IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, G.B.M KARIUKI & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 99 OF 2014

BETWEEN

DAVID MUTURI KAMAU..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Gatumbi, J) dated 15th November, 2013

in

H.C.CR.A NO. 511 OF 2010)

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JUDGMENT OF THE COURT

Background

1. DAVID MUTURI KAMAU, the appellant, was charged with the offence of attempted defilement contrary to ***Section 9 (2) of the Sexual Offences Act No. 3 of 2006*** and an alternative offence of indecent act to *a* child contrary to

Section 11 (1) of the Sexual Offences Act in the Chief Magistrate's Court at Thika.

2. The particulars of the offence were that on the 18th May, 2008 at ***[particulars withheld]*** Village in Murang'a South District within Central Province, the appellant attempted to commit an offence that could have caused penetration with MWN, a girl of six [6] years. The particulars of the alternative charge were 1

that on the above mentioned place and date, the appellant intentionally committed an indecent act with MWN a child aged 6 years, by touching her genital organs.

3. The appellant pleaded not guilty to both the main and the alternative charge. After considering the prosecution's evidence and that of the defence, the learned Principal Magistrate *(Hon. L.W. Gicheha)* in her judgment dated 10th

September, 2010, acquitted the appellant of the offence of attempted defilement but found that the prosecution had proved its case against the appellant to the required standard of the charge of indecent act with a child and sentenced the appellant to twelve [12] years imprisonment.

4. Aggrieved by that decision, the appellant appealed against both the conviction and sentence. The High Court (Gitumbi, J) vide a judgment dated

15th November, 2013 dismissed the appeal and confirmed the conviction and sentence imposed upon the appellant by the subordinate court.

5. The appellant, who was unrepresented, filed his Memorandum of Appeal

raising the following grounds:

1. *The charge was defective and was not proved to the required standard.*

2. *The appellant was held in police custody for more than 24 hours thereby violating his constitutional right under the retired Constitution.*

3. *The appellant was denied a fair trial by being denied the right to cross examine the complainant contrary to S77 of the retired Constitution.*

4. *The prosecution did not prove its case beyond all reasonable doubt.*

5. *The alibi defence was not considered.*

6. *There was no evidence to link the appellant to the offence.*

Submissions

6. At the hearing before us, the appellant was unrepresented and relied on his handwritten amended grounds of appeal which he handed to the court on the day of the hearing.

Mr. B.L Kivihya, Assistant Director of Public Prosecutions (ADPP), in opposing the appeal, maintained that the charge was framed as per the law; that it had not been demonstrated that the High Court erred in law in upholding the appellant's conviction and sentence; and that the evidence of PW1 was corroborated by that of PW2.

7. The ADPP further submitted that there was no issue of mistaken identity as the evidence proved that the complainant knew the appellant well as they were neighbours; that it had not been demonstrated that the burden of proof was shifted to the appellant; that the prosecution proved its case beyond all reasonable doubt and that the appellant was convicted after his defence was considered and lastly, that the charge of indecent act with a child was proved to the required standard and urged us to dismiss this appeal as it lacks merit.

8. The appellant in response maintained that there was no evidence at all that PW1 knew him; that PW1's clothes were not produced in court as evidence and yet he had requested for the same to be produce; that the doctor did not examine him to prove that he had committed the offence and that the learned Judge failed to consider his evidence. The appellant urged us to consider his

submissions and allow his appeal.

Determination

9. This being a second appeal, this Court is restricted to address itself on matters of law. As this Court has stated many times before in a long line of its own decisions, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making its findings. See

CHEMANGONG V R, [1984] KLR 611. In ***KARINGO V R, (1982) KLR 213*** at p. 219 this Court said:

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. (*Reuben Karari s/o Karanja v R*,

(1950) 17 EACA 146)."

10. We have considered the grounds of appeal, record of appeal, submissions and the law. On the ground whether the delay in taking the appellant to court invalidated the charge, we reiterate what this Court said in the case of ***JULIUS KAMAU MBUGUA V R, [2010] eKLR 37***:

"The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in *Section 72 (6) of the former Constitution****. That is the appropriate remedy which the appellant should have sought in a different forum."***

The breach could, therefore, logically give rise to a civil remedy which the appellant can seek in a different forum. In addition, the record indicates that the trial court found the explanation for the delay of four [4] days in arraigning the appellant in court, acceptable. The explanation given to the Court was that as the victim was strangled, the required medical tests could not be carried out until the complainant's neck healed sufficiently.

