REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NUMBER 51 OF 2017

(From original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 878 of 2015, **A B Kibiru, CM** on 13th April, 2017)

DOUGLAS MUTUNGA MUTHENE...................APPELLANT

VERSUS

REPUBLIC…..RESPONDENT

JUDGEMENT

1. The appellant, **Douglas Mutunga Muthene**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No 878 of 2015 with the offence of defilement contrary to section 8(1)(3) as read with section 8 of the ***Sexual Offences Act. No. 3 of 2006***. The particulars were that the appellant on the 28th day of May, 2015 at around 1700 hour within Machakos County intentionally caused his male organ namely penis to penetrate into the female organ namely vagina of J K, a child aged 12 years. Alternatively, the appellant was charged with the offence of Committing an Incident Act with a Child contrary to section 11(1) of the ***Sexual Offences Act. No. 3 of 2006,*** the particulars being that on the 28th day of May, 2015 at around 1700 hour within Machakos County intentionally touched the female organ namely vagina of J K, a child aged 12 years with his male organ namely penis.

2. After hearing the Learned Trial Magistrate found that there was no evidence to sustain a charge of defilement but found that there was sufficient evidence to prove beyond reasonable doubt that the appellant attempted to defile PW1. Accordingly, the appellant was convicted of the offence of attempted defilement contrary to section 9(1) of the ***Sexual Offences Act***. No. 3 of 2006, pursuant to section 215 of the ***Criminal Procedure Code***. He was accordingly sentenced to serve Ten (10) years imprisonment.

3. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

> **1. That, the Learned Trial Magistrate erred in law and facts by convicting the appellant on a defective charge sheet.**
>
> **2. That, the Learned Trial Magistrate erred in both law and fact by failing to consider the reason that the accused person was unrepresented of limited education and does not speak the language of the court.**
>
> **3. That, the Learned Trial Magistrate erred in both law and facts by convicting him on count one and two whereas there was absolutely no evidence capable of supporting conviction.**

4. That the entire case for the prosecution was not proved to the standard needed in law.

5. That the provisions of section 169(1) of the CPC was not adhered to in relation to the appellant's alibi defence statement.

6. That the trial magistrate shifted the burden of proof upon the appellant.

4. Accordingly to the appellant, the charge sheet was not properly drawn hence it was not possible for one to properly understand the offence with which the appellant was charged. It was submitted that though the offence with which the appellant was charged was "defilement contrary to section 8(1)(3) as read with section 8 of the ***Sexual Offences Act. No. 3 of 2006", there is nowhere in the sexual charge where it is written "***as read with section 8 of the ***Sexual Offences Act."*** According to the appellant since the trial court found that the charge of defilement was not proved, in the absence of an amendment, the evidence was at variance with the particulars of the offence in the charge sheet. It was therefore submitted that there was a mistrial contrary to section 124 of the ***Criminal Procedure Code*** and the appellant relied on **Yongo vs. Republic [1983] KLR**, **Nelson Kitese Maweu & 2 Others vs. Republic** and **Joel Kariunga & Anor. vs. Republic H.C.CR.APP No. 348 of 1989**.

5. It was further submitted that the prosecution failed to prove its case to the prescribed standards. According to the appellant the complainant did not indicate whether the appellant inserted his penis into her vagina as she neither stated that she felt pain nor that she led as a result thereof. The appellant submitted that the complainant did not even disclose to her sister what had happened to her and instead claimed that she had been sent to get milk. It was therefore submitted that the allegations of defilement were not proved and were false since on examination there was no evidence of penetration. Based on the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283** and **Woolmington vs. The DPP [1935] AC 462**, it was submitted that as there was not credible evidence, the case was not proved beyond reasonable doubt.

6. According to the appellant, his defence was that of an alibi. In his submissions the trial court did not however adhere to the provisions of section 169(1) of the ***Criminal Procedure Code***. It was contended that the trial court relied on hearsay.

7. According to the appellant, by convicting him of the offence of attempted defilement as opposed to defilement, the trial court set out to fill in the gaps left by the prosecution hence he was not accorded a fair trial pursuant to Article 49(1) and 50(1) and (2) of the Constitution. It was his case that the trial court shifted the burden of proof upon him, the appellant, yet it was upon the prosecution to dislodge his defence. In this respect the appellant relied on **Eliud Kamau Njuguna vs. R Cr. App. No. 82 of 2010**.

8. It was therefore the appellant's case that the appeal ought to succeed in its entirety.

9. The appeal was however opposed by the Respondent. According to the Respondent, it is true that the charge sheet indicates that the appellant was charged contrary to section 8(1)(3) as read with section 8 of the ***Sexual Offences Act*** instead of contrary to section 8(1)(3) or contrary to section 8(1) as read with section 8(3)(3) being the subsection that prescribes punishment. However the Respondent relied on section 382 of the ***Criminal procedure Code*** which forbids an appellate court from reversing or altering a finding, sentence or order passed by a court of competent jurisdiction on account of an error, omission or irregularity unless the error has occasioned a miscarriage of justice. In this case it was submitted that from the proceedings, the appellant understood the charge he was facing and hence did not raise the issue of the defect in the charge sheet. To the contrary the appellant as aware of the charge facing him and took active part in the proceedings. In support of the submissions the Respondent relied on **Paul Katana Njuguna vs. Republic [2016] KLR** and submitted that the defect here is not fatal since the appellant understood the chare he was facing from the time of the plea, prosecution's case and even during defence hearing, hence he faced no confusion as to the offence he was facing. He further did not raise the issue during his trial.

10. In any case, it was submitted that the appellant was not convicted of the offence of defilement but that

of attempted defilement. According to the Respondent under section 179 of the ***Criminal Procedure Code***, the court has the power to substitute an offence with a lesser one based on the evidence which the court rightly did in this case in the absence of evidence of penetration.

11. With respect to the right to legal representation it was submitted that since the appellant was not a minor at the time of the commission of the offence; was not of unsound mind and the offence with which he was charged was not a capital offence, there was no warrant for him to be entitled to legal representation by the state.

12. As regards the defence of alibi, the Respondent submitted that the appellant did not raise the issue early enough during the trial to enable the prosecution deal with it. In this respect the Respondent relied on **Karanja vs. Republic [1983] KLR 501**.

13. It was therefore submitted that the decision was well reasoned and supported by evidence and the court was urged to dismiss the appeal.

14.According to PW1, the appellant on 28th May, 2015 at 6.00pm she was at home with his brother, PW2 when the appellant who was her cousin went and told her that he was going to take tea and asked PW1 to get him milk from the neighbour. After being given money for the said purpose by the appellant and as PW1 embarked on the said mission, the appellant offered to give her a ride on a motor cycle and the appellant took her to his house, locked it and disappeared. He then returned shortly, removed PW1's clothes and pant and slept on PW1. According to PW1, the appellant had sex with her by inserting his penis into her. Upon her screams, PW1's brother, PW2, went and the appellant opened the door for her to leave and she went home. She however informed her sister that she had been sent to get milk and it was PW2 who relayed the information to her father after which she recorded her statement with the police and was taken to Hospital for treatment and the matter reported to the police. In her evidence she saw blood oozing from her private part. In cross-examination by the appellant, PW1 confirmed that from the appellant's house one can hear screams at their place.

15. PW2, **S V M**, testified that on 28th May, 2015, the appellant went to their home and told him that he wanted to send PW1 to get milk for the appellant. At this point the appellant was carrying PW1 on her motor cycle. Though he raised an issue, the appellant left with PW1 and later he saw the motorcycle outside the appellant's house when he heard screams coming therefrom. Upon approaching the house, he found it locked and he asked the appellant to open it and at the same time called out PW1. When the door was opened, PW1 came out unhappy and they went home where he informed his father when he arrived at 9.00pm of what had transpired. Upon cross-examination, PW2 stated that the appellant went and found them at home.

16. PW3, who was PW1's father testified that he received a call from his wife who informed him that the appellant had picked PW1 took her to his house and defiled her. Upon arriving at home at 8.50pm he called PW1 and PW2 who confirmed that the incident had taken place. He then reported the matter to the police. According to her PW1 was 12 years old and he produced her birth certificate to confirm this. In cross examination, PW3 confirmed that PW1 bathed because no one informed her not to do so.

17. PW5, **Corporal Prisca Cherop**, was the investigating officer. According to her on 29th May, 2015 she was at the crime office at Chumvi Police Station where she was stationed when she perused the OB and found that a case had been minuted for her investigation which case involved PW1. According to her she recorded PW1s statement after which she issued her with a P3 form after taking possession of PW1's blood stained pant which was produced as an exhibit. She then effected the arrest of the appellant and charged him with the instant offence. In her evidence, PW1 was 13 years from her birth certificate.

18. PW5, **Dr John Mutunga**, testified that upon examination of PW1 it was found that her private parts were inflamed though her hymen was intact. Accordingly a P3 Form was filled in for her. He accordingly produced the P3 Form and post rape care form. In his evidence PW1 was defiled and her injuries were caused by a penis. He testified that there was blood on her underpants. In an extensive cross-examination by the appellant, PW5 admitted that he did not treat PW1 and reiterated that PW1's hymen was intact.

According to him, penetration does not mean that the hymen has to be broken and confirmed that semen was not found after urine analysis. According to him penetration depends also on age. He discounted the allegation by the appellant that the blood found on the pants could have been that of an animal and insisted that it was human blood. In his evidence PW1's external genitalia was swollen

19.At the close of the prosecution evidence, the appellant was placed on his defence. According to him, on 29th May, 2015, he had been contracted by a lady to ferry her children in the morning and in the evening. He accordingly took the children to school and returned her to release the goats for grazing. He then proceeded with his work till 11.00am when he called by his bother to pick the children on his behalf. He then proceeded to Machakos Huduma Centre to pick his ID and left at 3.00pm to Kithemboni to pick some cows. In his statement he arrived there at 6.00pm, found his grandmother and spent the night there. The following morning he got information alleging that he had raped his cousin and ran away. He was later arrested and charged with the present offence.

20. The appellant called his grandmother, **Kyunu Beatrice**, as DW2 who testified that on the date the appellant was alleged to have defiled PW1, the appellant was at her place where he spent the night. In cross-examination, she could however not recall the date when the appellant was at her place.

21. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.**

22. In this case, the prosecution evidence was that on 28th May, 2015, PW1, the complainant was at home with PW2 when the appellant approached her and requested her to go and buy for him milk for the purpose of preparation of tea. However, the appellant offered to give her a lift on his motor cycle and instead rode home, locked her up, removed her clothes and inserted his penis into her vagina. That there was some kind of contact between a penis and PW1's genitalia was confirmed by the medical report.

23. In his evidence, the appellant did not narrate what took place on the material day. He only restricted himself to the evets of the following day. Whereas, PW2 confirmed that he found PW1 locked in the appellant's house, DW2 on the other hand was unable to state with certainty the date when the appellant actually was in her home.

24. In this case, there is no doubt that PW1 knew the appellant very well since they were related. PW2 also knew the appellant well and it was his evidence that it was the appellant who despite his reservations left with PW1. The Learned Trial Magistrate found, based on the evidence that it was the appellant who picked PW1 and took her to his house and that the appellant was well known to both PW1and PW2 and that the offence occurred during the day. With regard to the alibi, the Learned Trial Magistrate discounted the same as the alleged alibi was not on the date of the commission of the offence. Accordingly, the Learned Trial Magistrate had no difficulty in finding that the offence against the appellant for attempted defilement was proved beyond reasonable doubt.

25. I have myself re-evaluated the case as presented before the trial court and it is clear that the evidence against the appellant was watertight. The appellant was well known to PW1 and PW2. He left with PW1 and PW2 found them locked in his house. I have no reason to disbelieve PW2 that he found PW1 locked in the appellant's house. The medical evidence proved that there was in the least an attempt to defile PW1. There was no one else in that house apart from the appellant. Accordingly the attempt could only have been by the appellant. There was no doubt at all that PW1 was aged 13 years.

26. In the foregoing premises, the inescapable conclusion is that the evidence pointed to the appellant as the person who in the least attempted to defile PW1 who was aged 13 years.

27. As regards the defence of alibi, it is clear that there was no allegation as to the appellant's whereabouts on the material date, 28th May, 2015. Accordingly, the defence of alibi does not inure to the appellant.

28. As regards the defect in the charge sheet, I agree that the same ought to have been better drafted. However, dealing with the framing of a criminal charge, the Supreme Court of India in **Willie (William) Slaney vs. State of Madhya Pradesh, [A.I.R. 1956 Madras Weekly Notes 391],** held that:

> **"We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent…We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms that it must all be "explained to him", so that he really understands … but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality. … The essence of the matter is not a technical formula of words, but the reality. Was he told" Was it explained to him" Did he understand" Was it done in a fair way…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."**

29. Therefore as was held in **Amos -v- DPP [1988] RTR 198 DC** uncertainty in the mind of the accused person is the **"vice at which the rule against duplicity is aimed and to counter a true risk that there may be confusion in the presenting and meeting of charges which are mixed up and uncertain".** I therefore associate myself with the holding in the English case of **Ministry of Agriculture & Fisheries and Food -v- Nunn [1978] Ltd [1990], Cr. LR 268 DC**, that the question of duplicity is one of fact and degree; and that the purpose of the duplex rule is to enable the accused to know the case he has to meet.

