REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO 161 OF 2016

DAVID MUSENGE SANDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(**From original conviction and sentence in Criminal Case Number 5537 of 2013 in the**

Chief Magistrate's Court at Thika by Hon G. Onsarigo (RM) on 11th February 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, David Musenge Sande was charged with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act No 3 of 2006. The particulars of this offence were that on 19th October 2013 at [particulars withheld] Village in Gatanga District within Murang'a County, he intentionally caused his penis to penetrate the vagina of MRN (hereinafter referred to as "PW 1"), a child aged five (5) years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of this offence were that at the aforesaid time and place, he intentionally touched the buttocks and vagina of PW 1, a child aged five (5) years, with his penis.

3. He was also charged with being unlawfully present in Kenya contrary to Section 25(A) of the Refugees Act No 13 of 2006. The particulars of this offence were that on the aforesaid time and place, being an alien, he was unlawfully in Kenya.

4. The Learned Trial Magistrate, Hon G. Onsarigo, Resident Magistrate, convicted him and sentenced him to life imprisonment for the offence of defilement. He dismissed Count II on the ground that it was not proved.

5. Being dissatisfied with the said judgment, on 15th April 2016, the Appellant filed a Petition of Appeal. He relied on five (5) Grounds of Appeal. His Amended Grounds of Appeal were filed on 19th March 2018. He now relied on six (6) Grounds of Appeal.

6. His Written Submissions were filed on 15th March 2018. When the matter came up in court on 20th March 2018, the State tendered oral Submissions.

LEGAL ANALYSIS

7. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor".**

8. Having considered the Appellant's and states Written Submissions, this court found the following issues to have been placed before it for

determination:-

1. Whether or not the Charge Sheet was defective;

2. Whether or not the Appellant was accorded a fair trial;

3. Whether or not the Prosecution proved its case beyond reasonable doubt.

9. The court therefore dealt with the said issues under the distinct and separate heads shown herein below.

I. CHARGE SHEET

10. Amended Ground of Appeal No (1) was dealt with under this head.

11. The Appellant submitted that the Charge Sheet was defective *ab initio* because it charged rape twice (**sic**). He argued that after being charged under Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act, the said Charge Sheet was read again with Section 8 (2) of Sexual Offences Act which proved that there was duplicity.

12. He referred to the definition of duplicity as given in the Black's Law Dictionary which defined it as:-

> **"The technical fault, in pleading, of uniting two or more causes of action in one count in a writ, or two or more grounds of defense in one plea, or two or more breaches in replication, or two or more offenses in the same count of an indictment, or two or more incongruous subjects in one legislative act, or two or more controverted ultimate issues submitted in a single special issue…".**

13. He contended that this duplicity was apt to confuse accused persons not to understand what they had been charged with. He averred that from the way the Charge Sheet had been framed, he did not know whether he was pleading to defilement or against the life sentence under Section 8(2) of the Sexual Offence Act.

14. He referred this court to the cases of **George Omondi vs Republic Criminal Appeal No 5 of 2005** and **Peris Wairimu Gichuru vs Republic Criminal Appeal No 352 of 2004** where the courts therein quashed the convictions against the appellants therein as the charge sheets were found to have been defective.

15. On the other hand, the State submitted that the charge sheet was proper because it disclosed all the elements of the offence of defilement. It contended that the Prosecution adduced in evidence Postcare Report, Treatment Notes and P3 Form which showed that PW 1 was a minor aged five (5) years and that she had been defiled.

16. Section 134 of the Criminal Procedure Act Cap 75 (Laws of Kenya) provides as follows:-

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific 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. It is submitted that that omission was vital to the subsequent proceedings since the accused cannot be said to have been given sufficient details of the charge to facilitate an unequivocal plea."**

17. A perusal of the cases the Appellant relied upon to support his argument that he ought to be acquitted due to defectiveness of the Charge Sheet were decided prior to the promulgation of the Constitution of Kenya, 2010. Notably, Article 159 (2) (d) of the Constitution of Kenya provides that courts shall administer justice without undue regard to procedural technicalities. In that respect, this court was not persuaded that the Appellant's Appeal should be allowed merely because the Charge Sheet would have been defective.

18. In any event, Section 382 of the Criminal Procedure Code provides 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:**
>
> **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."**

19. In the absence of any demonstration by the Appellant of what prejudice he suffered, this court was not persuaded to find that the Charge Sheet as drafted was defective merely because it did not contain the word unlawful. This is because the charge sheet contained the date and place of the offence of defilement, the act of penetration of PW 1 by the Appellant's penis and her age. All these were ingredients for proving the offence of defilement.

20. In the circumstances foregoing, this court found and held that his Amended Ground of Appeal No (1) was not merited and the same is hereby dismissed.

II. APPELLANT'S RIGHT TO FAIR TRIAL

A. LEGAL REPRESENTATION

21. Amended Ground of Appeal No (3) was dealt with under this head.

22. The Appellant submitted that the Learned Trial Magistrate erred by failing to accord him the right of an advocate to represent him during the trial given the fact that he was a foreigner. He relied on the provisions of Article 50(2) (h) of the Constitution of Kenya that provides as follows:-

> **"Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."**

23. He added that he did not understand the language of the court hence it was imperative for him to have been accorded a fair trial from the onset to balance the scale of justice as he was facing a serious offence. The State did not address this court on this issue.

24. In the case of **Cr Appeal No 497 of 2007 David Njoroge Macharia vs Republic [2014] eKLR,** the court therein explained that legal representation ought to be assigned to an accused person where substantive injustice would occur in complex issues of law or fact, where the accused is unable to conduct his own defence or where public interest requires that representation be provided.

25. The limitation of the right to be assigned legal representation by the State was addressed by the Court of Appeal in the cases of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR** and in the case of **David Macharia vs Republic (**Supra**)** amongst many other cases.

26. In the case of **David Macharia vs Republic** (Supra), the Court of Appeal rendered itself as follows:-

> **"Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence..We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."**

27. In the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic**(Supra),the Court of Appeal also stated as follows:-

> **"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include *all situations where an accused person is charged with an offence whose penalty is death.* This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.**
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> **Again, this Court differently constituted in the case of Moses Gitonga Kimani v Republic, Meru Criminal Appeal No. 69 of 2013, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows:**
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> **"It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation."**
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> **Article 261 of the Constitution provides *inter alia*:-**
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> > **(i) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.**
> >
> > **(ii) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year**

It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution."

28. Accordingly, whilst this court agreed with the Appellant that there was discrimination relating to the provision of legal representation, it took cognisance of the aforesaid decision by the Court of Appeal that the right is progressive in nature and only hoped that the right to assign legal representation to **all** (emphasis court) accused persons will be realised progressively but sooner than later. Notably, his assertions that he did not understand the language of the court was an afterthought as the proceedings from the lower court were clear he took plea in the Kiswahili language and cross-examined witnesses in the same language.

29. In light of the aforesaid limitations on assignment of legal counsel, this court was not persuaded to find that the Appellant's rights to fair trial had been infringed upon as he had contended. His Amended Ground of Appeal No (3) was therefore not merited and the same is hereby dismissed.

B. WITNESS STATEMENTS

30. Amended Ground of Appeal No (2) was dealt with under this head.

31. The Appellant argued that he was never supplied with Witness Statements before he proceeded with the trial. He submitted that the order by the Learned Trial Magistrate that he pay for the same was contrary to principle (**sic).**

32. He referred this court to the case of **Simon Ndicho Kahoro vs Republic [2016] eKLR** where the court therein held that the appellant's right to fair trial had been infringed upon. It was therefore his submission that his fundamental rights and freedoms as an accused person had been infringed upon.

33. On its part, the State submitted that at all given times, the Appellant had indicated during trial that he was ready to proceed and that he only raised the issue of not having been furnished with Witness Statements for the first time on 9th July 2014. It pointed out that it was his responsibility to have informed the Trial Court if he had not received the Witness Statements because if he had not received the same, the hearing would have been adjourned to enable him obtain the same.

34. A perusal of the proceedings showed that when the Appellant was first arraigned before the Trial Court on 23rd October 2013, the Learned Trial Magistrate did not order that he be furnished with the Witness Statement. The hearing proceeded on 27th November 2013 when the evidence of PW 1 and PW 1's mother NNN (hereinafter referred to as "PW 2") was taken. On 20th April 2014, the evidence of PW 1's father, SNM (hereinafter referred to as "PW 3") was taken.

35. As was rightly pointed out by the State, the Appellant raised the issue of being supplied with Witness Statements for the first time on 9th July 2014. The Learned Trial Magistrate then directed that he be furnished with witness statements at his own costs. The Learned Trial Magistrate made a similar order on 7th August 2014.

36. On 7th October 2014, and 1st April 2015 the Appellant indicated that he was ready to proceed with the trial and in fact, the evidence of No 74608 Corporal Feisal Juma (hereinafter referred to as "PW 4") and the Clinical Officer, Simon Mwangi (hereinafter referred to as "PW 5") testified. He did not inform the court that he had not received the witness statements by the time the Prosecution closed its case on 1st April 2015.

37. This court agreed with the State that it was the responsibility of the Appellant to have requested for an adjournment to enable him obtain the witness statements at his own cost once the Trial court made the order. However, it was the duty of the Trial Court to have directed that the Appellant be furnished with witness statements after he took plea on 23rd October 2013. The fact that PW 1, PW 2 and PW 3 testified before the Appellant had gone through their statements infringed on his right to fair trial and in particular, his right to be given all the evidence the Prosecution was relying upon to enable him prepare his defence as is contemplated in Article 50 (2) (c) of the Constitution.

38. It was the considered opinion of this court that failure by the Learned Trial Magistrate to order that the Appellant be furnished with witness statements greatly prejudiced him. There was no other way of looking at the consequences of such omission.

39. Indeed the Appellant was a lay man in matters of law and a foreigner. It was not expected that he would have known the rigmaroles of court procedures more so as during sentencing, the Prosecutor informed the Trial Court that it did not have his previous records which was sufficient to suggest that he was a first offender who did not know the court procedures.

40. Notably, in the case of **Simon Ndichu Kahoro vs Republic** (Supra), the Court of Appeal held that an appellant's right to fair trial was infringed upon. Having considered the evidence that was adduced by the Prosecution witnesses, this court noted that the Prosecution had established that an offence had been committed by the Appellant herein. However, it was evident that he was not accorded a fair trial rendering the entire proceedings before the Trial Court a nullity as it was not known how he would have prepared and mounted his defence to counter the evidence the Prosecution had adduced in support of its case.

41. In a case where the trial court responsible for a nullity, an appeal court can order a retrial. Be that as it may, a re-trial is not ordered as a

matter of course. It can only be ordered where it does not prejudice the appellant. **In this regard, this court fully associated itself with the case of Ahmed Ali Dharmsi Sumar vs Republic 1964 E.A 481** and restated in **Fatehali Manji vs The Republic 1966 E.A. 343**:-

> **"In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.**

42. In addressing the question of prejudice that may be suffered by an appellant when a matter is to be referred for a re-trial, Mativo J had the following to say in the case of **Joseph Ndungu Kagiri v Republic [2016] eKLR**:-

> **"As held above under no circumstances should prejudice be caused to an accused person. I therefore find that the entire trial was conducted in total breach of the jealously safe guarded constitutional provisions which guarantee a fair trial, and therefore the entire proceedings in criminal case number Nyeri Criminal Case Number 254 of 2011, *Republic vs. Simon Murage Mutahi & Another* are hereby declared to be a nullity and are hereby quashed. I therefore find that this appeal is successful. Accordingly, I hereby allow the appeal, quash the entire proceedings and set aside the orders made in the said case."**

43. In the case of **Erick Ochieng v Republic [2015] eKLR**, Sitati J also quashed a sentence of twenty (20) years that the appellant therein had been handed down in a case of defilement where he had not been supplied with witness statements.

44. Doing the best that it could, this court came to the firm conclusion that ordering a Re-Trial in this case would cause the Appellant herein great hardship and prejudice. Indeed, the incident was said to have occurred on 19th October 2013 when PW 1 was aged five (5) years. There is a high possibility that PW 1 who is aged ten (10) years presently might not remember all the details of this case without being coached. In any event, it could also be traumatic to ask her to repeat the evidence she adduced in court.

45. Further, there is a chance that witnesses herein may not be traced or be readily available which could cause delays in a fresh trial thus infringing on the Appellant's right of liberty. Indeed, Article 29 (a) of the Constitution of Kenya, 2010 stipulates as follows:-

> **"Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause."**

46. Notably as was stated in the case of **Ahmed Ali Dharmsi Sumar vs Republic (Supra)** and restated in **Fatehali Manji vs The Republic (Supra)**, in deciding whether a case is suitable for re-trial, each case depends on the particular circumstances. As can be seen herein, it was the considered opinion that ordering a re-trial herein would not be in the interests of justice as the same had the potential of greatly prejudicing the Appellant.

47. In the premises foregoing, this court found and held that Amended Ground No (2) was merited and it is hereby upheld.

III. PROOF OF THE PROSECUTION CASE

48. Having reached the aforesaid conclusion, this court did not find any value in analysing the evidence that was adduced during trial.

DISPOSITION

49. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was filed on 15th April 2016 was merited and the same is hereby allowed as ordering a Re-Trial would greatly prejudice him.

50. This court hereby orders that the Appellant herein be released forthwith unless he be held for any other lawful cause.

51. It is so ordered.

DATED and **DELIVERED** at **KIAMBU** this **26th** day of **June** 2018

J. KAMAU

JUDGE