provided under section 72 (3) (b) of the repealed Constitution was violated because he was held in police custody from 6th November, 2006 to 20th November, 2006.*

During the hearing of the appeal, the appellant opted to rely on brief written submissions which he tendered to the court. Regarding the alleged defects in the charge sheet, the appellant stated that failure to cite *Section 8 (1) of the Sexual Offences Act* was fatal to the charge. *Section 8 (3) of the Act* which was referred to in the charge sheet merely stipulates the sentence for defilement. In his view, the charge ought to have read: *"Defilement contrary to section 8 (1) as read with Section 8 (3) of the Sexual Offences Act"*. The latter subsection only defines the sentence for the offence of defilement, the appellant stated.

In respect of the second ground of appeal as summarized hereinabove, the appellant submitted that he was unable to prepare his defence due to the prosecution's failure to indicate the part of his body which he had allegedly used to commit the offence. That omission was fatal, the appellant submitted.

He cited a High Court decision in *SIGILAI & ANOTHER V REPUBLIC, [2004] 2*

KLR 480 where it was held:

> *"The principal [sic] of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused person to prepare his defence to the charge."*

The appellant alleged that he was unable to prepare his defence because of the aforesaid omission.

Arguing the third ground of appeal, the appellant submitted that in the absence of a medical examination on his part to ascertain whether the infection which the complainant had could have been associated with him, there was no conclusive proof that he had defiled the complainant.

Mr Kivihya for the respondent opposed the appeal and submitted that there was overwhelming evidence that the appellant had defiled the complainant. The complainant knew the appellant well as she was working as a house girl for his mother. At the material time, they were the only people in the appellant's home and the incident occurred at 6.30 pm when there was sufficient light, counsel added. He urged the court to dismiss the appeal.

We have considered the grounds of appeal and the submissions as summarized hereinabove. We will start by considering the first two grounds of appeal. The charge sheet indicated that the appellant was accused of defilement contrary to *Section 8 (3) of the Sexual Offences Act, 2006*. The particulars

of the offence were that:

> *"Andrew Shauri Ndungu:*
>
> *On the 2nd day of November, 2006 at* ***[Particulars Withheld]*** *village in Kiambu District within Central Province, committed an act which caused penetration and did penetrate the genital organs of "CBF", a girl aged 13 years."*

It is true the offence of defilement is defined under *Section 8 (1) of the*

Sexual Offences Act which states as follows:

> *"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."*

Section 8 (3) of the Act states that:

> *"(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."*

While we agree that it would have been elegant to cite both *sections 8 (1) and (3)* in the charge sheet, we do not think that the charge as framed was defective. *Section 2 of the Act* states that *"penetration"* means *the partial or complete insertion of the genital organs into the genital organs of another person*. Given that definition, it was not necessary to indicate that the appellant, using his penis, penetrated the girl's vagina. The charge sheet clearly stated that the appellant committed an act which caused penetration and the same was not defective.

Regarding the third ground of appeal, the appellant was the only person who was with the complainant at the material time when she was defiled. Shortly after the ordeal, the complainant reported to her mother, PW 2, what had been done to her by the appellant, a person well known to her. Upon examining her private parts, her mother was able to see that the complainant had been defiled. On the following day, PW 2 took the complainant to Kiambu District Hospital where Dr David Njagi, PW 3, medically examined her and ascertained that she had been defiled.

That evidence notwithstanding, the appellant contended that having not been medically examined, there was no conclusive proof that he was the one who had defiled the complainant. According to him, the complainant's vaginal fluid ought to have been taken along with his blood sample and the same subjected to DNA tests to determine whether it was he who had defiled the complainant.

We agree that there are instances in which an accused person ought to be medically examined before a court of law can positively connect him to commission of an offence, but we do not think that in this particular case there was dearth of evidence to enable the two courts below reach a conclusion that it was the appellant who defiled the complainant. Even in the absence of a medical examination on the appellant, there was sufficient evidence to enable the trial court reach the finding that it arrived at. We must, therefore, reject the third ground of appeal.

We now move to the fourth ground of appeal. The appellant stated that his fundamental right to freedom as enshrined by *Section 72 (3) (b) of the repealed Constitution* was violated because he was held in police custody for fourteen [14] days before he was arraigned in court. That ground was neither raised before the trial court nor the first appellate court. It was argued for the first time before this Court. If the issue of delay had been brought up during trial, the prosecution would have been required to tender an explanation for the same. The trial magistrate would then have considered whether the delay had been properly explained or not and make a determination thereon.

However, this being a point of law, the appellant cannot be barred from raising the same before this Court. The record shows that the appellant was arrested on 6th November, 2006 but was not arraigned in court until 20th November, 2006. There was a delay of almost thirteen [13] days, excluding the twenty four hours within which he was required to be produced in court. We do not know what caused that delay. If there was no reasonable explanation, we would agree that the appellant's constitutional right was violated.

That notwithstanding, it is now trite law that an appellant who alleges that his constitutional rights were violated in the process of his arrest and arraignment in court, his remedy lies in filing an appropriate suit in the High Court for redress but not in acquittal for such a reason only, if otherwise the appeal is not meritorious. See *ODONGO V REPUBLIC, [2009] KLR 261*. That ground of appeal is, therefore, rejected.

Having carefully evaluated all the evidence on record and considered the grounds of appeal, we find no merit in this appeal and hereby dismiss it in its entirety.

Dated and delivered at Nairobi this 8th day of November, 2013.

W. KARANJA

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

GATEMBU KAIRU

JUDGE OF APPEAL