**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT VOI**

**CRIMINAL APPEAL No. 41 of 2018**

**HASSAN JUMAPILI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal from the Decision of Hon B.S. Khapoya SRM in the SRM's Court***

***in Taveta delivered on 29th August 2018 in Criminal Case No. 322 of 2015)***

**J U D G M E N T**

1. The Appellant before the Court was convicted on 29th August 2015 of the offence of defilement contrary to Section 8(2) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006. On 13th September 2018 the Appellant filed a Petition of Appeal dated 12th September 2018.

2. The Appellant relies on the following grounds:

> *"1.**THAT** The trial subordinate court erred in law and fact by failing to find that the evidence adduced against the appellant did not satisfy the ingredients required to uphold a conviction under the charges that were preferred against the appellant.*
>
> *2.**THAT** in so doing the learned trial magistrate erred in law by failing to note that the prosecution's case was not proved to the standard required by the law and hence the appellant conviction unsafe very unsafe*
>
> *3.**THAT** the learned trial magistrate failed to appreciate that the case against the appellant was a fabrication and in so doing also failed to take note proper witness were not called to unclear doubts raised into prosecution case.*
>
> *4.**THAT** the learned trial magistrate failed in -law and in the fact to appreciate, analyze and resolve the numerous contradictions manifest on record in favour of the appellant and which contradictions diminished any credibility the prosecution evidence had;*
>
> *5.**THAT** in views of paragraph 4 above the learned trial magistrate failed to properly analyze the evidence on record and thereby arrived at erroneous finding of fact and law.*
>
> *6.**THAT** the honourable Trial court erred in law by convicting the appellant on uncorroborated evidence of s manor;*
>
> *7.**THAT** the LEARNED Trial Magistrate failed in law in NOT making a finding that the medical evidence as present [did] not disclose the offence that the appellant was charged with;*
>
> *8.**THAT** the honourable Trial court erred in law and in fact in failing to find that the conduct of the appellant did not portly a guilty mind.*
>
> *9.**THAT** the learned trial Magistrate failed in law and in fact in NOT finding that the evidence of the first report materially contradicted the evidence on record.*
>
> *10.**THAT** the honourable trial court erred in law and in fact by failing to objectively apply its mind to the defense evidence raised by the appellant and his witnesses and which evidence was credible and encountered or at all.*

3. On 19th October 2018 the Appellant filed a Notice of Motion application. The Application was brought under Article 159(2)(e) of the Constitution 2010, Section 357(1) of the Criminal Procedure Code and all other enabling provisions). The Application prayed for orders **THAT**:-

> "*1. The Applicant be released on bail pending Appeal.*
>
> *2,That the Honourable Court be pleased to grant stay of execution of the sentence and Order dated 29th August 2018 pending the hearing and determination of the appeal."*
>
> The Grounds relied upon are:
>
> "1. *THAT the applicant herein has filed a petition of Appeal on 14th September 2018 against the Judgment and sentence of Hon. B.S. Khapoya, SRM delivered on August 29 2018 in Criminal case no. 322 of 2015 – Taveta*
>
> *2.THAT the Petition of Appeal has high chances of succeeding*
>
> *3.**THAT** the appellant is ready and willing to abide by the condition which the Honourable Court will set when admitting him to bail pending appeal.*
>
> *4.**THAT** it is in the best interest of the Applicant that he be released on bail pending hearing and determination of the Appeal.*
>
> *5.**THAT** the offence which the accused person was charged originally was bailable*
>
> *6.**THAT*** fairness in this matter requires that the Orders herein be prayed as granted (sic)"

4. The Application is supported by the Affidavit of a Dorah Jumapili. She states that she is "The guardian to the appellant herein and hence competent to swear the affidavit. She then goes into the grounds and merits of the appeal being advised by her Advocate that the chances of success are high.

5. The Court did not certify the Application as urgent and gave directions for the service thereof. On 20th February 2019, the Respondent filed Grounds of Opposition. The grounds relied upon were:

> "1. There are no exceptional or unusual circumstances to warrant the grant of orders sought.
>
> 2. The appellant has not demonstrated a prima facie arguable appeal to warrant the grant of orders sought.
>
> 3. The appellant has not demonstrated that the appeal is likely to be successful on account of some substantial point of law.
>
> 4. Dates for hearing of appeal are open and therefore the appeal will be heard timeously

6. Shortly thereafter the Appellant dispensed with the services of his Advocate and decided to represent himself. On 28th January 2020 the Appellant filed Amended Grounds of Appeal in accordance with the provisions of Section 250(v) of the criminal procedure code cap 75 Laws of Kenya. The Amended Grounds are:

> "*1. That the learned trial magistrate erred in both law and facts when he convicted me in the present case in relying on a fatally defective charge sheet.*
>
> *2.That the pundit trial magistrate erred in both law and fact when he convicted me on the present case yet failed to find that the trial was irregularly conducted contrary to sec 77/2 E/ACT CAP laws of Kenya*
>
> *3.That the learned trial magistrate erred in both law and facts when he convicted me in the present case yet failed to observe that my rights to a fair trial were infringed under article 50(2)(j) and (k) of the constitution of Kenya 2010*
>
> *4.That the learned trial magistrate erred in both law and facts when he relied on evidence adduced by a hostile witness as described under section 163/1/c of the evidence Act cap 80 laws of Kenya*
>
> *5.That the learned trial magistrate erred in both law and facts when he totally failed to comply with the provisions of sect 211 of the criminal procedure code Cap 75 laws of Kenya*

*7.* The Appellant has filed his Submissions attached to the amended Grounds of Appeal. In summary he is arguing that he disagrees with his conviction. He also argues that the Charge Sheet is defective because reading ***Section 8(2) together with 8(3)*** of the Sexual Offences Act makes it contradictory and meaningless. He is also arguing that the evidence before the Court was not reliable because the Complainant was a hostile witness. He argues that the Charge Sheet was incurably defective in respect of the definition of penetration. He relies on the case of ***Jason Akumu Yongo vs Rep Cr App No 1 of 1983*** at page 3 where "it was held that: '*in our opinion, a charge is defective under section 214 cpc where:*

"*a.It does not accord the evidence in committal proceedings because of in accuracies or deficiencies in the charge because*

*b) it gives a misdirection of the alleged particulars*"

The Appellant also relies on the case of ***Singilani vs Rep 2004 2KLR*** in which it was observed that. "the principal of law governing charge-sheets is that an accused person 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 accued to prepare his defence"

8. In relation to his argument that he did not have a fair trial the Appellant argues that there was no evidence of age presented. He bases that conclusion on his assertion that the age assessment done by Dr Macharia at Taveta hospital "was wrongly received as evidence". It is argued that PW-3 was not the author of the document and the prosecutor did not apply for production of the report and therefore it does not comply with ***Section 77(2) of the evidence Act Cap 80***. It is argued that the Report is therefore of no probative value and as a consequence the age of the Complainant is not proved. The Court is invited to disregard Prosecution Exhibit 2.

9. In relation to Hon Trial Magistrate's assessment of the Defence case in terms that the Defendant had indicated that he would be calling three witnesses but only called one. The Appellant now alleges that he was not able to re-examine his first witness and was prevented from calling the second and third witnesses. The Appellant calls the Court's attention to page 30 line 23-25 of the proceedings where the Learned Trial Magistrate said"… *when he was placed on his defence on 14/6/2017 he had initially stated he ould call three witnesses but ended up calling one witness who for sure did not know…".* The Learned Trial Magistrate also said that ".. he did not call his mother or grandmother as a witness, of course out of the three intended witnesses, two remained and likely were his mother and grandmother. Further, it was the absolute duty of the defence to call the named person

10. In addition the Appellant argues that the Complainant was not a willing witness and was coerced after being thrown in Police cells and had fled to Tanzania. It is also argued that there was non compliance with Section 211 of the Criminal Procedure Code.

11. The Respondent opposes the Appeal. In relation to Ground one , it is argued that the Charge Sheet was not defective, and even if it had been a defect that is not necessary fatal. The Respondent relies on the Authority of JMA v Republic (2009) KLR 671, it was held inter alia that: "*It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible. Applying this principal to the rival arguments of the parties, we are satisfied in the instant case that this was an omission and discrepancy which did not prejudice the appellant and that no miscarriage of justice has been occasioned as a result of the differences in dates. The errors on the dates cannot make the charge sheet defective or the conviction a nullity.*"

12. The Respondent argues that the defect is curable under Section 382 of the CPC which provides "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by the 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 occasion 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." Further ***Section 214(2) of the CPC*** provides that "… *variance between the charge and evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance"*.

***RESPONDENT'S SUBMISSIONS***

13. The Respondent filed its Written Submissions on 10th March 2020. They are as follows:-

***GROUND 1 ; DEFECTIVE CHARGE SHEET.***

*The appellant was charged with defilement contrary to Section 8 (2) as read with Section 8 (3) of the Sexual offences Act of No. 3 of 2006. Section 8 (1) is the defining Section for the offence of Defilement. The question therefore would be whether this defect is fatal.*

*In the case of* ***JMA v Republic (2009) KLR, 671****, it was held inter alia that:*

***" It was not in all cases in which a defect dertected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible." Applying this principle to the rival arguments of the parties, we are satisfied in the instant case that this was an omission and discrepancy which did not prejudice the appellant and that no miscarriage of justice has been occasioned as a result of the difference in dates. The errors on the dates cannot make the charge sheet defective or the conviction a nullity.***

*14. This defect is therefore curable under Section 382 of the Criminal Procedure Code which provides:*

***" 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, warrants, 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."***

*The above statutory curative position is also replicated in Section 214 (2) of CPC which provides that:*

***"…variance between the charge and the evidence adduced support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time ( if any ) limited by law for the institution thereof".***

***We are therefore of the considered view that the discrepancy on the dates as contained in the charge sheet and as contained in the facts reads out to the appellant did not occasion a miscarriage of justice".***

*In the instant case, the charge sheet clearly state the offence as Defilement; an offence which is known to law. The only error is the section quoted which the appellant herein never raised and objection to before, during or after the trail before he was convicted.it is our humble submission that the error is curable and falls within the purview of* ***Section 382, Criminal Procedure Code****. Moreover, the evidence tendered in court was cogent, supported the offence of defilement and was sufficient to convince the trial court to place the appellant on his defence and subsequently convict.*

***Ground 2: SECTION 77, EVIDENCE ACT.***

*The Appellant avers in his submissions that the evidence on the age of the complainant should be disregarded as it was not properly produced. Pw3 testified on behalf of the doctor who assessed the age of the complainant. Page 14 of the record captures the relevant part thus "****The girl was done age assessment by Dr. Macharia on 08-10-15 at Taveta Hospital and she was aged 14 years . I know the doctor and we have worked with him for 6 years and I am conversant with his signature and I wish to produce the report ( P . Exh. 2).***

*Your ladyship our submission on this matter is that the age assessment report was laid procedurally as envisaged in Section 77, Evidence Act.*

*In this matter the said report was prepared by a doctor from Taveta Hospital and produced in court by another doctor from the said hospital. We are guided by the provision of Section 77 of the Evidence Act. The same provides that,*

***77 (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, documents examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***

***((2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time where he signed it.***

*In Republic –Vs- Rono Khalif Ahmed ( 2015) e KLR; where the court dealt with the issue of production of a postmortem report by the doctor who was not a maker of the documents. The court held as follows;- genuineness* ***"In my view Section 77 of the Evidence Act does not deal with the issue as to whom can produce such a documents. The Section allows the court to presume the genuineness of the document. The section also states that the court may call the maker of that statement to be examined on the same. This means that such a document need not be produced by the maker. It also means that the court may or may not require the maker of the document to come to court. It thus means that the document is admissible whether or not the maker comes to court. That does not mean that its value will be same I the maker fails to come to court to be examined. When the maker comes to court the evidential value will be such higher as he/she will be subjected to cross examination".***

*In light of the above we urge you to find at the age assessment report was properly admitted as evidence before the trial court. The record is also clear that the appellant never objected to the production of the same.*

***GROUND 3: INFRINGMENT OF RIGHTS UNDER ARTICLE 50 (2) (I) AND (K) CONSTITUTION OF KENYA.***

*The Appellant in his submission has raised the issue of his rights being infringed. Article 50 (2) (j) and (k), Constitution of Kenya profess thus Fair hearing 50….*

*2.Every accused person has the right to a fair trial, which includes the right - 11 j)* ***to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;***

*Your Ladyship, it is our submission that the prosecution discharged is duty by providing all the evidence it relied on to the appellant before trial commenced and that the sufficient time to prepare for trial. This is evident from the record where he ably cross examined all the witnesses.*

***GROUND 4: RELIANCE ON EVIDENCE BY A HOSTILE WITNESS.***

*The appellant alleges that Pw1 was a hostile witness. It is our humble submission that Pw1 was not a hostile witness. She gave cogent evidence that was put to test by cross examination by the appellant, was not declared a hostile witness by the state or the court.*

*The relevant statuary provision of the law relating to hostile witness is Section 152 of the Act which provides;-*

***152 (1) Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required any the court to give evidence.***

***a) refuses to be sworn; or***

***b) having been sworn, refuses to answer any question put to him; or***

***c)refuses or neglects to produce any documents or thing which he is required to produce; or***

***d) refuses to sign his deposition, without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for a period not exceeding eight days, and may in the mean time commit that person to prison, unless he sooner consents to do what is required of him.***

***(2) if the person, upon being brought before the court at or before the adjourned hearing, against refuses to do what is required of him, the court may again adjourn the case and commit him for the same period, and so again from time to time until the person consents to do what he is required of him.***

*It is our submission that none of the prosecution witnesses exhibited the above provided characteristics to warrant the court to declare any of them hostile. Therefore, this ground lacks any merit and we urge the court to dismiss it.*

***GROUND 5: FAILURE TO COMPLY WITH SECTION 211, CPC***

*My lady, the record at lines 8 to 15 of page 24 clearly indicate that Section 211. CPC was complied with. Therefore, this ground is a non- starter and must fail.*

*Your ladyship in the circumstances we submit that the prospection was able to prove its case beyond any reasonable doubt. We urge you to find that the appeal before you lacks merit and proceed to dismiss the same.*

14, The Appellant then filed further submissions (entitled Closing Submissions) on 1st July 2020. The Appellant makes series allegations about the trial process. He argues that it was unfair and unprocedural. He even goes as far as to say that he was prevented from calling his witnesses and that the burden of proof was shifted from the Prosecution to the Defence.

15. As a starting point, on the issue of witnesses, the proceedings show that the trial was adjourned on several occasions due to the absence of the Prosecution witnesses, first the Complainant and then the Investigating Officer.

16. Then it was adjourned because the Learned Trial Magistrate was unwell. All the time the Appellant was not in custody but out on a bond. If he had witnesses to call he could have arranged that. In the proceedings there is no record of the Appellant/Accused asking for more time to call witnesses or an adjournment. On 5th July 2017 the Hon Trial Magistrate (J. Omburah) gave a date for judgment of 3rd August 2017. The matter was before the Court again on 17th January 2018. The Learned Trial Magistrate explained that he had been unwell. On both those dates, the Appellant was present. He did not make any statement about wishing to call more witnesses. It is not correct that his mother and/or grandmother were intended to be witnesses for the Prosecution. The Charge Sheet names only the Complainant. The responsibility of calling witnesses rests on the Party who seeks to rely on their testimony, not the opposing party. Each Party is entitled to restrict their witnesses to those they feel will put forward their case. The Defendant cannot direct which witnesses the prosecution would call. In any event those witnesses could equally have been called by the Appellant as there is no property in a witness. It is clear from the proceedings that the Appellant did not give any indication that he wished to call more witnesses during the trial. Neither did his Advocates raise that ground in his initial Appeal. It is clear it is now merely an afterthought.

17. The Appellant argues that the Complainant was a hostile witness having been forced to attend after being locked up in prison. That argument does not assist him. Firstly, there is no finding that the Complainant was a hostile witness. She was a compellable witness and she was compelled by summons to attend. The Summons were enforced. Had she been hostile, the hostility would have been directed against the party calling her ie the Prosecution, and not the Defence. Therefore that Ground must fail.

18. The Appellant argues that the Age Assessment Report was not properly adduced in evidence. He relies on ***Section 77(2) of the Evidence Act***. ***Section 77*** provides:

77. *(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence. (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it. (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."*

19. In the circumstances, it is clear that Section 77 of the Evidence Act does not lend any support to the submission that the Court could not and should not have relied upon it. In this case, the report was prepared by a doctor in the course of his duties. He has signed the Report. It forms part of the records of the Hospital. His signature was verified by a colleague of 10 years standing. For this Court that is sufficient to make the evidence admissible.

20. In any event, even if he had been successful in knocking out that piece of evidence, it does not assist the Appellant. There were several sources of evidence on the age of the Complainant. She gave sworn testimony. She was adjudged to understand the importance of telling

the truth. Nevertheless she was a child and her evidence needed to be corroborated. It was corroborated by her Father on oath. He was believed. The witnesses also spoke of the Complainant being dressed in school uniform. Therefore, even if the Age Assessment Report was not admitted at all, there would still be probative evidence of age before the Court.

21. The Appellant also argues that the Charge Sheet is Defective. Having read the Charge Sheet, this Court is not satisfied it is defective. The Sexual Offences Act provides at Section 8 provides ; *8. Defilement (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.* In the course of the Trial, the Charge Sheet was read out to the Appellant he pleaded not guilty. He did not say, there is nothing to plead to (as suggested by the Respondent). He defended his case and he called a witness. In the circumstances, this is a case where the omission can be corrected by the facts that emerged during the trial. The Appellant did not say (in his appeal) that he would have pleaded guilty/differently had the charge been framed differently. He was able to decide which witnesses to call and he did so. He was able to present a defence, albeit he chose to give an unsworn statement from the dock. He denied being found with a school girl and then asked for leniency, thereby conducting his defence.

22. The Particulars of the Offence are set out in the Charge Sheet. The evidence presented to the Court was that the Complainant was a schoolchild. She was aged 14 years old. She was wearing her school uniform. She said she spent the night with the Appellant and that they had intercourse. That was corroborated by the medical evidence. The defence was a bare unsworn denial. The Complainant alleged that the Appellant used duress and violent restraint to force her into his house where intercourse took place. The Appellant was discovered by his grandmother who questioned whether he had married the Complainant – most likely because of the way she found them together.

23. The Appellant does not address that evidence in his Submissions. He states that the Complainant was unwilling to give evidence. The circumstances of the Complainant do not assist the Appellant but rather provide aggravating factors against the offence. The Complainant had a troubled childhood. He parents were separated and divorced. It was said that her step-father beat her. She was forced to marra a stranger in Tanzania. She ran away. She was sent back to school. She ran away. She was beaten and so it goes on. The Appellant then shoes such a vulnerable and abused child to prey upon.

24. Following his conviction, the Appeal was filed out of time. Nevertheless, the Court gave the Appellant the benefit of the doubt and admitted the Appeal for hearing. The Appellant instructed Advocates who filed the Appeal (without an application for leave). He then dismissed them and amended his Grounds.

25. It is clear to this Court that the Appellant is not himself convinced of his Grounds and they are simply an afterthought. In the circumstances, this Court is not satisfied that the Learned Trial Magistrate misdirected himself whether as alleged or at all. The Appeal against conviction is dismissed.

26. As to sentence. The celebrated case of ***Francis Muruatetu*** provides guidance on what considerations should be taken into account in sentencing. In this case, there is the fact of the defilement of a school child, there is the fact of the restraint and force used. There is the fact of the Child's vulnerability. There is the fact of the denial thereby putting the child through the trauma of a trial. There is the prevalence of such offences Taita Taveta County. The Appellant was an adult. The aggravating factors justify the application of more than a minimal sentence. For those reasons the appeal against sentence is similarly dismissed.

Order accordingly,

Farah S. M. Amin

**JUDGE**

**Dated , Signed and Delivered on-line in Mombasa on 27th October 2020**

**In the Presence of**

Court Assistant: Daniel Njuguna

Applicant: In person virtually

Respondent: Ms W. Otieno ODPP Mombasaon-line