



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL 105 OF 2014

ANDREW MUTUA KINJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. V. Kachuodho RM delivered on 1st April 2014 in Criminal [Case No. 630 of 2012](#) in the Chief Magistrate's Court at Mombasa)

JUDGMENT

The Appeal

1. The Appellant was convicted of, and sentenced to serve life imprisonment for the offence of defilement, contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars of the offence were that on 25th February 2012 in Mombasa District within Coast Province, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of MS, a child aged three and a half years. The Appellant had also been charged with an alternative offence of an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

2. The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Petition and Memorandum of Appeal filed in Court on 22nd April 2014, as well as in his Amended Grounds of Appeal and submissions dated 28th November 2018, which the Appellant wholly relied on during the hearing of the appeal on 11th December 2018. The grounds of appeal are that:

1. THAT the trial magistrate erred in law and fact by convicting the Appellant without considering that the charge sheet that was exhibited was fatally defective.
2. THAT the trial magistrate erred in law and fact by convicting the Appellant without noting that the case was full of massive contradictions and discrepancies, hence a conviction could not have been attained.
3. THAT the trial magistrate erred in law and fact by convicting the Appellant without considering that witnesses who were adversely mentioned were never compelled to appear before Court.
4. THAT the trial magistrate erred in law and fact by convicting the Appellant without considering that no D.N.A. test was carried out to prove who truly defiled the complainant.

3. The Appellant in his submissions on his first ground of appeal argued that the charge sheet lacked the term "unlawful" which rendered it defective under section 137 and 214 of the Criminal Procedure Code. Further, that the evidence adduced was contradictory as to the date he was arrested with some witnesses testifying it was on 29th February 2012, and another 26th February 2012, and as to the date while the offence was alleged to have been committed with one witness stating it was on 29th January 2012, and others stating it was on 29th February 2012. Further that the medical evidence by PW1 contradicted that of PW3 that there was spermatozoa on the complainant's legs.

4. The Appellant also urged that the people who were said by PW2 to have witnessed him kneeling before the complainant were not called to testify, and that no DNA test was done of the sperms that were found on the complainant to determine that they were his sperms.

5. Mr. Masila, the learned prosecution counsel, made oral submissions in Court during the hearing of the appeal. His case was that the prosecution witnesses proved that the complainant committed the offence, particularly PW3 who was the complainant, and PW2, the complainant's mother who found the Appellant with the complainant. Further, that the age of the complainant was proved by a birth certificate produced in the trial Court as an exhibit. In addition that the doctor who testified as PW1 confirmed that the complainant was defiled, and lastly, that the sentence meted out was legal as the victim is below the years old.

6. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

7. The Prosecution called five witnesses to testify. PW1 was Dr. Lawrence Ngari, a doctor at Coast General Hospital who produced a P3 form on the results of the examination of the complainant on 29th February 2012 as the Prosecutions Exhibit 1. PW2 was CMH, the complainant's mother, who gave an account of the events of 29th February 2012 and produced the complainant's birth certificate as the Prosecution's Exhibit 2. PW3 was the complainant, and after a *voire dire* examination, she testified as to the events of the day when the Appellant is alleged to have defiled her.

8. The remaining prosecution witnesses were Said Mwanzombo Said (PW4), a policeman who was going to work on 29th January 2012 and went to the scene of the offence after hearing screams, and arrested the Appellant. PW4 was PC Lydia Wambui Wambugu who was attached to Central Police Station, and testified that the Appellant was brought to the police station on 29th February 2012 and charged with defilement. She testified that the complainant was then taken to hospital and produced the Post Rape Care form as Exhibits 3 (a) and (b).

9. The Appellant was found to have a case to answer and was put on his defence. He gave sworn testimony that on 29th February 2012 a certain lady gave him work to do and when he asked for his money, the lady hit him and he lost consciousness. That when he came to, there were police on patrol who arrested him and took him to the police station on allegations he did not know about.

The Determination

10. The issues raised by the grounds of appeal and arguments made by the Appellant and Prosecution are firstly, whether the Appellant was convicted on the basis of a defective charge; secondly if so, whether he was convicted for the offence of defilement on the basis of sufficient and satisfactory evidence.

11. On the first issue, the Appellant argued that the charge was defective as the particulars thereof did not include the phrase "unlawful". The question as to whether 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."

12. 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."

13. The record of the trial Court shows that on 28th August 2013, the prosecution applied to amend the charge to include an additional charge. The amended charge included the alternative charge. The charge sheet clearly indicated that the Appellant was charged with a main charge of defilement, contrary to section 8(1) as read with (2) of the Sexual Offences Act, and an alternative offence of an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the two offences were provided in terms of the date and place of the offence, the acts constituting the offence and the name and age of the victim. The Appellant thereupon pleaded not guilty to both the main count and alternative charge.

14. As regards the particulars of the two offences, the main charge stated that the Appellant "intentionally and unlawfully" caused his penis to penetrate the vagina of the complainant whose age was provided. Likewise the alternative charge stated that the Appellant "intentionally and unlawfully" caused his penis to come into contact with the vagina of the complainant. Therefore the unlawfulness of the acts alleged to be offensive was clearly captured in the charge sheet. The charge sheet was therefore not defective.

15. On the second issue, as to whether the Appellant was convicted on the basis of sufficient and satisfactory evidence, the ingredients 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."

16. The Appellant alleges that evidence presented by the Prosecution was contradictory and was not corroborated. The key witness in this regard was PW3 who was the complainant, who testified that on the material day, she went to urinate behind a tree, and that the Appellant who she knew put his "mdudu on her pupu". When asked where her "pupu" was she pointed at her private parts. "Mdudu" is a Kiswahili word commonly used to refer to a penis. PW3 further testified that she then called her mother, who came and beat the Appellant with a stick.

17. PW3's testimony was corroborated by that of PW2 who was her mother, and who confirmed that on 29th February 2012, she sent PW3 outside the house to urinate at around 4pm, and that she then heard PW3 calling and went to the scene and found the Appellant kneeling near PW3, and sperms were falling from his penis on the child's legs. PW1 also corroborated PW3's evidence, and testified that upon examination of PW3, he found that her hymen had been freshly perforated with lacerations on the vaginal opening. There was however no spermatozoa found on the vagina.

18. The Appellant was therefore not only identified by PW3 as the person who was inserting his “mdudu” into her private parts, but the Appellant was also placed at the scene by PW2 who found him in a compromising state next to PW3, and by PW4 who arrested him at the scene of the crime. It is not disputed that PW3 was 3½ years at the time of the offence and the birth certificate produced as an exhibit showed that she was born on 14th July 2008.

19. Lastly, section 2 of the Sexual Offences Act defined penetration as “the partial or complete insertion of the genital organs of a person into the genital organs of another person”, and the P3 form produced as an exhibit by PW1 showed that PW3’s hymen was freshly perforated, which was evidence of penetration.

20. The Appellant alleges that persons who witnessed the defilement were not called to testify. Section 143 of the Evidence Act provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact. In the present appeal, the material facts that required to be proved were the ingredients of defilement, and PW3’s evidence of penetration was corroborated by the evidence of PW2 and PW4 who were part of the people at the scene, and the medical evidence produced by PW1, and was sufficient to prove defilement by the Appellant without requiring further evidence including DNA evidence.

21. The Appellant also alleged inconsistencies as regards the date of his defilement and arrest. The evidence of PW2 and PW5 are clear as to the date of the offence and his arrest being 29th February 2012. PW1 also examined PW3 on 29th February 2012. The only inconsistent evidence was that of PW4 which referred to the date of arrest as 29th January 2012, and in light of the evidence by PW5 who received the Appellant at the police station on 29th February 2012, was not a material inconsistency. In any event it is not an inconsistency that would affect the guilt or otherwise of the Appellant, as all the elements of the charge against him and of the offence he was convicted of were proved by the evidence of the other witnesses.

22. In addition, section 214(2) of the Criminal Procedure Code provides as follows:

“(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.”

It is therefore not necessary to amend a charge on account of a contestation by the Appellant as to the time when the offence was committed as alleged in this appeal, and to this extent any variance in the charge sheet as to the date of the commission of the offence is not material.

23. I accordingly find the Appellant’s appeal not to have merit and uphold and affirm the conviction of the Appellant for the offence of defilement, contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, and confirm the sentence of life imprisonment imposed upon the Appellant for this conviction.

24. It is so ordered.

DATED AT MACHAKOS THIS 19TH DAY OF DECEMBER 2018.

P. NYAMWEYA

JUDGE