



IN THE COURT OF APPEAL
AT KISUMU

(CORAM: BOSIRE, WAKI & NYAMU, J.J.A.)

CRIMINAL APPEAL NO. 175 OF 2010

BETWEEN

BEN JOSEPH NANZALA APPELLANT
AND
REPUBLIC RESPONDENT

*(Appeal from the conviction and sentence of the High Court of Kenya at Kisii (Musinga, J.) dated 21st July, 2008
in*

H.C.C.R.A.NO.1 OF 2008)

JUDGMENT OF THE COURT

The appellant was, in the Resident Magistrate's court at Kilgoris, charged with defilement of a girl contrary to **section 8(1)** as read with **section 8(3)** of the Sexual Offences Act 2006. The factual background as outlined by the prosecution in the trial court was that on 30th January 2007 in Transmara District, the appellant Ben Joseph Wanzala had unlawful carnal knowledge of E.N, a girl aged 12 years. During the trial the appellant advanced an alibi defence that he was not at the scene of the crime at the material time. However, after a full trial, the court convicted the appellant and sentenced him to 20 years imprisonment.

On 2nd January 2008 the appellant filed an appeal in the High Court which unfortunately for him resulted in a dismissal on 22nd July 2008. Undeterred, the appellant filed a second appeal to this Court in which he raised the following grounds:-

1. **“That the learned trial magistrate and first appellate court went extra mile to overlook my constitutional right under *section 72(3)* of the constitution of Kenya.**
2. **That the learned trial magistrate and the first appellate court erred in fact and law without considering that there was no any (sic) independent witness who came to support the same.**
3. **That the learned trial magistrate and the first appellate court failed to consider that the appellant was not alerted about (sic) to proceed with the doctor who did not examine the patient.**
4. **That the learned trial magistrate and first appellate court failed to value the contradictions on the prosecution side.**
5. **That I pray to be present during the hearing of this appeal.”**

At the hearing the appellant appeared in person and the State was represented by Mr Kiprop, learned State Counsel. In his oral submissions the appellant contended that he was brought to court outside the prescribed period as per **section 72** of the retired Constitution in that he was arrested on 31st January 2007 and taken to court on 5th February 2007. He urged the court to hold that the contravention was such as to nullify the trial, that the victim's P3 form did not bear an occurrence book reference number (O.B); that he was not given an opportunity to cross-examine the mother of the girl namely PW2 and therefore her evidence was untested; that from the evidence it was not clear whose blood stains were exhibited, and whether the stains were attributable to the complainant's blood and further that the complainant's playmates who allegedly witnessed the defilement did not testify and finally that since only the complainant was medically examined and the appellant was not examined, there is nothing which could link him to the offence.

In his submissions Mr Kiprop submitted that a delay of four days was not inordinate and therefore could not constitute a constitutional violation and in any event the appellant who was ably represented by counsel in the High Court, the counsel did not raise the alleged constitutional violation; that the trial court believed PW1's evidence which was sufficiently corroborated by the evidence of the clinical officer (PW3) and that of the investigations officer Mr Keleli (PW4), not to mention the medical evidence produced in support of the charge; that even if the court were to disregard the evidence of the complainant's mother (PW2) because the court had not re-called her for cross-examination, there was still sufficient evidence in support of the prosecution case from the other witnesses who testified and for the same reason it was unnecessary to call the complainant's playmates to testify, and finally as the appellant was known to the complainant and the courts below made concurrent findings of fact which they believed, this Court should not interfere with those findings because the offence of defilement was in the circumstances clearly established notwithstanding the absence of a medical examination of the appellant.

On our part, we agree with the learned State Counsel that since the two courts below had made concurrent findings concerning the credibility of PW1 that she was defiled and that she recognized the appellant as the perpetrator and in view of the overwhelming medical evidence of penetration given by the clinical officer, the prosecution case was watertight and therefore did not require the testimony of the complainant's playmates. For this reason it was not necessary for the complainant's playmates to testify.

Regarding the alleged constitutional violation, we note that despite the appellant's representation by counsel of his choice in the High Court the same was not raised as stipulated in section 84 of the retired Constitution. We further wish to state that the retired Constitution did provide for a remedy of any proven contravention. In this regard we fully endorse this courts holding on the point, in the case of **Julius Kamau Mbugua v Republic C.A. 50/2008 NBI (unreported)**. For this reason this ground must fail as well. The above notwithstanding we note from the record that 2nd February 2007 fell on a Friday. The appellant was taken to court on Monday 5th May 2007 and thus a substantial element of the delay was due to the intervening weekend and therefore the delay could not in the circumstances be said to have been inordinate. In addition the alleged contradiction concerning the date of arrest seems to us as per the record to have been due to inadvertence on the part of the trial court and therefore the contradiction did not in any way prejudice the appellant.

Finally, although where possible a medical examination of an alleged perpetrator of a defilement could prove useful or even critical in certain situations, in the circumstances of the matter before us, the same was not necessary and we cannot lay a rule of thumb that all perpetrators of defilement should be medically examined. In our view whether or not an examination is necessary should be determined in circumstances of each case and undertaken where it is necessary to establish or advance the case.

All in all, this appeal lacks merit and the same is dismissed.

Dated at Kisumu this 3rd day of November, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR