REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 9 OF 2016.

ISAACK MAKOLI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of the senior principal Magistrate Hon. D. Ole Keiwua (Mr) delivered on 12th January 2016 in Molo Criminal case No. 1585 of 2015.)

JUDGMENT

1. The appellant 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 being that on diverse dates of 9th to 12th June 2015 at [particulars withheld] Village in Kuresoi North District within Nakuru County intentionally caused his penis to penetrate the vagina of **SCS** a child aged 15 years.

2. The appellant was also charged with alternative count of committing an **indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on diverse dates of 9th to 12th June 2015 at [particulars withheld] Village in Kuresoi North District within Nakuru County intentionally touched the vagina of **SCS** a child aged 15 years with his penis.

3. The appellant denied the main charge and alternative charge and the case proceeded for hearing with the prosecution calling 4 witnesses in support of their case while the appellant in his defence gave unsworn statement and never called any witness. By the judgment delivered on 12th January 2016 the trial magistrate found the appellant guilty as and convicted of the offence of defilement. He was sentenced to 20 years' imprisonment.

4. The appellant being aggrieved and dissatisfied with the conviction and sentence filed this appeal dated 18th of January 2016 on the following grounds: -

i. The learned trial magistrate erred both in law and in fact by convicting the appellant on a case that was not proved beyond reasonable doubt.

ii. The learned trial magistrate erred both in law and in facts by convicting the appellant on the basis of a charge that was totally defective in that it only defined the offence of defilement but lacked the section that defines the sentence thereon.

iii. The learned Trial magistrate in law and in fact by convicting the appellant but failed to note that the age of the complainant (PW1) was not proved. The certificate produced did not tally with the evidence adduced creating disparities in the prosecution case.

iv. That the learned Trial magistrate erred in law and in facts by failing to find the medical evidence adduced was insufficient to corroborate the charge or safely sustain a conviction.

v. That the learned trial magistrate erred in law and in fact by convicting the appellant but failed to note that the evidence on record was that of abduction a lesser charge that if the trial magistrate considered in law could have overturned the whole prosecution evidence tendered.

5. The state opposed the appeal on both conviction and sentence. The appeal proceeded for hearing on 4th of June 2020. The appellant adopted his filed grounds of appeal and written submissions while the state counsel made oral submissions.

6. The appellant in his submissions filed amended grounds of appeal as follows: -

i. That the learned trial magistrate erred both in law and facts when he convicted the appellant on a defective charge sheet.

ii. That the learned trial magistrate erred both in law and in facts when he convicted the appellant and voire dire examination was not conducted to the complainant as per section 19 of the Oaths and Statutory declaration Act.

iii. That the learned trial magistrate erred in law by passing a judgment that is contrary to Section 169(1) of the Criminal Procedure Code that fails to show facts of determination or reasons for the decision.

APPELLANT'S CASE

7. In respect to defective charge sheet, the appellant submitted that it could not sustain a safe conviction due to grave omission. He further submitted that the word "intentionally" used by the prosecution is very broad and cannot sustain a conviction; that the lower court was left in a dilemma and convicted the appellant because of the evidence adduced that he had the intention of causing his penis to penetrate the vagina of the complainant who was 15 years.

8. The appellant further submitted that the trial magistrate erred in law as he failed to comply with **Section 19 of the Oath and statutory declaration Act** which requires the Court to conduct *voire dire* to a complainant to examine whether she understood the nature of oath as she was underage being 15 years old.

9. He submitted that the record indicates that PW2 aged 15 years from her physical appearance looked like an adult to the Court thus no *voire dire* was conducted.

10. He submitted that in the case of **Gabriel Maholi Vs Republic**, the East Africa Court of Appeal said that even in the absence of express statutory provision it is always the duty of the Court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligent to justify the reception of the evidence but also that the child understands the difference between truth and falsehood. The appellant submits that this principal was never applied by the trial magistrate.

11. The appellant submitted that the trial Court failed to set out issues for determination as provided **by Section 169(1) of the Criminal Procedure Code** which provide as follows: -

> **"every such judgment shall except as otherwise expressly provided by this court, be written by or under the direction of the presiding officer of the court, in the language of the court and shall contain the point or points for determination, the decision thereon and the reason for the decisions and shall be adopted and signed by the presiding officer in the open court at the trial of pronouncing it."**

12. The appellant submitted that the Court in its judgement did not clearly state how the decision was determined and what his findings were. The trial Court did not state the reasons why he had found the appellant guilty and convicted him.

13. Further that the doctor only testified the complainant was in pain but never explained where the pain came from. He did not find injuries on the girl. He urged the Court to find his appeal merited, proceed to quash the conviction, set aside the sentence and set the appellant at liberty.

PROSECUTION'S CASE

14. The state counsel **Rita Rotich** submitted on behalf of the state. She stated that the appellant had been sentence on 12th January 2016 to 20 years' imprisonment upon being found guilty of defiling children of tender age. On age, she stated that the complainant testified that she was 15 years and her testimony was corroborated by her mother PW1 who produced birth certificate to confirm her age.

15. On identification she submitted that PW2 testified to have met the appellant during the day and he took the complaint PW2 to his house where he defiled her for 3 days severally. PW2 further stated that she had known him and she had spoken to him on several occasions. PW2 also identified the accused on the dock. PW4 testified the appellant was found together with the complainant at his house during the time of his arrest. PW3 the doctor examined the minor and found bruises in her private parts which was prove of penetration and a P3 form was produced in Court. The prosecution prayed the appeal be dismissed.

DETERMINATION AND ANALYSIS

16. This being the first appellate Court. I am expected to subject the entire evidence adduced before the trial Court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first appellate Court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

> **"The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"**

17. In view of the above, I have perused and considered evidence adduced before the trial Court. I have also considered submissions by the parties herein and consider the following as issues for determination: -

i. Whether the charge sheet was defective.

ii. Whether failure to conduct a voire dire examination on PW2 was fatal to the prosecution case.

iii. Whether section 169(1) of the CPC was complied with and if not the consequences of such non-compliance if any.

iv. Whether the ingredients of defilement were proved.

i. <u>Whether the charge sheet was defective.</u>

9. The charge sheet read the appellant was charged of **defilement contrary to Section 8(1) (3) of the Sexual Offences Act**, it is the appellant's submission that there exists no such section in the sexual offences act. **Section 134 of the Criminal Procedure Code** provide 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."**

10. In the case of **Yosefa v. Uganda [1969] E.A. 236,** the Court of Appeal held that a Court would come to a finding that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence and in **Sigilani v. Republic [2004] 2 KLR 480 Justice Kimaru** stated as follows:_

> **"The principle 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 an accused person to prepare his defence."**

11. It is the duty of the Court to examine if a defect on the charge sheet prejudiced the appellant. That can be arrived at by examining whether as a result of the defect he was not able to know the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence. The question is "did it discloses the charge sufficiently or accurately give the accused adequate notice of the charge facing him."

12. Under **Section 382 of Criminal Procedure Code**, Court has a leeway to amend a charge sheet if a defect is a mere technicality that does not affect the substance of the charge.

13. Whereas it is true that such **section 8(1)(3) of the Sexual Offences Act** does not exist in the act, the question is "**did the accused understand the charge he was facing and has he suffered any prejudice as a result of the defect in the charge sheet?".** If no prejudice was occasioned, then the defect is curable under **Section 382 of the Criminal Procedure Code** which provide as follows: -

> **"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…"**

14. I suppose the intention was for the charge to read **Section 8(1) as read together with Section 8(3) of the Sexual Offences Act"**. In the Supreme Court of India in **Willie (William) Slaney vs. State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391]** held as follows: -

> **"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."**

15. From the record it is clear that the appellant understood the charge he was facing and the defect in the charge sheet was merely a technical one. **Article 159 (d) of the Constitution** provide that justice shall be administered without undue regard to procedural technicalities. In my view, the variance in the charge sheet is a technicality which can be cured under **Article 159(d) of the Constitution.**

16. Further the appellant submits the charge sheet lacked the element of "unlawfully" as it only reads that he intentionally caused his penis to penetrate the vagina of **SCS** a child of 15 years. In the case **Joseph Maina Mwangi – Vs – Republic Crim. Appeal No. 73 of 1993** the learned Judges of Court of Appeal stated as follows: -

> **"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences**."

17. It is true the word unlawful has not been included in the particulars of the offence. However even without including the word unlawful, the offence is unlawful and it is committed against a child whose consent in the act is immaterial. The act of having carnal knowledge of a child below 18 years is unlawful. The appellant is expected to know that as it is the law and ignorance of the law does not offer any defence.

From the foregoing, the mere omission of the word "unlawful" does not, in the circumstances, render the charge sheet defective.

ii. Whether the ingredients of defilement were proved.

18. The trial Court is expected to establish that the prosecution has proved beyond reasonable doubt three ingredients of offence of defilement as set out hereunder: -

- proof of the age of the complainants;
- proof of penetration;
- proof that the appellant was the perpetrator of the offence.

19. In respect to age of the complainant, it is the appellant's argument that it was not sufficiently proved as required by law. The certificate produced did not tally with the evidence adduced creating disparities in the prosecution case.

20. PW1 who is the complainant's mother testified that PW2 was born on 5th November 2000 and that she was 15 years. The prosecution produced the complainant's birth certificate which indicates the complainant was born on 16th July 2001. The complainant testified that she was 15 years old. She said she was born in the year 2000. I note that the birth certificate was issued on 2nd April 2013. The offence is alleged to have been committed in the year 2015. In my view this certificate's issuance was not influenced by this case as it was issued 2 years before the incident herein. The registrar must have relied on birth notification or child health card to obtain the date of birth. There is no prove that the certificate is a forgery or is not authentic. The document has been issued by a government department and not challenged on its authenticity; I take it to be the correct document to prove age of the complainant. In my view age assessment done is an estimate and in the presence of authentic birth certificate, it should be relied on as it most likely the accurate date of birth. As per charge sheet, the offence was committed on 9th June 2015. The birth certificate indicates date of birth as 16th July 2001 which brings up age of the complainant as 14 years at the time of the alleged offence. The trial magistrate rightfully found that the complainant was 14 years at the time of the offence.

21. In the case of **Hadson Ali Mwachongo Vs. Republic [2016] eKLR**, the Mombasa Court held as follows: -

> **"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim…"**

10. On penetration, it was the testimony of PW1 that on 9th June 2015 she sent PW2 to the shop to buy her drugs as she was unwell and she did not return home. PW2 told the PW1 the Appellant had persuaded her to go with him to his house and they had sex with the Appellant.

11. PW2 testified she used to meet with the appellant and they talk, she informed the appellant at first, she was in school and later that she had finished school. On 9th of June 2015 when she was going to the shop to buy her mother drugs, she met with the appellant who bought her tea and andazi and took her to do a haircut. The appellant promised to take her to work at his Mpesa shop located in Nakuru and that is how PW2 agreed to go to his house. On reaching his home they both undressed and had sex on several occasions that night in the appellant's bed. The appellant threatened to tear PW2 clothes if she did not remove her clothes. The appellant had sex with PW2 on several times every night she spends in his house. After 3 days the appellant asked PW2 to go back to her home.

It was PW2's testimony that it was not the first time she was having sex she had done it with another man.

12. PW3 the medical doctor testified to have examined PW2 on 15th June 2015, and observed that she had bruises on her vagina and as per the lab test she was infected with Sexually Transmitted infection and it was his conclusion that the complainant had been sexually abused. PW4 the investigation Officer testified the appellant and PW2 had a sexual relationship for a long period of time and that the complainant was 14 years and was a class 6 student. This was corroborated by the medical evidences produced in court.

13. On Identification of the perpetrator, PW2 testified she used to meet with the appellant and they talk, she informed the appellant at first she was in school and later that she had finished school. On 9th of June 2015 when she was going to the shop to buy her mother drugs, she met with the appellant who bought her tea and andazi and took her to do a haircut. The appellant promised to take her to work at his Mpesa shop located in Nakuru and that is how PW2 agreed to go to his house. They stayed together in the house sharing the same bed for 3 days.

14. In cross examination the complainant stated to know the appellant very well and it was the testimony of PW3 the appellant and the complainant were in a sexual relationship for a long time. Also the incident happened at the appellant's house where the complainant had been persuaded to go by the appellant himself and the complainant identified the appellant to the police for purposes of his arrest, therefore I find the appellant was identified by recognition by the complainant and no reason the complainant would implicated the appellant for defilement.

15. From the foregoing, it is clear that the key elements of defilement were proved beyond reasonable doubt and I don't find any reason to disturb the judgment of the lower court.

iii. **Whether section 169 (1) of the CPC was complied with and if not the consequences of such non-compliance if any.**

16. The appellant submitted the trial court erred in law for the judgment did not comply with Section 169(1) of the Criminal Procedure

Code. **Section 169 of the CPC** provides as follows: -

> **"Every such judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.**
>
> **In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.**
>
> **In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."**

17. The Court of appeal in the case of **Hawaga Joseph Ansanga Ondiasa Vs Criminal Appeal No. 84 of 2001** held as follows:

> **"It is true that the trial magistrate may be criticized for the perfunctory way in which he expressed himself in his judgment. However, even if we were to hold that he did not prepare his judgment strictly in accordance with section 169 of the Criminal Procedure, this would not, of itself mean that the conviction of the appellant was wrong or is to be invalidated."**

18. And in the case of **Samwiri Senyange V R [1953] 20 EACA stated as follows: -**

> **"Where there had not been a strict compliance with the provisions of Sections 168 and 169 of the Criminal Procedure Code that will not necessarily invalidate a conviction and the court will entertain an appeal on its merit in such a case if it can be done with justice to the parties."**

19. From the foregoing, failure to comply with **Section 169 (1**) does not render the judgment a nullity as technical failure of this nature does not vitiate the trial particularly because the evidence on record is sufficient to support the conviction for the offence defilement as the appellant had been charged with.

iv. **Whether failure to conduct a voire dire examination on Pw2 was fatal to the prosecution case.**

20. The Court of Appeal in the case of **Manipett Loonkomok –Vs- R (2016) eKLR** stated as follows:

> **"We turn to consider the effect of failure by the court to administer voire dire on the complainant. It is firmly settled that not in all cases that voire dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that question will depend on the peculiar circumstances and particular facts of each case."**

21. From the evidence on record the complainant, PW2, was born on 16th July 2001, she was therefore 14 years at the time she testified clearly, she was not of tender age and there is no doubt that she understood the meaning of oath.

v. Whether the appellant sentence was harsh and unreasonable.

22. I note from the record that the appellant was convicted under **section 8 (3)** which provide penalty for defilement of a child between the age of 12 and 15 years. The section provides for minimum sentence of 20 years' imprisonment.

23. However mandatory nature of sentences was however declared unconstitutional by the Supreme Court in **Muruatetu case**. In the absence of discretion, the mitigating factors raised by an accused person are rendered superfluous. In this case the appellant said he had no parents in his mitigation, the prosecutor also said he was a first offender.

24. I have considered circumstances of this case, the age of the complainant and mitigating factors of the appellant and in view of the Supreme Court's decision in **Muruatetu** case I am inclined to reduce the life sentence to 15 years' imprisonment.

25. **FINAL ORDERS**

1. Appeal against conviction is hereby dismissed
2. Appeal against sentence is hereby allowed
3. I hereby reduce sentence to 15 years' imprisonment
4. Sentence to run from the date the appellant was sentenced in the lower court.

Judgment dated, signed and delivered via zoom at Nakuru This 24th day of July, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person