30. It was therefore held in **Paul Katana Njuguna v Republic [2016] eKLR** that:

> **"In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective. In this appeal, the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under Section 382 of the Criminal Procedure Code."**

31. It was accordingly opined in **The State vs. Matlhogonolo Masole, 1982 (1) BLR 202 (HC) the High Court of Botswana,** citing with approval **(R vs. Greenfield, (1973) 57 Cr. App.Rep. 849)** thus:

> **"... there is, however, one over-riding matter to be considered and that is whether or not the accused was prejudiced by the duplicity in the charge, as duplicity in a count is a matter of form, not a matter of evidence."**

32. In this case, it is clear that the appellant knew exactly the offence with which he was charged. He was able to cross-examine the witnesses as was shown by his extensive cross-examination of the doctor and not only gave evidence but also called a witness to support his case. In **Isaac Nyoro Kimita & Another**

vs. Republic [2014] eKLR, the Court of Appeal expressed itself as follows.

> **"In this case, we have no doubt in our minds that the appellant knew that it was practically impossible for him and others to have *"jointly"* defiled the complainant. He therefore understood the charge against him to have been that on the material date, while together, with others, engaged in an illegal enterprise, they successively defiled the complaint. This is confirmed by the fact that in the trial, the appellant extensively cross-examined prosecution witnesses and defended himself. In the circumstances, we find that the defects in the charge were minor and did not prejudice the appellant. They did not occasion any miscarriage of justice or violate the appellants' constitutional right to a fair trial."**

33. As regards the issue whether the prosecution proved it case to the required standards, it is clear that there was no mistake as to the identity of the culprit in this case who was not only well known to the complainant but was related to her. The complainant was picked by the appellant in broad daylight in the presence of her brother and there is evidence that the complainant was found locked in the appellant's house where the offence was committed. Dealing with the issue it was held in **Okeno vs. R, [1972] EA 32** that**:**

> **"I have considered the evidence as a whole, and found no fault with the manner in which the learned magistrate made her assessment of the same. The trial court had entertained no doubts at all as to the truthfulness of the complainant as a witness and her demeanour had commended itself as a demeanor of candour. The complainant did not go missing from the view of her parents for nothing, she had been abducted and detained by 2nd appellant who held her for some 16 days; during that period the appellants herein committed unrelenting defilement upon her particularly so, 2nd appellant; after the most severe sexual harm had been occasioned to the complainant, 2nd appellant dumped her near a clinic; the complainant very well saw her molesters, these are men she knew, and she gave their names to the police."**

34. In the instant case I am similarly of the view that the ingredients of the offence with which the appellant was convicted was proved to the required standards. As regards the substitution of the offence Section 179 of the ***Criminal Procedure Code*** provides that:

> ***179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
>
> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.***

35. Section 191 of the ***Criminal Procedure Code*** provides that:-

> ***The provisions of Sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of Sections 180 to 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of Section 179.***

36. Section 179 aforesaid was dealt with by the Court of Appeal in the case of **Rashid Mwinyi Nguisa & Another vs. Republic [1997] eKLR** in which it was held:-

> **"In short this means that apart from recognizing that Section 179 sets out the principle of law applicable in a trial with respect to conviction for offences other than those charged, and that this general principle shall apply as such notwithstanding that Sections 180 to 190 deal with special cases in a trial…..Section 179 of the Criminal Procedure Code cannot be in derogation of the appellate powers of the High Court contained in Section 354(3) (a) of the same code."**

37. The same Court in **Kalu –vs- Republic (2010) 1 KLR** observed as follows:-

> **"With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading:-"Convictions for Offences Other than Those Charged" and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder".**

38. The ***Black's Law Dictionary*** 9th Edition page 1186 defines a cognate offence as:-

> ***A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.***

39. I agree with **Ngenye-Macharia, J** in **David Mwangi Njoroge vs. Republic [2015] eKLR** that:

> **"…the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with."**

40. There is no doubt that the offence of attempted defilement is a cognate offence to the offence of defilement. Accordingly the Learned Trial Magistrate properly convicted the appellant of the offence of attempted defilement.

41. In the premises this appeal fails and is dismissed.

42. Right of appeal 14 days.

43. Judgement accordingly

Judgement read, signed and delivered in open court at Machakos this 25th day of June 2018.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in Person

Ms Mogoi for the Respondent

CA Geoffrey