Case Number:	Criminal Appeal 210 of 2017
Date Delivered:	29 Mar 2019
Case Class:	Criminal
Court:	Court of Appeal at Nakuru
Case Action:	Judgment
Judge:	Roseline Pauline Vunoro Wendoh
Citation:	Francis Kanyi Kirunda v Republic [2019] eKLR
Advocates:	Ms. Rugut for State
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon. V, A, Ochanda – R.M.)
County:	Laikipia
Docket Number:	-
History Docket Number:	Cr.No.2564 of 2014
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.210 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.2564 of 2014 by: Hon. V, A, Ochanda – R.M.)

FRANCIS KANYI KIRUNDA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

Francis Kanyi Kirunda, the appellant, faced the following charges in the trial court:

Count I: Defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006.

Particulars:

On the 12th day of October, 2014 at around 0900 hours in Laikipia County, intentionally and unlawfully caused his penis to penetrate the vagina of C.N.W. a child of 8 years old.

Count II: Attempted defilement Contrary to Section 9(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006.

Particulars:

On the 12th day of October, 2014 at around 0900 hours in Laikipia County, intentionally and unlawfully attempted to cause his penis to penetrate the anus of J.M.W. a child aged 6 years old.

In the alternative, the appellant faced two charges of committing an indecent act with a child contrary to section 11(1) of the Penal Code in that he caused his penis to come into contact with the vagina of C.W. a child aged 8 years and that his penis came into contact with the anus of J.M.W. a child aged 6 years.

The appellant was convicted on Count I and sentenced to serve life imprisonment. In respect of Count II, the appellant was guilty on the alternative charge instead sentenced to serve 10 years imprisonment.

The appellant is aggrieved by the conviction and sentence and filed this appeal citing 7 grounds of appeal. The grounds are as follows:

(1) That the charge was defective and did not conform with section 214, 134 and 135 of Criminal Procedure Code and Sexual Offences Act;

(2) That the act of penetration was not proved;

(3) That the prosecution evidence was inconsistent and contradictory;

(4) That the appellant was denied witness statements and his rights under Article 50(2)(c), (j) and (k) of the Constitution were violated;

(5) That essential witnesses were not called Contrary to Section 146 of the Evidence Act;

(6) That the court failed to comply with Section 211 of the Criminal Procedure Code;

(7) That the court failed to consider his defence;

(8) The court failed to comply with Section 169 of the Criminal Procedure Code.

The appellant filed submissions in support of his grounds.

The appellant submitted that in Count II the appellant was charged under Section 9(1) and 8(2) of the Sexual Offences Act which are totally different sections; that the charge did not indicate sufficient particulars as provided in Section 134 of the Criminal Procedure Code; that the evidence disclosed that the appellant and the complainants are relatives and the appellant wondered why he was not charged with the offences of incest under Section 20 of the Sexual Offences Act. He attributed that failure to the charge being a fabrication; that the evidence does not support the charge. He submitted that the evidence on record is that he had defiled the children several times yet the charge indicates only one incident occurred. The appellant also submitted that though the charges indicate that the incident occurred at 0900 hours; the evidence was that the incident was at day time. Lastly that on penetration, the appellant was of the view that had the offence occurred, there would have been blood and that there was no medical evidence to support the allegation; he also questioned why there was a delay in taking the children for medical check-up. It was his view that the long period taken to report goes to support his contention that the case was a fabrication.

As to violation of Article 50(2)(c), (j) and (k), the appellant urged that it is a requirement that an accused be presented to court within a reasonable time which was not done; that he was never supplied with witness statements to help him prepare his case in terms of Article 50(2)(j). He relied on the decision in ***Republic v Daniel Chege (2014) eKLR*** where it was held that the police are under a duty to provide an accused with witness statements. He also alleged that he was not allowed to call defence witnesses contrary to Article 50(2)(k). He relied on the decision of ***Simon Githaka Malombe v Republic (2015) eKLR*** where the court found that failure to provide the accused with witness statement fatally compromised the fairness of the appellant's trial when the DPP failed to supply the witness statement.

It was the appellant's submission that the prosecution failed to call Ken, Maggie, Mama Gitau and the Chief of Maihanyu; that the chief of Maihanyu Location was a very key witness and yet they were never called and the court should presume that their evidence would have been adverse to the prosecution evidence, *see* ***Donald Majiwa Achilwa & others v Republic (2009) eKLR (CRA.34/2006)*** and ***Bukenya v Uganda 1972 E.A. 549***.

The appellant further submitted that the trial court failed to comply with Section 211 Criminal Procedure Code in that he was denied a chance to be heard.

Lastly, it was the appellant's contention that the court failed to comply with Section 169 Criminal Procedure Code in that the court failed to evaluate the evidence and give reasons for its decision, did not specify the offence and section under which the appellant was convicted.

The appellant also faulted the manner in which he was sentenced in that he was sentenced to life imprisonment and then 10 years but the court did not indicate that was to be suspended.

The appeal was vehemently opposed by learned counsel for the State Mr. Mutembei who submitted that the charges were not defective and were read to the appellant to which he denied.

As regards the question whether there was penetration, counsel urged that PW1 and 2 were minors and each clearly narrated what happened to them after which they reported to their grandmother as soon as she came home and she in turn reported to the police; that the evidence of PW1 was corroborated by the medical evidence of PW4 and as regards PW2, the evidence was that the appellant touched PW2's genital organs; that the appellant was known to the complainant who are his cousins and they lived in the same home. Counsel denied that the appellant's right to know the case he faced was violated because witness statements were given to him and he fully participated in the trial. It was counsel's view that the sentence was proper and the appeal lacks any merit.

This being the first appeal, this court has the duty to re-examine all the evidence that was tendered in the trial court, evaluate and analyze it and arrive at my own independent determinations. Of course this court has to bear in mind that it neither saw the witnesses' testify nor did it have an opportunity to weigh their demeanor, an opportunity which the trial court had (see ***Kiilu v Republic (2005) KLR 174***).

The evidence that was tendered before the trial court is as follows. **PW1 C.N.W**. a child aged about 8 years, underwent a *voire dire* examination. The court was of the view that the witness would only be affirmed. She identified the appellant as Kanyi, her cousin who on 12/10/2014, did '*tabia mbaya'* to her; PW1 said that the appellant lives in a house next to theirs; that he took her to his house, locked the door asked what he could buy for her and she said books; that he lifted up her dress after she was told to get into his blankets, told PW1 to remove her pant, told her to lie on him and that the appellant put his 'dudu; (organ for urinating) inside hers; that by then he had removed his clothes; that thereafter appellant gave her an avocado. PW1 said that she was also with PW2 John while her sister had gone to the river. PW1 informed her sister upon return and she was taken to hospital, then to Mairo Inya police Station.

PW2 J.W, who was younger than PW1 was also affirmed. He identified the appellant as Kanyi who lived with them; that they were in his house, during the day when the appellant removed his clothes, removed PW1's own clothes; that the appellant put his organ for urinating and put inside his from the front and warned him not to cry or tell anybody. PW1 later reported to his grandmother who took him to hospital. PW2 said the appellant also did bad manners to PW1 after he removed her clothes and his.

PW3 Peris Wanjeri testified that he was told by the children that they had been defiled by the appellant after she came home from church; that PW1 was defiled while PW2 was sodomized and she reported to the police station.

PW4 PC Samuel Kamau of Laikipia County A.P. Office recalled the 18/10/2016 when he received a call that the appellant had defiled the complainants. He interrogated the complainants who identified the appellant as the perpetrator.

PW5 PC Erick Odak received the appellant from Mairo Inya Administration Police Post. He took the children for examination and age assessment. PW1 was found to be aged between 8 – 9 years while PW2 was found to be aged about 5 – 6 years.

Dr. Joseph Karimi (PW6) on 24/11/2014 examined the complainants. He found PW1's hymen to have been broken but no other injuries. He also saw the treatment notes from Nyahururu District Hospital. On examining PW2 he had no wounds on the body or anus.

When called upon to defend himself, the appellant denied committing the offences; he alleged that his parents were mistreating him and he was arrested for no reason after coming from work.

To establish an offence of defilement, the prosecution has to prove the following:

(1) That the victim was a child;

(2) That there was penetration of the victim;

(3) Positive identification of the perpetrator.

In the instant case, the complainants appeared before the trial court and the court found them to be children of tender age. They were subjected to *voire dire* examination. The complainants' ages were assessed, PW1 was found to be between 8 – 9 years while PW2 was between 5 – 6 years old.

Whether penetration was proved:

Section 2 of the Sexual Offences Act defines penetration as "***penetration***" means "***the partial or complete insertion of the genital organs of a person into the genital organs of another person***".

PW1 vividly narrated in detail what the appellant did to her. After she undressed and the appellant did likewise, while in the

appellant's bed, the appellant put his organ for urinating into hers and she felt pain. This incident occurred on 17/10/2014 and PW1 was not examined by the Doctor till 24/10/2014. PW6 found that the hymen was missing but there were no injuries to the genitalia. Although a missing hymen is not necessarily evidence of penetration, however, from PW1's narration, there was penetration and the lack of injuries to the genitalia may be due to the lapse of time from the date of the incident and the examination.

As regards PW2, although PW2 said that the appellant put his organ for urinating into his, there was no evidence of penetration. If there had been penetration to the anus, maybe, there would have been evidence of healing bruises or scars.There was no evidence of penetration. However, I find that from PW2's narration, he was indecently assaulted. Section 2 of the Sexual Offences Act defines indecent act as:

"Indecent act, means an unlawful intentional act which causes:-

(a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include and act that causes penetration."

PW1 narrated that the perpetrator removed all his clothes and he too had removed his. According to PW2, the appellant put his genital organ into his from the front. From the above narration, the appellant's genital organs did come into contact with PW1's body and I am satisfied that an indecent act was committed with PW2.

Under Section 124 of the Evidence act, corroboration is no longer a requirement in sexual offences. The court can proceed to convict on evidence of a single witness provided the court records the reasons for its decision and is satisfied that the child is telling the truth.

The appellant is related to PW1 and 2. They are cousins. They live in the same home. Both PW1 and 2 said that the appellant's house is next to theirs. PW3 identified the appellant as her grandchild and so are PW1 and 2. The incidents occurred during the day when PW3 had gone to church. The charge indicates that they occurred about 9.00 hours which is 9.00 a.m. in appellant's house. PW1 and 2's evidence was not in any way shaken during the cross examination. I am satisfied that PW1 and 2 were truthful witnesses and there is no reason for them to frame the appellant. In fact from a reading of the evidence, it shows the appellant may have been abusing the children for some time. The identity of the perpetrator is therefore not in issue.

The appellant alleged that the charge was defective. I have considered the charges. There was no defect in the first charge. In Count II, the appellant was charged with attempted defilement contrary to Section 9(1) as read with Section 8(2) of the Sexual Offences Act. However, I do agree that Count II was defective in that the charge should only have read attempted defilement Contrary to Section 9(1) of the Sexual Offences Act. The inclusion of Section 8(2) Sexual Offences Act was irregular. However the particulars of Count II clearly supported a charge under Section 9(1) of the Sexual Offences Act and the same would have been cured by Section 382 of the Criminal Procedure Code which provides that the finding of a court of competent jurisdiction will not be reversed or altered on account of an error or irregularity in the charge. In the alternative, the appellant faced a charge of committing an indecent Act Contrary to Section 11(1) of the Penal Code. No such offence exists in the Penal Code. The charge should have been under the Sexual Offences Act. It seems the trial court did not pay much attention to the provisions of law under which the charges were made. The court went ahead to convict the appellant of the alternative charge without mentioning under what Section she did so. I think that failure to state the law under which the appellant was convicted in the alternative charge dealt a blow to the charge as no such offence exists.

The appellant also complained that his fundamental rights under Article 50(2)(c)(j) and (k) were breached. The appellant alleged that he was not supplied with witness statements. Article 50(2)(c) provides that an accused has right to have adequate time and facilities to prepare his defence while (j) provides that an accused has a right to be informed in advance of the evidence that the prosecution will rely upon.

I have perused the court record. On 27/10/2014 when the appellant appeared before the trial court for plea, the prosecution indicated that there were 5 witnesses to be called of 7 pages and the court directed that the appellant be supplied with witness statements at the court's cost. Thereafter, there was no mention of witness statements. The appellant never complained that the court had not supplied him with witness statements. I believe the appellant was supplied with statements because he would have complained during the hearing. He cannot be heard to complain now when he would have done so in the trial court.

Article 50(2)(k) of the Constitution guarantees an accused's right to adduce and challenge evidence. The record clearly shows that the appellant cross examined witnesses and was given time to defend himself. He indicated that he needed to call witnesses, was allowed time to call the witnesses but later indicated that they had declined to come. There is no evidence that the appellant's rights under Article 50(2)(c)(j) and (k) were breached.

The appellant complained that essential witnesses were not called, that is Ken, Maggie, Mama Gitau and Mahianyu area Chief. It is PW3 who told the court that Maggie, Ken PW1 and 2 informed him that the PW1 and 2 were defiled. The complainants testified that they were alone with the appellant when defiled. It means that Maggie and Ken did not witness the incident. Even if Maggie and Ken were called, their evidence would have been hearsay. As regards the chief of Mahianyu, PW3 reported to him about what the children told her. The discretion to call prosecution witnesses is always left to the prosecution although the said discretion must be exercised judiciously so that no material evidence, whether in favour or against the prosecution is left kept away from the court or that evidence is left out for an ulterior motive. In the case cited by the appellant – ***Donald Majiwa Achilwa & 2 Others Vs Republic (2009) eKLR*** *where the Court of Appeal held that :*

*"**The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution** case- see **Bukenya & Others Vs Uganda (1972) EA 549**."*

In this case, there is no evidence that the witnesses mentioned had any material evidence relevant to this case.

The trial court is also alleged to have been in breach of Section 211 of the Criminal Procedure Code. After the close of the prosecution evidence, the court ruled that the accused had a case to answer and was called upon him to enter his defence. The three ways of making a defence were explained to him and he opted to give unsworn evidence which he did. The appellant did not explain how Section 211 Criminal Procedure Code was breached.

The trial court in its judgment set out the charges that the appellant faced, summarized the evidence and analyzed it and made its conclusion. Basically, the court complied with Section 169 of the Criminal Procedure Code. Even if it had not, that is not a reason to quash a conviction because this court as a first appellate court has the duty to evaluate all the evidence tendered before the trial court and make its own findings from the said evidence.

The appellant merely denied the offence and alleged that his parents caused his arrest. At no time did the issue of his parents arise during cross examination of the prosecution witnesses. The defence was evasive and a mere denial. The trial court considered it and found it to be a sham in view of the prosecution evidence tendered by PW1 and 2.

In the end, I find the conviction of the appellant on Count I to be well founded on cogent and credible evidence and I dismiss the appeal on conviction. On the alternative to Count II, however, I found above that it was based on non-existent provisions of law and the trial court did not address it. I hereby acquit the appellant of the said charge.

As regards the sentence, PW1 was about 8 – 9 years old and under Section 8(2) of Sexual Offences Act, the only sentence allowed in law is life imprisonment. This court cannot interfere with it.

The appeal on Count I is hereby dismissed in its entirety but the appeal on Count II is allowed, the conviction is quashed and the sentence of 10 years set aside.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***29th*** day of ***March,*** 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for State

Soi – Court Assistant

Appellant - present