



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO 91 OF 2017**

**RAYMOND MWANGAMA NYAMBU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal against the judgment and conviction of Hon. D. Mulekyo CM, delivered on 3<sup>rd</sup> February 2017 in Criminal Case No. No. 1337 of 2013, in the Chief Magistrate's Court at Kwale)**

**JUDGMENT**

**The Appeal**

1. The Appellant was convicted and sentenced to serve twenty five (25) years imprisonment for the offence of defilement contrary to section 8(1) as read with sub-section 8(2) of the Sexual Offences Act. The Appellant had also been charged with an alternative offence of indecent act with a child, contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence of defilement that he was convicted of were that on 21<sup>st</sup> November 2013 at Diani Location in Kwale County within Coast Region, he caused his penis to penetrate the vagina of LWM, a child aged 10 years.
2. The Appellant pleaded not guilty to the charges in the trial court, and was convicted and sentenced after a full trial. He is aggrieved by the judgment of the trial magistrate, and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal were stated in a Petition of Appeal filed in Court on 12<sup>th</sup> June 2017 and in Amended Grounds of Appeal filed in Court on 26<sup>th</sup> November 2018.
3. The grounds of appeal are as follows:
  - a) That the learned trial magistrate erred in law and fact in convicting and sentencing the Appellant to twenty five (25) years imprisonment, without considering that the medical evidence brought before the Court to support the case was full of hypothetical explanations and hearsay.
  - b) That the learned trial magistrate erred in law and fact by finding for his conviction and sentence without considering that there were massive contradictions and invariances.
  - c) That the learned trial magistrate erred in law and fact by finding for his conviction and sentence without considering his defence.
4. The appeal proceeded for hearing on 10<sup>th</sup> December 2018, and the Appellant submitted that he would rely on written submissions filed in Court on 26<sup>th</sup> November 2018, as well Further Submissions he filed on 18<sup>th</sup> December 2018. He orally highlighted the issues arising in the submissions. The Prosecution counsel, Mr. Masila, also relied on written submissions dated and filed in Court on 30<sup>th</sup> November 2018, save to concede that the complainant was over ten years, having been born on 13<sup>th</sup> May 2003.
5. The Appellant in his submissions contended that the medical evidence adduced by the Prosecution did not identify who broke the complainant's hymen and when it was broken, and that the Prosecution had the burden of proof under section 109 of the Evidence Act to prove defilement to the required standard of law. In addition, that PW6 who was at the scene of the crime testified that he was away from his house and left the Appellant and complainant for only two minutes, and no defilement could have occurred in the said two minutes.
6. The evidence of the complainant, who was PW1, was also alleged by the Appellant to be contradictory, as she stated on cross-examination that she was told what to say, and that she took the soda outside the bank and not in the house as she had earlier testified. In addition, that her evidence as regards the defilement contradicted that of PW6. Lastly, the Appellant submitted that he raised a strong defence, as he explained that the complainant had asked for a ride from him as he was going to the bank

7. Mr. Masila's submissions were that the medical evidence adduced in Court by PW4 confirmed that there was penetration, and supported the charge of defilement. Further, that it was not in dispute that the Appellant was with the minor at the time of the alleged incident, which was confirmed by PW6 who left the Appellant alone with the complainant in his house.

8. The Prosecution also submitted that the age of the complainant was proved by a birth certificate which showed that she was born on 13<sup>th</sup> May 2003, and was therefore ten years old at the time of the offence. Therefore, that all ingredients of defilement were proved beyond a reasonable doubt, and any contradictions in the evidence were minor, and did not adversely affect the Prosecution's case. Lastly, that the Appellant's defence merely confirmed that he was with the complainant at the time of the alleged offence, and corroborated PW1's testimony on the events that occurred.

### **The Determination**

9. My duty as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR 21** and **Kimeu v/s Republic (2003) 1 KLR 756**.

10. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I note that the main issue for determination is whether the Appellant's conviction was on the basis of sufficient, consistent and satisfactory evidence.

11. The ingredients of the offence of defilement were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows:

**“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”**

Section 2 of the Sexual Offences Act in addition provides that penetration entails the partial or complete insertion of the genital organs of a person into the genital organs of another person.

12. The Appellant has alleged that the evidence adduced by the prosecution was not sufficient to prove he was the one responsible for penetration of the complainant, and the said evidence was also contradictory.

13. The evidence by PW1, PW4 and PW6 was key in this regard. PW1 who was the complainant, testified after a *voire dire* examination, that the Appellant told her to climb on his motorcycle and took her to KCB bank and thereafter to his friend's house. That at the said house, the Appellant sent his friend to buy cigarettes, told her to remove her clothes, he also removed his clothes and put his “dudu” in her “dudu”. That she felt pain and cried, but did not bleed. The Appellant's friend thereafter came with the cigarettes, and after smoking the cigarettes the Appellant took her home.

14. PW1 then informed PW2 who was her aunt, and PW3 who was her mother, what had happened, and the two witnesses testified that they reported the matter to the police on 21<sup>st</sup> November 2013, and later took PW1 to hospital for examination. PW5, who was attached to Diani Police Station, testified as to receiving the report of the defilement and arresting the Appellant. She also produced the complainant's birth certificate as an exhibit.

15. PW4 was a clinical Officer at Diani Health Centre who examined the complainant on 22<sup>nd</sup> November 2013, and found that she had normal external female genitalia with inflammation, lacerations on the vagina walls, her hymen was broken and she had severe tenderness on the vagina which had a foul smell. She produced the filled P3 Form as an exhibit.

16. PW6 was the Appellant's friend in whose house the defilement was alleged to have occurred, and he testified that the Appellant did come to the house with the complainant, and that the Appellant sent him to buy cigarettes. He testified that he was away for only two minutes before going back to the house, where he found the Appellant and complainant sitting and watching television.

17. Upon perusal of the Court record, I find that it is indeed the position that upon cross-examination, the complainant did give contradictory evidence as follows:

**“Yes, I went to take soda with the accused at a hotel. At the friends place I did not take soda. I was told what to say by mama. She said I should not panic and I should speak the truth. He did not buy me soda at friend's place. He went alone to take soda, and I was outside next to KCB bank and he brought me the soda...”**

18. The reliability of PW1's evidence was thus brought to question and therefore required corroboration under section 124 of the Evidence Act. Section 124 provides as follows:

**“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**

**Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

19. The evidence by PW4 that PW1's hymen was broken at the time of her medical examination on 22<sup>nd</sup> November 2013 was corroboration of penetration, however it did not identify the person responsible, and was therefore not corroboration as to penetration specifically by the Appellant. However, I find that together with the evidence by PW6, there was sufficient corroborating evidence, as PW6 placed the Appellant with the complainant at the time of the alleged defilement, which was the day before the medical examination of the complainant by PW4. In addition, as PW6 was not present at the time of the alleged defilement, his evidence that he was away for only two minutes, during which time the defilement could not have occurred was only an opinion and purely speculative.

20. On the requirement of age, the Prosecution did concede that the complainant was aged over ten years, as the birth certificate produced as an exhibit showed that she was born on 13<sup>th</sup> May 2003 and the offence occurred on 21<sup>st</sup> November 2013. PW1 was therefore over ten at the time of the commission of the offence.

21. Article 259(5)(c) of the Constitution provides as follows with regard to calculation of years:

**(5) In calculating time between two events for any purpose under this Constitution, if the time is expressed—**

**(a) as days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included;**

**(b) as months, the time period ends at the beginning of the day in the relevant month—**

**(i) that has the same number as the date on which the period began, if that month has a corresponding date; or**

**(ii) that is the last day of that month, in any other case; or**

**(c) as years, the period of time ends at the beginning of the date of the relevant year that corresponds to the date on which the period began.**

22. The date when the relevant period began in this case is 13<sup>th</sup> May 2003, which is the date of birth of the complainant, and therefore, 10 years from 13<sup>th</sup> May 2003 would be 13<sup>th</sup> May 2013, which is the date when the year ended for purposes of Article 259(5)(c). The alleged offence was committed on 21<sup>st</sup> November 2013, and there was thus an error in the charge sheet as regards the age of the complainant which showed that she was ten years old.

23. In **Peter Ngure Mwangi v Republic, [2014] eKLR** the Court of Appeal sitting at Nairobi provided guidance as how to address a defective charge, and held that there are two limbs to the issue of a defective charge sheet. 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.

24. The issue of when a charge is defective is to be examined in light of the requirements of the law as regards the framing of charges as stated in section 134 of the Criminal Procedure Code which provides 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.”**

25. In addition it was held in **Sigilani vs Republic, (2004) 2 KLR, 480** that:

***“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”***

26. The mistake as to the complainant's age therefore ought to have been corrected by the Prosecution or trial court by amendment of the charge sheet under section 214 of the Criminal Procedure Code. This Court therefore needs to address the second limb as to whether the noted mistake in the charge sheet is curable. Section 382 of the Criminal Procedure Code provides as follows in this regard:

**“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.”**

27. I find that the mistake in the charge sheet did not materially affect the proceedings in the trial Court, and is curable under section 382 of the Criminal Procedure Code, as the charge sheet clearly cited the section creating the offence which is section 8(1) of the Sexual Offences Act, which creates the offence of defilement of a child which is an offence that exists in the law. In addition, the applicable penalty section of the law remained the same, being section 8 subsection 2 of the Sexual Offences Act, which provides follows:

**“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.”**

28. The Prosecution had initially served the Appellant with a Notice of Enhancement which was it later withdrew due to the concession as regards the complainant’s date of birth. I will therefore give the Appellant the benefit of the lesser sentence that was initially meted by the trial Court.

29. Lastly, on the Appellant’s defence, the Appellant gave sworn testimony and did not call any witnesses. He gave an account of the events of 21<sup>st</sup> November 2013, and stated that the complainant requested for a ride on his motor cycle, and that he gave her a ride to the bank and to his friend’s house, where the complainant had a soda before they he took her back home. This defence therefore put the Appellant at the scene of the offence and did not give him any alibi, and was a mere denial which did not displace the evidence of defilement adduced by the Prosecution.

30. I accordingly uphold and affirm the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (2) of the Sexual Offences Act. The sentence imposed upon him of twenty five (25) years imprisonment for this conviction is also upheld.

31. It is so ordered.

**DATED AND SIGNED AT MOMBASA THIS 21<sup>ST</sup> DAY OF FEBRUARY 2019**

**P. NYAMWEYA**

**JUDGE**