



REPUBLIC OF KENYA



**Mokera v Republic (Criminal Appeal E012 of 2022)
[2023] KEHC 22910 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22910 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E012 OF 2022
WA OKWANY, J
SEPTEMBER 28, 2023**

BETWEEN

DENNIS SUNDO MOKERA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Conviction and Sentence in Keroka MCSO/E027 of 2021 at Keroka Principal Magistrate Court by Hon. B.M. Kimtai, Principal Magistrate on 21st April 2022)

JUDGMENT

1. The Appellant herein, Dennis Sundo Mokera, was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on diverse dates between 2019 and April 8, 2021 in Masaba North Sub-County within Nyamira County, intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of AK (particulars withheld), a child aged 12 years.
2. An alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006 was also brought against him. The particulars were that on diverse dates between 2019 and April 8, 2021 in Masaba North Sub-County within Nyamira County, he intentionally touched the vagina of AK, (particulars withheld) a child aged 12 years with his penis.
3. The Appellant took plea before the trial court and denied the charges. The matter proceeded to a full trial in which the Prosecution called a total of seven (7) witnesses.

The Prosecution's Case

4. PW1, AK, the complainant herein testified that the Appellant was her Kiswahili teacher at [Particulars Withheld] Primary school and that he had, since 2019, formed a liking for her because she was performing well in Kiswahili. She testified that the Appellant requested her to be his friend and that



- they used to chat on phone until her parents discovered the relationship and reported to the matter to the school's head teacher. She stated that she went to church on April 10, 2021 when the Appellant sent another pupil to call her. She added that she went to the Appellant's house where the Appellant undressed himself, undressed her, put on a condom and inserted his penis into her vagina. She narrated that she later on went home after which her parents decided to take her to Gesima Police Station and later to the hospital at Keroka. She testified that the Appellant had been her teacher from the time she was in standard 6 and that they did not have sex in 2019.
5. PW2, ZN (particulars withheld) the victim's mother, testified that the complainant was born in 2009. She stated that sometime in 2019, the Appellant, who was her daughter's teacher, called her to inquire who would pick PW1 from school since they were running late. She later she noticed that the Appellant was communicating with PW1 on the same phone and reported the matter to the head teacher who promised to follow up on the issue but did not give her any feedback. PW2 testified that in 2021, PW1 went to church and came back home late. On inquiry, PW1 refused to disclose where she was after which they took her to the police station and thereafter to the hospital for examination. She confirmed that she knew the Appellant as her daughter's teacher and that the Appellant and PW1 had had a relationship in 2019.
 6. PW3 GK (particulars withheld) the victim's father testified that the victim was born in 2009. He stated that sometime in 2019, he received greetings on his phone through a message and found it peculiar. He warned his children and the habit stopped but that on April 10, 2021, PW1 went to church and did not come back on time. He sent his sons to go and fetch her. He later found PW1 and took her to the police at Gesima. The police referred them to Keroka Hospital. He added that he was informed that the Appellant had slept with his child and that the police were looking for him as he was at large.
 7. PW4, Lameck Nyaribo, a Clinical Officer at Keroka Sub-County Hospital testified that the victim was 14 years old and was examined at their facility on April 10, 2021 over allegations were made that she had been defiled by her teacher at Nyaronge Primary School on April 8, 2021 at around 4 p.m. On examination, he found an old missing hymen, bruise on the lower side of genitalia and no discharge. He testified that the lab results conducted on urinalysis indicated presence of red blood cells. He concluded that there was evidence of defilement because of the bruises. He produced the Treatment Notes (P.Exh 1), P3 Form (P.Exh 2a) and PRC Form (P.Exh 2b).
 8. PW5, No. 98690 Cpl. Lucy Soin, the Investigating Officer testified that PW1 was brought to Gesima Police Post over allegation of defilement. PW1 was escorted to hospital for examination. On inquiry, the minor informed her that she was in a relationship with the Appellant and that they would often have sex using protection. PW1 informed her that during the last encounter on April 8, 2021, the Appellant picked her from church and took her to his house where they had sex. She testified that the Appellant disappeared and only resurfaced on May 5, 2021 when he surrendered himself to the police and was charged with the offence of defilement. She produced the victim's birth certificate (P.Exh 3).
 9. PW6, PM (particulars withheld) the complainant's brother, testified that he was at Nyaronge centre on April 10, 2021 where he saw the Appellant near their church. He went home and informed his mother that he had seen the Appellant near their church and that he knew him as a friend of his sister (PW1). He stated that they could not find PW1 at the church the said day.
 10. PW7, Job Onkoba, a teacher from Esani Secondary School, testified that he was one of the teachers invigilating examinations at Nyakongo Secondary School. He testified that they had a meeting with students during the examinations period on April 19, 2021 but that the Appellant was absent and unreachable on phone. He added that the police later came looking for the Appellant over allegations of defilement.



The Defence Case

11. At the close of the Prosecution's case, the trial court found that the Appellant had a case to answer and placed him on his defence. He elected to give sworn evidence and called one witnesses.
12. The Appellant (DW1) a teacher at Nyaronge Primary School, testified that, he went to his cousin's home in Keumbu on April 10, 2021 where they had a chicken project. He spent the night at Keumbu. He denied the allegation that he defiled PW1 and noted that the evidence presented in court was to the effect that the minor was allegedly defiled two days prior to the date indicated in the charge sheet. He also stated that the allegation that the head teacher knew about his relationship with the minor was not true. He denied the claim that he had a relationship with PW1.
13. DW2, Tom Nyabeta, the Appellant's cousin testified that the Appellant went visited him on April 10, 2021 at around 1p.m. since they had a chicken project that they were working on together. He stated that the Appellant left his house on April 11, 2021 at 9 a.m. and that he was not aware of the issue of defilement.
14. At the close of the Defence case, the trial court found the Appellant guilty, convicted him on the main charge of defilement and sentenced him to serve 20 years imprisonment. Dissatisfied with the decision of the trial court, the Appellant filed this Petition in which he listed 8 grounds as follows: -
 1. The learned trial magistrate erred in fact and in law in finding and holding that the case against the Appellant had been proved beyond reasonable doubt, without taking into account and/or reconciling the discrepancies that were discerned in the Prosecution's evidence.
 2. The conviction and sentence by the court was/is irregular, illegal, null and void. There was no proof of any defilement whatsoever.
 3. The learned trial magistrate erred in fact and in law in disregarding the evidence and defence of the Appellant herein.
 4. The learned trial magistrate erred in fact and in law in disregarding, ignoring and/or failing to answer the Appellant's defence which was dismissed without being properly analysed and/or appreciated.
 5. The learned trial magistrate erred in fact and in law in being engrossed and/or concerned with the truth of the Appellant's defence, contrary to the principles of criminal law that lay emphasis on the reasonableness of the defence.
 6. The learned trial magistrate in the process of ascertaining the truth ended up shifting and placing the burden of proof upon the Appellant contrary to the principles of criminal law and practice.
 7. The learned trial magistrate erred in fact and in law in failing to correctly evaluate the evidence on record. The judgment herein has occasioned miscarriage of justice.
 8. The sentence meted out by the trial court was excessive in the obtaining circumstances.
15. This Court admitted the Appeal for hearing and directed that it be canvassed by way of written submissions.



The Appellant's Submissions

16. The Appellant cited the decision in the case of High Court of Kenya at Malindi, *R. vs. Safari Katana Lugo*, Criminal Case No. 20 of 2020 and highlighted the 4 main grounds of appeal being, discrepancies in the Prosecution evidence, defective charge, failure to prove the age of the victim and insufficient medical evidence.
17. On the defect on the charge, it was submitted that the victim denied the claim that she was defiled in 2019 or that she met with the Appellant on April 8, 2021 as indicated on the charge sheet. The Appellant noted that while PW1 testified that she was defiled on April 10, 2021, the Investigating Officer and the Clinical Officer stated that she was defiled on April 8, 2021. It was submitted that the date indicated on her medical examination Report (P3) was not clear as it had been changed. It was the Appellant's case that there was therefore, no way of ascertaining the exact date when the offence was committed. It was submitted that the trial court erred in convicting the Appellant on inconsistent evidence.
18. According to the Appellant, the charge sheet was defective because the date of the offence indicated therein was inconsistent with the Prosecution's evidence and in particular the evidence of the minor. Reference was made to the decision in the case of *Idah Nziza Kikubi & Another v Republic*, Criminal Appeal No. 30 and 31 of 2021, where Odunga J. cited the case of *Fappyton Mutuku Ngui v Republic* [2020] eKLR in which the court held that a charge sheet should specify the offence in a clear and unambiguous manner and should be accurate since technical defects would entitle an accused to acquittal upon appeal. The Appellant argued that his rights to a fair trial were violated because he was subjected to a trial and conviction founded on a defective charge sheet.
19. It was further submitted that the age of the victim was not proved to the required standards since the victim herself testified that she was 14 years old and conceded, on cross-examination, that the year indicated on the birth certificate was erroneous. It was submitted that since the charge sheet indicated the age of the victim to be 12 years contrary to her own testimony and that of her mother, an age assessment ought to have been conducted to enable the court ascertain the victim's age and to enable the Prosecution to proffer the correct charge. Counsel cited the decision by the High Court at Kapenguria in *EK v Republic*, Criminal Appeal No. 9 of 2017 and High Court at Chuka, *Kenneth Mutegi Kilonzo v R*, Criminal Appeal No. E008 of 2020 where the courts stressed on the importance of proving the age of a minor in a defilement case.
20. It was submitted that the medical evidence was not conclusive proof of defilement because there was no discharge on the victim's genitalia, no presence of spermatozoa and puss cells except an old missing hymen. He also argued that the medical officer failed to confirm whether the bruise on the victim's genitalia was occasioned by an act of penetration. Counsel argued that there was therefore no basis for the conclusion that there was defilement. Reference was made to the decision in the High Court of Kenya at Garissa, *Mohamud Omari Mohamed vs. Republic*, Criminal Appeal No. 2 of 2020 where the court held that lack of hymen could not be attributed to the alleged offence of defilement.

The Respondent's Submissions

21. The Respondent conceded to the Appeal on the basis that the evidence on Record did not support the particulars of the charge since the charge sheet indicated the dates of the offence to be on diverse dates between 2019 and April 8, 2021 while all the Prosecution witnesses testified that the offence was committed on April 10, 2021.



22. The Respondent submitted that there were material contradictions with respect to when the offence was allegedly committed and the medical evidence which contradicted the testimony of PW1, PW2, PW3 and PW6.

Analysis and Determination

23. I have considered the Record of Appeal and the parties' respective submissions. The following issues arise for my determination: -
- i. Whether the charge was defective.
 - ii. Whether the offence of defilement was proved to the required standards.
 - iii. Whether the sentence was appropriate
24. The Supreme Court of India explained the duty of a first appellate court in *K. Anbazhagan v State of Karnataka and Others* Criminal Appeal No. 637 of 2015 as follows:-

“The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.”

i. Whether the Charge was Defective

25. It is trite that an accused person should be charged with an offence that is known in law. A charge should also specify or spell out all the relevant information in such a manner that would enable an accused person put up an appropriate defence. This principle is premised on Section 134 of the *Criminal Procedure Code* which stipulates the manner in which a charge should be drafted as follows: -

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

26. I have considered the charges and their particulars. The Appellant was charged is alleged to have committed the offence on diverse dates between 2019 and April 8, 2021. This means the Prosecution's entire case/evidence and subsequent defence put forth by the Appellant must be in consonance with these dates.
27. I have considered the evidence tendered by the Prosecution witnesses in this case. It is noteworthy that the minor herself, her parents PW2 and PW3 and her brother (PW6) who allegedly saw the Appellant near the church on the day that the offence is alleged to have been committed testified that



the offence was committed on April 10, 2021 and not on diverse dates between 2019 and April 8, 2021 as stated on the charge sheet. The question for this Court's determination is whether the variance of the Prosecution evidence and the dates indicated on the charge sheet renders the charge defective.

28. The Supreme Court explained the particulars that a charge should disclose in *Isaac Omambia v R* [1995] eKLR as follows:-

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the [Criminal Procedure Code](#) which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”

29. The particulars of a charge can therefore render a charge defective. I draw guidance from the Court of Appeal in *Yongo v R* [1983] eKLR where the learned judges held that a charge can be defective if the evidence adduced in its support is at variance with the offence disclosed in the charge or its particulars. They stated thus: -

“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- i. When it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein;
- ii. when for such reason it does not accord with the evidence given at the trial.” (emphasis added)

(See also [Archbold, Criminal Pleading, Evidence and Practice](#) (40th Edn), page 52 paragraph 53.)

30. It is my finding that the variance between the dates on the charge sheet and the Prosecution evidence rendered the charge in question defective. Consequently, a court must consider the defects in a charge from a two-step test. First is to determine whether the charge is defective and if so, whether such defect can be remedied. This was stated by the Court of Appeal in *Peter Ngure Mwangi v Republic* [2014] eKLR thus:-

“On the issue of a defective charge sheet, there are two limbs to it. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not.”

31. Section 386 of the [Criminal Procedure Code](#) provides a remedy for defects in charges sheets. It states as follows: -

382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings

Subject to the provisions hereinbefore 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.

32. The Court of Appeal gave guidance on determining whether a defect in a charge is fatal in *Benard Ombuna v Republic* [2019] eKLR as follows:-

“In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.” (emphasis added)

33. Similarly, the Supreme Court of India in *Willie (William) Slaney v State of Madhya Pradesh* [A.I.R. 1956 Madras Weekly Notes 391], held that:-

“Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.”

34. Turning to the variance in this case, the Record indicates that the Appellant centered his defence around the date of April 10, 2021 and stated as follows: -

“...I heard the doctor’s evidence. He said that the defilement had happened two days ago....”

35. The Clinical Officer testified that the victim he examined on April 10, 2021 had been defiled 2 days prior to her examination. It therefore clear that based on the testimonies of the Prosecution witnesses especially PW1, who was the complainant, the Appellant was subjected to defending himself against an offence that was allegedly committed on April 10, 2021, while the clinical officer was categorical that the offence was committed 2 days earlier on April 8, 2021. I find that the confusion on the issue of the date of the offence is quite glaring. While two Prosecution witnesses (PW4 and PW5) testified that the Appellant committed the offence on April 8, 2021 as indicated on the charge sheet, all the other Prosecution witnesses spoke of a different date, being,

36. It is my finding that the variance between the dates indicated on the charge sheet and the evidence of the Prosecution witnesses occasioned the Appellant prejudice throughout the trial and resulted in a subsequent miscarriage of justice. It is my further finding that such a discrepancy could have been corrected by the Prosecution early enough in the trial, under section 382 of the *Criminal Procedure Code*, and not on this appeal. It is my finding that failure, by the Prosecution, to do so means that the charge was incurably defective and rendered the entire trial a nullity.

37. The next question determination is whether the Appeal herein has merit and should be allowed or whether a retrial should be ordered in the circumstances of this case. The principles that guide the Court in this regard were aptly explained by the East Africa Court of Appeal in *Fatehali Manji v Republic* [1966] EA 343 as follows: -

“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even



where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”

38. In the instant case, it is my view that this case was marred with several inconsistencies and gaps that the trial court should have resolved in favour of the Appellant. The discrepancy in the date of the offence is at two levels; firstly, while the charge sheet seems to suggest that the offence was committed on April 8, 2021, the victim herself testified that she was defiled on April 10, 2021. I find that the difference in the dates is so critical that the court cannot wish it away.
39. It is my further view that, in the circumstances of this case, and order for a retrial would prejudice the Appellant and defeat the ends of justice as it would be tantamount to giving the Prosecution a second bite at the cherry by enabling them to restructure or fill in the glaring gaps in their case. For these reasons, it is my finding that this case is not a proper fit for a retrial. As such, I allow the appeal, quash the conviction and set aside the sentence of the trial court.
40. In the circumstances, the other two issues for determination are now moot. I find this Appeal merited and hereby allow it.
41. It is hereby ordered that the Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.
42. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS
THIS 28TH DAY OF SEPTEMBER 2023.**

W. A. OKWANY

JUDGE

