REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL CASE NO. 57 OF 2016

KAZUNGU KARISA BAYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 200 of 2012 of the Senior Principal Magistrate's Court at Kilifi – Hon. L.N. Juma, RM)

JUDGEMENT

1. The Appellant, Kazungu Karisa Baya, was charged before Kilifi SPM's Court with defilement contrary to Section 7 of the Sexual Offences Act, 2006 (S.O.A.) . The particulars of the charge stated that on 10th February, 2012 at [particulars withheld] Sub-Location in Kilifi County the Appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of SR a child with mental disability aged 15 years.

2. At the conclusion of the trial the trial court found the Appellant guilty of defilement contrary to Section 8(1) as read with Section 8(4) of the S.O.A. He was sentenced to 15 years imprisonment.

3. The Appellant being dissatisfied with both the conviction and sentence has, through the amended grounds of appeal filed on 5th September, 2018, sought to overturn his conviction on the grounds that the charge was defective; that the medical evidence did not connect him with the defilement; that the evidence adduced by the prosecution was contradictory; and that his defence was not considered by the trial magistrate.

4. The appeal was dealt with through written submissions. On the alleged defectiveness of the charge, the Appellant submitted that it was erroneous for the trial magistrate to find him guilty of defilement contrary to Section 8(1) as read with Section 8(4) of the S.O.A. without first amending the charge considering that he was charged with defilement contrary to Section 7 of the S.O.A. The Appellant submitted that the trial magistrate could have only proceeded in accordance with sections 214 and 89(5) of the Criminal Procedure Code (C.P.C.). It is the Appellant's case that the trial court fell into error by not amending the charge and the only outcome is to have the charge quashed. He relied on the case of **Jason Akumu Yongo v Republic [1983] eKLR; Criminal Appeal No. 1 of 1983 (Nairobi)** in support of his assertion that a defective charge should be quashed. The Appellant stressed that he never pleaded to the offence for which he was subsequently convicted by the court. It is the Appellant's position that the trial court's decision was based on the wrong principles of law and as per the decision in **Richard Kaitany Chemagong v Republic [1984] eKLR; Criminal Appeal No. 150 of 1983** his conviction should be quashed.

5. Turning to the ground on the insufficiency of the evidence adduced, the Appellant submitted that the medical evidence adduced did not establish defilement. He stated that the P3 form produced by PW3 Dr. Kigwara showed that there was no injury to the genitalia. There was no discharge and neither did the complainant have any disease. According to the Appellant, the medical report contradicted the evidence of PW1 ER, the sister of the complainant, who had talked of semen on the thighs of the complainant and whitish discharge from her vagina. The Appellant cited the decision of this court in **Bonface Chitsango Ngoba v Republic [2018] eKLR** in support of his proposition that contradictions in the evidence of the prosecution witnesses should be reconciled in favour of an accused person.

6. On the non-consideration of his defence by the trial court, the Appellant submitted that his alibi defence was not taken into account by the trial magistrate.

7. The Respondent represented by the office of the Director of Public Prosecutions strongly opposed the appeal. It was the Respondent's case that sufficient evidence had been adduced to warrant the conviction of the accused person. Further, that the trial court had given due consideration to the Appellant's defence and rejected it.

8. This being a first appeal this court's duty was stated in **Okeno v Republic [1972] EA 32 thus:**

"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M. RUWALA VS. R. (1975) EA 57). 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."

9. Another principle to be taken into consideration by a first appellate court was stated in **Chemagong** (supra) as follows:

"A court on appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

Those are the principles to be applied in this appeal.

10. That there was a defect in the charge cannot be contested. Section 7 of the S.O.A. under which the Appellant was charged states:

"A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years."

11. The evidence that was adduced pointed to the commission of the offence created under Section 8(1) of the S.O.A. which provides that:

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

12. In convicting the Appellant, the trial magistrate stated that:

"The accused herein was charged under the provisions of Section 7 of the sexual offences act which talks of committing rape or an indecent act in the presence of a child or a person with mental disability. In my view the proper provision should have been section 8(1) and 8(4) of the Sexual Offences Act as the age of the victim at the time of offence was 17 years as per the clinic card. Penetration has also been proved. The question is whether failure to include this provision makes the charges herein defective. In my humble opinion the defect is curable by virtue of section 382 of the Criminal Procedure Code. Further the accused herein knew the charges facing him and did not raise any complaint as the matter was proceeding for hearing."

13. The Appellant's view is that the trial magistrate ought to have proceeded under Section 214 of the Criminal Procedure Code. The section states:

"214. Variance between charge and evidence, and amendment of charge

(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the 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 if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary."

14. As to what a defective charge is, the Appellant referred this court to the decision of the Court of Appeal in **Jason Akumu Yongo v Republic [1983] eKLR; Criminal Appeal No. 1 of 1983 (Nairobi)** where it was stated that:

"In our opinion, a charge is defective under Section 214(1) of the Criminal procedure Code where:

(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

(b) it does not, for such reasons, accord with the evidence given at the trial; or

(c) it gives a misdescription of the alleged offence in its particulars."

15. The question therefore is whether the trial magistrate erred in proceeding in the manner she did. In the case of **John Irungu v Republic [2016] eKLR; Criminal Appeal No. 20 of 2016**, the charge against the appellant had only indicated the punishment section of the offence with which the Appellant was charged. The Appellant claimed that the charge was defective and the Court of Appeal answered him thus:

"Section 137 of the Criminal Procedure Code, which sets out the rules for framing charges and informations, requires a charge or information to commence with the statement of the offence describing the offence briefly and in plain language and without stating all the essential elements of the offence. Where the offence charged is one created by an enactment, the statement of the offence is required to contain a reference to the section of the enactment creating the offence. This is the provision that the appellant contends was violated in his case.

As section 137(a)(iv) of the Criminal Procedure Code makes abundantly clear, the rules of framing the charge are not cast in stone. The Code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein section 382 of the Code focuses, not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice. As this Court observed in *Samuel Kilonzo Musau v Republic, Cr. App No. 153 of 2013,* that provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice. (See also *George Njuguna Wamae v. Republic, Cr. App. No. 417 of 2009)….*

We are in agreement with the first appellate court that the failure to refer to section 8(1) of the Act did not occasion a miscarriage of justice in view of the clear statement of the particulars of the offence and therefore cannot form the basis for interfering with the decisions of the two courts below."

16. In the case at hand, the statement of the charge was that of defilement. The particulars of the charge disclosed that the Appellant had penetrated a child. Nowhere is it stated that the Appellant committed an act which caused penetration or an indecent act in view of a family member or a child or a person with mental disabilities being the offence created by Section 7 of the S.O.A. The act of quoting Section 7 of the S.O.A. was therefore an error. As already stated, the statement of the charge and the particulars of the offence in the charge sheet were clear that the Appellant was being charged with defilement contrary to the Section 8(1). He was therefore not prejudiced by the decision of the trial magistrate to convict him of the proper section of S.O.A. that he had breached. I therefore find the Appellant's claim that he was convicted on a defective charge unmerited. This ground of appeal is dismissed.

17. What was the evidence adduced at the trial? PW1 ER, the sister of the complainant, told the court that on the material day she sent the complainant to go and buy omena from the sister of the Appellant. When she came back her sister told her the Appellant had called her inside one of the houses and defiled her. She examined the complainant and saw semen on her thighs and whitish discharge from her private parts. When the Appellant was confronted he denied defiling the complainant. It was the evidence of PW1 that the complainant who is epileptic tore and burnt the clothes she was wearing on the material day.

18. PW2 GR, the brother of the complainant, told the court that when PW1 informed her of the defilement of the complainant he reported the incident to administration police officers who arrested the Appellant.

19. PW3 Dr. Kigwara produced a P3 form filled for the complainant by one Dr. Faraj. The form shows that the complainant is a 15 year old girl who is epileptic and mentally challenged. The examining doctor also observed that the genitalia was normal. There was no blood, no discharge and no disease noted.

20. PW3 also referred to the post rape care form filled for the complainant. The form disclosed that the complainant was examined on 10th February, 2012 at 9.00 p.m. The time of assault was indicated as 1.00 p.m. on the date of examination. It was noted that the victim had changed clothes and had washed herself.

21. PW4 Corporal Zainab Dado testified that she took over the matter from another police officer.

22. The complainant testified as PW5. She was declared a vunerable witness and her mother acted as her intermediary. The complainant's testimony was that she had gone to the shop when the Appellant held her hand and took her to his home where he defiled her. She stated that she had already shopped when the Appellant held her. Her testimony was that the person who sold her goods saw the Appellant holding her hand.

23. On the actual act, the complainant testified that the Appellant removed her panties and lesso and put her down. He then inserted his penis in her vagina. She stated that there was no one in the room where she was defiled. After the incident she proceeded home and reported the matter. She was taken to hospital where she was examined. She identified the Appellant in court as the person who had defiled her.

24. When cross-examined, the complainant stated that she had gone to buy omena from a shop near the Appellant's house. Her evidence was that she did not see the wife of the Appellant in the house. She denied having stated there was blood and clarified that there was dirt all

over as a result of the sexual intercourse. She told the court that the shopkeeper saw the Appellant holding her hand.

25. PW6 MK told the court that on the material day she was at the home of PW1. PW1 was plaiting the hair of her daughter FK. The complainant told her she had been defiled by the Appellant. She noticed a substance like sperm between the legs of the complainant. She went and confronted the Appellant who denied defiling the complainant but later said they could talk. The mother of the complainant stated that they should go to the police and they went and reported the matter to the police. PW6 stated that both PW1 and the Appellant are her neighbours. PW6 stated that the complainant had a dress and a lesso. She stated that she had no differences with the Appellant prior to the incident.

26. During cross-examination PW6 stated that she had no dispute with the Appellant although she had cancelled a land transaction with the Appellant's uncle. It was her testimony that the Appellant never told them he wanted to accompany them to the police station and to the hospital. She reiterated that the Appellant wanted the issue solved at home.

27. In his defence, the Appellant who testified as PW1 stated that on the material day he took his wife to hospital in the morning after which they came back home. At 1.00 p.m. he saw the complainant go to the shop and leave. The Appellant stated that he was with his brother. After about five minutes a large group of people led by one Bendera arrived claiming he had defiled the complainant. Together with his wife they offered to take the child to hospital but the people refused. He stated that the brother of the complainant had previously stolen his phone and he had reported the incident.

28. Rina Awino Akumu, the wife of the Appellant testified as DW2. Her testimony was that she was sitting under a tree with the Appellant when they saw the complainant pass by. They also saw her go back to her home. After about five minutes the complainant went to where they were with a group of people claiming that the Appellant had defiled her. She told the people to allow her and her husband to accompany the child to the hospital but they refused. When DW2 was cross-examined she stated that the complainant went to the shop at 9.00 a.m. Her testimony was that after coming from the hospital she had stayed at home the whole day. It was DW2's testimony that she was sitting outside the house with the Appellant, the Appellant's mother and one Dama.

29. DW3 Gladys Dama Hamisi testified that she sold omena to the complainant on the material day. She later came back claiming to have been defiled. Her testimony was that at the time she sold omena to the complainant the Appellant was sitting outside his house with his wife.

30. DW4 Baya Mushenza stated that on the material date they had just woken up when the complainant went and bought omena from the shop. She bought omena from the Appellant's elder sister. After five minutes the complainant came back in the company of some people claiming she had been defiled by the Appellant.

31. Cross-examined DW4 stated that they were at home with the Appellant and another girl on the material day and they never left home the whole day.

32. From the above evidence the question is whether the prosecution proved beyond reasonable doubt that the complainant was a child and was indeed penetrated by the Appellant.