11. On the ground that the appellant was not accorded a fair trial, we find that the appellant was given the opportunity to cross examine all the prosecution witnesses except the complainant. On this ground of appeal, the High Court stated:

"I state that the reasons why the appellant was not afforded an opportunity to cross examine the complainant was because the complainant gave an unsworn statement."

We find that there is no evidence that the appellant was not accorded a fair trial. Accordingly, this ground of appeal fails.

12. On the issue of whether the prosecution discharged its burden of proof, it is common ground that the burden of proof lies with the prosecution. The *locus classicus* on this is the case of ***DPP V WOOLMINGTON, (1935) UKHL 1*** where the court eloquently stated that the *"golden thread"* in the *"web of English common law"* is that it is the duty of the prosecution to prove its case.

The Kenyan Courts have upheld this position in numerous cases. See ***FESTUS MUKATI MURWA V R, (2013) eKLR***.

The standard of proof required is *"proof beyond reasonable doubt"*. In reference to this Lord Denning in ***MILLER V MINISTRY OF PENSIONS, [1947] 2 ALL ER 372*** stated:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability.

Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

13. With regard to the issues of corroboration and the appellant being proved as the person who defiled the complainant, ***Section 124 of the Evidence Act*** is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. From the record it appears that the victim told the truth. In its judgment, the trial court stated:

"I have considered the evidence before me. I have no doubt that the child is a minor. I also have no reason to doubt that there was an attempt to assault her. Her evidence of the attempt to defile is supported by PW 2 who is an independent witness. It is her (sic) evidence he saw a child leaving the bush muddy and was bleeding from the mouth. I therefore have no reason to doubt the child's evidence. … However from the evidence, the child and the accused are neighbours they are also close family friends and even share household chores. The incident also occurred during daytime and thus she was able to see the person who was attempting to defile her.

She informed PW 2 immediately that it was Muturi who had tried to defile her and then repeated it to her mother PW 3. I therefore have no doubt in my mind that she was able to identify her assailant."

The evidence on the record shows that the complainant identified the appellant as the one who committed an indecent act. PW 2, an independent witness, corroborated the complainant's evidence. From all of the above, we are satisfied that the prosecution did indeed discharge its burden of proof.

As a general rule of evidence embodied in ***Section 124 of the Evidence Act***, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and provides as follows:

"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, the court is satisfied that the alleged victim is telling the truth."

Herein, the learned trial magistrate gave reasons as to why she so heard the complainant's testimony. Accordingly, we find that the prosecution proved its case to the required standard of beyond reasonable doubt. This ground of appeal, therefore, fails.

14. On the issue of whether the appellant's alibi defence raised reasonable doubt in the prosecution's case, in his unsworn testimony, the appellant denied the offence.

In the recent case of ***VICTOR MWENDWA MULINGE V R, [2014] eKLR*** this Court rendered itself thus on the issue of alibi:

"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *KARANJA V R,* ***[1983]***

KLR 501 … this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."

In the present appeal, the question is: did the alibi defence raise a reasonable doubt in the prosecution

case? From the facts on record it appears that the prosecution made a strong and watertight case against the appellant. The evidence of the prosecution witnesses corroborate each other and form a clear and logical sequence of events establishing the appellant's guilt.

The trial court stated:

"I have too (sic) considered the accused person's alibi defence, which to me remains to be a mere statement which is uncorroborated or unsubstantiated."

16.Taking all the facts into consideration, we find that the alibi defence did

not shake the prosecution's case. The finding of the High Court that the appellant was properly identified and convicted of the offence of indecent act with a child was based on overwhelming evidence and cannot be faulted. This ground of appeal, therefore, fails.

17.The upshot of our assessment is that the appeal is devoid of merit and is

dismissed in its entirety.

Dated and delivered at Nairobi this 8th day of May, 2015.

R.N. NAMBUYE

JUDGE OF APPEAL

G.B. M. KARIUKI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR