REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO 20 OF 2018

WILLIS ANGATIA SHIKANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(*An appeal against the original conviction and sentence of Hon. P.K. Mutai RM**

delivered on 28th December 2017 in Criminal Case No. 55 of 2017

in the Chief Magistrate's Court at Kwale)

JUDGMENT

The Appeal

1. The Appellant was convicted and sentenced to serve fifteen (15) years imprisonment. He had been charged with a main count of defilement, contrary to section 8(1)(4) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between 2015 and April 2017 at [Particulars Withheld] area in Diani Location Kwale County within Coast region, the Appellant intentionally caused his penis to penetrate the vagina of JKN, a girl aged 16 years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, based on similiar particulars.

3. The Appellant pleaded not guilty to the charges in the trial, and 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 as stated in his Amended Petition of Appeal dated 9th October 2018 that was filed in Court on 16th October 2018 by his Advocates, Chala & Company Advocates, are as follows:

a) That the evidence lacked corroboration and section 124 of the Evidence Act was not properly applied.

b) That the evidence was contradictory and inconsistent.

c) That the charge was not supported by the evidence.

d) That the trial magistrate erred in law and fact in convicting the Appellant under section 215 of the Criminal Procedure Code which is not the applicable section in relation to his case.

e) That in the circumstances both the conviction and the sentence are not merited and as such the conviction should be quashed and the sentence set aside.

4. The appeal proceeded for hearing on 4th September 2018, and Ms. Chala, the Appellant's Advocate, relied on written submissions dated 9th October 2018 that she filed in Court, and which she highlighted during the hearing. The key submissions by Ms Chala were that the victim gave two accounts of the alleged defilement which were contradictory, and was also contradicted by the evidence of PW2 as to the number of times the victim was defiled.

5. Further, that in both accounts of defilement, the victim testified that her mother was aware, but the victim's mother was not called as a

witness to corroborate the accounts of defilement. In addition, that PW2's and the investigating officer's testimonies did not corroborate the account given by the victim, yet they had been informed of the defilement by the victim.

6. The Appellant further submitted that the trial magistrate made a wrong finding in law that section 124 of the Evidence Act provides that corroboration is not mandatory when a child is of tender years, yet the correct position as held in **David Ochieng Aketch vs Republic (2015) e KLR** is that corroboration is not required of a sexual victim's evidence where the Court is satisfied that the witness is telling the truth.

7. It was also urged that the charge sheet was defective, as the offence was charged under section 8(1)(4) which does not exist in law, and the evidence adduced did not support the charge, as no evidence was adduced of the defilement having taken place in 2015 or 2017. In addition that the failure by the victim, who was 16 years old, to remember the dates of the offence was a gap in the prosecution's case as held in **Guni Musungu Mwandia vs Republic (2017) e KLR.**

8. Lastly, that the trial magistrate erred by convicting the Appellant under section 215 of the Criminal Procedure Code which makes no reference to the offence and penalty, and only sets out the procedure to be employed by the trial courts after taking evidence. Reliance was placed on the decision in **Raphael Ogongo Akumu vs Republic (2008) e KLR** for this position.

9. Mr. Masila, the learned prosecution counsel, relied on two sets of written submissions filed in Court by the Prosecution, dated 16th October 2018 and 7th December 2018, which he briefly highlighted. The Prosecution's case is that the prosecution witnesses gave a chronological account of the events that took place, which remained unshaken after cross-examination and which showed that the complainant was defiled. Further, that the defence offered by the Appellant did not cast any doubt on the prosecution evidence, and the Appellant was positively identified by the complainant as he was a close relative, and had lived with the complainant and her family.

10. In addition, that corroboration is no longer required in sexual offences under section 124 of the Evidence Act, and that in any event, there was corroboration by PW2 and by the P3 form produced as an exhibit, and that corroboration does not require the calling of many witnesses on the same fact.

11. The Prosecution urged that the charge sheet was properly drafted, as the Appellant was charged under section 8(1) as read with section 8(4) of the Sexual Offences Act, and the Appellant understood the charges facing him as defilement of a girl aged 16 years. In addition, that the charge was supported by evidence as PW1 stated that the defilement occurred on several occasions between 2015 and 2017, her hymen was absent, and her age was evidenced by her birth certificate.

12. Lastly, that the conviction under section 215 of the Criminal Procedure Code was not material, and if found to be material, then a retrial ought to be ordered as the error was not on the prosecution's side but on the trial court's side.

13. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence 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**).

14. The Prosecution in this respect called 5 witnesses. PW1 was JKN, who was the complainant, and who gave an account of the events that occurred in August 2015 when the Appellant is alleged to have defiled her, and in May 2017 when she told her aunt about the defilement. PW2 was JAM, the complainant's said aunt, who also testified as to the information she received from the complainant about the defilement, and the actions she took thereafter.

15. Harum Omariba, an officer with Cradle organization, testified as PW3, and on counseling the complainant and referring her to Diani Police Station. PC Lillian Wangui (PW4) who was attached to Diani Police station testified on the report of defilement that she received from the complainant and how she subsequently arrested and charged the Appellant. She also produced as exhibits, the complainant's birth certificate (Prosecution's exhibit 1), and a letter from the complainant's school confirming that she was a student there (Prosecution's exhibit 4).

16. The last prosecution witness (PW5) was Zainab Jembe, a clinical officer at Diani Health Centre. She testified that she examined the complainant on 18th June 2017 and filled a P3 form. Further, that the complainant had earlier on been treated at Malindi Hospital, and PW5 produced the P3 Form and treatment notes as Prosecution's Exhibits 3 and 2 respectively.

17. The Appellant was put on his defence, and he gave an unsworn statement and did not call any witnesses. He testified that he was arrested from his place of work and confirmed that the complainant was his relative and he had stayed at their home. He denied the offence and alleged that he was being charged because he refused to give his aunt part of money that he had been paid, which she had demanded for having accommodated him.

The Determination

18. I have considered the arguments by the Appellant and Prosecution, and I find that the issues for determination by the court are firstly, whether the Appellant was convicted for the offence of defilement on the basis of a defective charge, and if not, whether his conviction for the offence of defilement was on the basis of sufficient and consistent evidence, and was proper in law.

19. The charge that was read to the Appellant and to which he pleaded indicates that he was charged with defilement contrary to section 8(1)(4) of the Sexual Offences Act, and provided the particulars of the charge. In **Peter Ngure Mwangi v Republic, [2014] eKLR** the Court of Appeal sitting at Nairobi 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.

20. 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."**

21. 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."**

22. The charge sheet in the trial Court in this regard stated the correct sections creating the offence of defilement and penalty which were sections 8(1)(4) of the Sexual Offences Act, and the only mistake was a typographical error in terms of a missing words namely the word "and" or "as read with" between the figures (1) and (4). Turning to the second limb as to whether this typographical mistake 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."**

23. In the instant appeal, I find that the typographical error in the charge sheet did not materially affect the proceedings in the trial Court, as the charge sheet clearly indicated the particulars of the offence, which included the dates of the offence, the place of the offence, the act constituting the offence and the name and age of the victim, which the Appellant knew from the time of pleading to the charge, and he was thereby not in any way prejudiced by the typographical error in the charge sheet. The mistake as to the applicable sections is therefore one which in my view is curable under section 382 of the Civil Procedure Code by this Court on appeal.

24. The Appellant also argued that the charge was defective as the offence was not supported by the evidence that was presented by the Prosecution as regards the time of the alleged defilement, which the Appellant submitted was shown to be in 2015 only, and that no evidence was brought of defilement of the victim in 2016 and 2017. Section 214(1) of the Criminal Procedure Code in this regard provides as follows:

> **"(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."**

25. The Court of Appeal in **Yongo vs Republic** ***[1983] KLR, 319*** did hold that a charge that is not disclosed by evidence is defective and stated as follows in this regard:

> **"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."**

26. This holding was explaining the circumstances when a charge is considered to be defective in substance, so as to guide a court when it is altering the said charge. However, section 214(2) of the Criminal Procedure Code further 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."

27. It was therefore not necessary to amend the 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 the charge sheet was therefore not defective.

28. As regards 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."

29. The Appellant alleges that evidence presented by the Prosecution was contradictory and was not corroborated. The key witness in this regard was PW1 who was the complainant, who was the only witness who was present during the commission of the alleged offence. PW1's testimony was that in August 2015, the Appellant who was her uncle used to visit her when she was alone at home and he forced her to have sex with him. That the second time the Appellant defiled her is when she was sent by her mother to his house to collect some CDs. PW1 also testified that they had sex on several occasions. Further, that on 2nd May 2017 she told her aunt that the Appellant had raped her on several occasions.

30. PW2 on her part was not present during the said defilement, and testified as to what the complainant told her about engaging in a sexual acts with the Appellant since she was in class eight, and that it was the fourth time. That she then reported the matter to the children rights officer. The P3 form produced as an exhibit by PW5 showed that the Appellant's hymen was broken

31. It is my view in this regard that PW1's evidence was consistent as to the alleged defilement in August 2015, and therefore did not require corroboration under section 124 of the Evidence Act. Section 124 of the Evidence Act in this regard 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."

32. While the trial Magistrate in his judgment did err in holding that section 124 of the Evidence Act provides that corroboration is not mandatory where the minor is a child of tender age, he did find that the complainant's evidence was not dislodged during examination, and he had no reasons to doubt her testimony. Therefore, the trial Court in essence properly applied the provisions of section 124, despite the erroneous interpretation of the section.

33. This finding notwithstanding, this Court finds that PW1's evidence was not sufficient to prove penetration, which is a key ingredient of defilement. Penetration by the Appellant of his genital organ in any part of the complainant's genital organ, is key to a determination as to whether there was defilement, in accordance with the definition of penetration that is set by section 2 of the Sexual Offences Act as "the partial or complete insertion of the genital organs of a person into the genital organs of another person". The record in this regard shows that PW1 testified that she had sex with the Appellant and that the Appellant defiled her.

34. Evidence of having sex does not necessarily entail penetration and is not conclusive proof of penetration. Sex is defined in **Black's Law Dictionary , Ninth Edition** at pages 1498-1499 as the structures and functions that distinguish a male from a female; sexual intercourse; or sexual relations. In addition, sexual relations is defined either to be sexual intercourse or physical sexual activity that does not necessarily culminate in sexual intercourse.

35. Therefore, it is not always the case that sex is synonymous with penetration, hence the definition of penetration that is set by section 2 of the Sexual Offences Act, which is required to be proved beyond reasonable doubt. This Court in **Julius Kioko Kivuva v Republic [2015] eKLR** held as follows as regards specificity required in the proof of penetration:

"Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal".

36. PW1's testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. In addition the term "defiled" or "defilement" is a technical term, and in the context of this appeal was an offence which required the essential ingredients to be brought out in evidence. Therefore a statement by PW1 that she was defiled was not sufficient to prove the key ingredient of penetration.

37. This Court is also for the same reason not in a position to make a finding as to whether the alternative offence of indecent act with a child was proved. An indecent act is defined in section 2 of the said Sexual Offences Act as an unlawful intentional act which causes—

> **"(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;**
>
> **(b) exposure or display of any pornographic material to any person against his or her will".**

38. No specific evidence was adduced by PW1 in relation to any contact between a part of the Appellant's body and her genital organs or other relevant part of her body. The only specific evidence was that the Appellant used to "release sperms down during ejaculation". The gaps in PW1's evidence can only be construed in the Appellant's favour, taking into account that it is the Prosecution that bears the burden of proving the offences without a reasonable doubt.

39. On the last issue as to whether the conviction was proper in law, the Appellant contended that the conviction of the Appellant by the trial magistrate under section 215 of the Criminal Procedure Code was erroneous, as it did not specify the offence the Appellant was being convicted of. Section 215 of the Criminal Procedure Code provides as follows on the decision required to be made by a court after a criminal trial:

> **"The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him."**

40. It was therefore not erroneous for the trial magistrate to convict the Appellant under section 215 of the Criminal Procedure Code, as it is one of the decisions that can be made by a trial Court under the said section. However, section 169(2) of the Criminal Procedure Code in addition provides as follows as regards the content of a judgment after a criminal trial:

> "(**2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.** "

41. The trial Magistrate in his judgment did not indicate the offence which the Appellant was being convicted of, and the section of the law creating the offence. To this extent the Appellant's conviction and sentencing was irregular, considering that the Appellant had been charged with a main offence and an alternative offence, which attracted different sentences. I therefore find for the above reasons that the Appellant's conviction was not safe.

42. Mr. Masila sought a retrial in the event that the conviction was irregular. The principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal as follows:

> **"In general, a retrial 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 purposes 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 interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.**"

43. In **Mwangi v Republic [1983] KLR 522** the Court of Appeal also held thus:

> **"We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."**

44. I am convinced that this is not a proper case for retrial. I have in this regard particularly noted that the facts put forward of the offence of defilement and/or indecent act with a child was insufficient, and the Appellant may thus be prejudiced if an opportunity is given to the Prosecution to provide fresh facts and evidence at a retrial.

45. I accordingly quash the conviction of the Appellant and set aside the sentence of fifteen (15) years imprisonment imposed upon the Appellant for this conviction, and order that he be and is hereby set at liberty forthwith unless otherwise lawfully held.

46. It is so ordered.

DATED AND SIGNED THIS 19TH DAY OF DECEMBER 2018

P. NYAMWEYA

JUDGE