33. The case weaved by the prosecution through the evidence adduced was that the complainant had gone to buy omena at a shop near the Appellant's home when the Appellant held her by the hand and led her to a house where he defiled her.

34. The Appellant's defence is that he never defiled the complainant and is before this court because of differences he had with the family of the complainant.

35. After hearing the evidence the trial magistrate was convinced that the complainant was defiled by the Appellant. She rejected the Appellant's defence stating that the alleged bad blood between the Appellant and the family of the complainant was an afterthought.

36. Although the trial court and the prosecution through submissions in this appeal went to great length to establish that the complainant suffered mental disability, this was not an ingredient of the charge of defilement which the Appellant was found guilty and convicted for. It was not even an ingredient for Section 7 of the S.O.A. that had been cited in the charge. For the offence which the Appellant was convicted the prosecution was only required to establish that the complainant was a child at the time of the alleged offence and it was the Appellant and no other person who had penetrated her.

37. A perusal of the evidence shows that the complainant went to a shop near the Appellant's home to buy sardines. When she came back she informed PW1 and PW6 that she had been defiled. Both PW1 and PW6 told the court that they saw a substance like sperm on the complainant. In fact PW1 talked of a whitish discharge from the private parts of the complainant. PW3 stated that medical examination revealed that the hymen was missing.

38. The Appellant submitted that the medical evidence did not establish that the complainant had been defiled. He also stated that PW3 mentioned that the complainant had been defiled before by her cousin.

39. It is important to note however that defilement is not proved by medical evidence alone. Whether or not the complainant was defiled was a matter of fact to be established through the evidence of witnesses. Previous defilement of a child does not exonerate any subsequent defiler from being found guilty if sufficient evidence is adduced.

40. Indeed the fact that no discharge was noted when the complainant was examined was explained by the post-rape care form. It was noted that the complainant had washed herself and changed clothes.

41. The complainant though said to be mentally retarded gave a clear account of how the Appellant defiled her.

42. The Appellant's defence was that he had differences with the family of the complainant. I agree with the trial court that the defence case is unbelievable. During cross-examination of PW1, the Appellant tried to show that the differences he had with PW1 was because of a failed land deal with his (Appellant's) uncle. When he realized that was not believable he introduced in his testimony the issue of a mobile phone allegedly stolen by the brother of the complainant. He, however, could not back up the story by producing evidence like the police occurrence book number for the theft report. It is also important to note that none of his witnesses talked of any grudge between the Appellant and the family of the complainant.

43. The evidence of the defence witnesses was also contradictory. His wife (DW2) stated that the Appellant took her to hospital at 7.00 a.m. and they came back at 9.45 a.m. She then says she saw the complainant at the shop at 9.00 a.m. That is not even an issue. The real contradiction as regards time is because the Appellant talked of the child going to the shop at 1.00 p.m. It is also noted that DW3 talked of selling sardines to complainant at 1.00 p.m. DW4 however talked of the complainant going to the shop between 7.00 a.m. and 10.00 a.m. and the crowd going to the shop at 11.00 a.m.

44. DW4 insisted that the Appellant never left the homestead the whole day thus contradicting the Appellant's and DW2's evidence that they went to the hospital in the morning.

45. Whereas the Appellant talked of being with his brother when the complainant went to the shop, DW2, DW3 and DW4 never mentioned this crucial fact. Indeed they put themselves in the picture even when the Appellant had not mentioned them.

46. In my view, the evidence by the Appellant and his witnesses was only meant to rescue the Appellant. Their tale cannot be believed. Like the trial court, I reject the defence case.

47. The outcome is that the prosecution proved beyond reasonable doubt that the Appellant had sex with the complainant who was 17 years at the time of the incident. The prosecution therefore proved the offence for which the Appellant was convicted. The sentence imposed is the one provided by the law.

48. In the circumstances I find the Appellant's appeal without merit. The same is dismissed.

Dated, signed and delivered at Malindi this 31st day of January, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT