REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 9 OF 2013

PETER KARIUKI MUGO……..……..... APPELLANT

VERSUS

REPUBLIC……. RESPONDENT

(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 30 of 2011 (Hon. S.A. Okato Ag Chief Magistrate) on 11th January, 2013)

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to **section 8(1)(4)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of offence were that on the 24th day of July, 2011 at *[particulars withheld]* area in Nyeri district within central province, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of M W W a girl of16 years old.

In the alternative, the appellant was charged with the offence of indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act** the particulars here being that on the 24th day of July, 2011 at *[particulars withheld]* area in Nyeri district within central province, the appellant intentionally and unlawfully committed an indecent act by causing his penis to touch the vagina of M W W a girl who was 16 years old.

The appellant pleaded not guilty to both the principal and alternative counts; at the conclusion of his trial, he was convicted of the principal count and sentenced to 20 years imprisonment. He appealed against both the conviction and sentence; his grounds of appeal were as follows: -

1. The learned magistrate erred both in law and in fact by relying on the evidence of the complainant to convict the appellant yet she was not a credible witness;

2. The learned magistrate erred in law and in fact in admitting the complainant's evidence without conducting a voire dire examination;

3. The learned magistrate erred both in law and in fact in convicting the appellant on the charges that were not proved beyond reasonable doubt; and,

4. The learned magistrate erred in rejecting the appellant's defence and shifting the burden of proof from the prosecution to the appellant.

The state opposed the appeal and its counsel submitted that, as far as the complainant's evidence was concerned, it was not necessary for the trial court to subject the complainant to voire dire examination

since she was not a child of tender years. The learned counsel also refuted any allegations of inconsistency in the prosecution evidence and submitted that the only inconsistency was in the description of the appellant's clothing; according to counsel this inconsistency was not material.

Counsel also urged that the appellant was positively identified by the complainant who participated in his arrest. As to the appellant's defence, he submitted that the same had been duly considered by the trial court but was found wanting and therefore was properly dismissed.

The trial record shows that the complainant testified on oath and informed the court that she was aged 16. On 24th July, 2011 at about 3 PM she was on her way home from church when the appellant accosted her and dragged her into a coffee plantation; he is alleged to have forcefully stripped her of her clothes and defiled her for about half an hour; he then abandoned her there. She reported the incident to her mother, **F W M (PW2)** and the two of them went to Nyeri provincial general hospital where the complainant was treated; they also reported the matter to Nyeri police station where the complainant was provided with the P3 form on 25th July, 2011.

Two weeks after the incident, and more particularly on 8thAugust, 2011, the complainant was with her mother when she spotted the appellant on the road; she alerted her that the appellant was the person who had defiled her. Her mother screamed and attracted members of the public who pursued and caught the appellant; they arrested him and took him to Gamerock police post.

The complainant testified that though the appellant was a stranger to her, she could identify him if she saw him again. She recalled that at the time she was assaulted the appellant wore a black trouser, a T-shirt and a jacket.

The complainant's mother, **F W M (PW2),** confirmed that on 24th July, 2011 at around 3:30 PM the complainant found her at home and informed her that she had been defiled. She took her to hospital and went to Nyeri police station to report the assault. The complainant told her that her assailant was of brown complexion and wore a black jacket, black trouser and green sandals and that she could identify him if she saw him again.

She said that on 8th of August, 2011 she was walking along with the complainant when the latter pointed out the appellant as the person who had sexually assaulted her. She screamed for help and the appellant started running away; members of the public chased him and caught him; they brought him back and the complainant is said to have properly identified him. She testified that she was convinced the appellant is the person who defiled their daughter because he attempted to escape when she screamed.

Dr Nyambura Njau examined the complainant and filled her P3 form; however, the form was produced in court on her behalf by **Dr Maxwell Okoth (PW3)** who testified that he was acquainted with her signature and handwriting having worked with her for seven months before he testified. Upon examination of the complainant she found her to have been in a fair general condition though her hymen was not intact; there were also traces of discharge on the labia and a high vaginal swab revealed traces of spermatozoa and yeast cells. The complainant was found to be HIV negative.

Police constable Bokajo Barako (PW4) confirmed that a case of defilement was reported at the Nyeri police station on 25th of July 2011 at around 2 PM. The complainant who was accompanied by her mother narrated how she had been held and defiled by the appellant and added that she could identify him if she saw him. On 8th of August 2011, the complainant and her mother came back to the station to report that the suspect was at Nyeri provincial general hospital. They informed her that the suspect had been arrested and beaten by members of the public. The officer arrested the appellant when he was discharged on 15th of August, 2011.

The appellant gave sworn testimony in his defence and stated that on 24th of July 2011, he worked all day with his brother, **Patrick Wambugu (DW2)** thereby implying that he was not at the scene of the crime at the time it was committed. He was also with his brother on 15th August, 2011 when he was arrested. On

that day, they had been cutting fodder, apparently for their animals, when his brother, who had ferried some of the fodder home, came back with two men who arrested him. The two men were accompanied by what the appellant described as a mob. They frog-marched him to where the complainant and her mother was and asked him whether he knew the complainant. He denied knowing her and she also denied that she knew him. He was then beaten and forced to admit that he had defiled the complainant; he admitted that indeed he had defiled the complainant.

It was the appellant's evidence that he had been set up by one Shem Kiama, who must have misled the mob that he was the person who defiled the complainant. He believed that Shem Kiama set him up because of the differences that arose out of Kiama's refusal to pay for potatoes that the appellant sold to him.

The appellant's brother, **Patrick Wambugu (DW2),** testified that on 24th July, 2011, between 8 AM and 5 PM, he was with the appellant irrigating crops on his farm. On 8th August, 2011, he was at his home when two people came to buy kales. He directed them to the appellant who, apparently, was the only person who could sell them the vegetables. They then roughed up the appellant and beat him up on allegations that he had defiled the complainant. He was then taken to the hospital where he was admitted for treatment apparently as a result of the injuries he sustained.

This is the evidence that this court has to evaluate afresh and determine whether it was sufficient to sustain a conviction under **section 8(1) (4)** of the **Sexual Offences Act**. That provision of the law states as follows:

> ***8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) …***
>
> ***(3) …***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***

The burden on the prosecution was to prove at least three things; first, an act of penetration, second, the age of the victim to the extent that the law refers to 'a child', and third that the penetration was caused by another person who, in this case, is alleged to have been the appellant.

"Penetration" is defined in **section 2** of the **Sexual Offences Act** to mean "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

The medical opinion of Dr Nyambura Njau left no doubt that there was insertion into the complainant's genital organs by the genital organs of another person. As noted her hymen was established not to be intact; there were traces of discharge on the labia and finally there were also traces of the spermatozoa and yeast cells from the vaginal swab. A combination of these factors leads to no other conclusion other than that there was an act which caused penetration with the complainant.

Penetration by itself is not sufficient; for a conviction under **section 8(1)(4)** of the Act to be sustained it must also be proved that it was with a child. Thus, the age of the victim becomes an issue and once again the burden is on the prosecution to prove, beyond reasonable doubt, that the complainant was between the age bracket contemplated under section 8(4) which is between sixteen and eighteen years. A birth certificate was produced in this regard showing that the complainant was born on 5th October, 1995 meaning that she was 15 years 10 months at the time the offence is alleged to have been committed on 24th July, 2011.

If my calculation is correct then the complainant was obviously below the age of sixteen years and the

learned magistrate appears to have misdirected himself on the evidence to find that the complainant was aged 16 at the material time. It follows that the appropriate section under which the appellant ought to have been charged is **section 8(1) (3)** of the **Act** which applies to a person who commits an offence of defilement with a child between the age of twelve and fifteen years. It is appreciated that the applicant was only two months short of 16 years but that short period is still significant because under **section 8** of the Act, the age of the child determines not only the offence with which a person is charged but it also informs the severity of the sentence to be meted out against such a person in the event he is convicted. It is for this reason that the trial court must, as matter of law, be satisfied that the correct age of the complainant has been established beyond reasonable doubt before convicting a person charged under subsections (2), (3) or (4) of **section 8** of the Act.

Having said that, it is clear that the particulars of offence and the evidence adduced at the trial were inconsistent with the offence with which the accused person was charged. One may draw either of two conclusions from this inconsistency-that the charge sheet was simply defective or, to the extent that the complainant was below sixteen years, the charge as framed was not supported by evidence.

The prosecution and the trial court had the opportunity to invoke section 214 of the Criminal Procedure Code and correct the error on the charge sheet and charge the appellant under the appropriate provisions of the law but as noted, they both proceeded on the mistaken presumption that the complainant was aged 16. The end result of their misapprehension of evidence was that the appellant was convicted on a defective charge or his conviction was against the weight of evidence. Either way, the appellant's conviction was rendered unsafe. The defect in the charge sheet or the lack of evidence to support the charge are, in my humble view, errors that can properly be said to have occasioned a failure of justice and were incurable under **section 382** of the **Criminal Procedure Code.**

In **Kamunya versus Republic (2009) 1EA 181 at page 191** Ojwang and Warsame JJ (as they then were) stated that under **section 77(2)** of the old Constitution, any criminal charge brought against a person must state explicitly the nature of the offence charged and that the statement of offence must refer to the specific law that creates the offence. The tenor of that provision is now covered by **article 50 (2)** of the current constitution which sets the very basic standards for what one would regard as a fair trial. **Article 50(2)(b)** is particular that an accused person must be informed of the charge with sufficient detail, which would undoubtedly include the appropriate law that creates the offence, to answer it. Without stating the specific law, the learned judges held that the charge sheet was defective.

In the case against the appellant the law was stated but, as noted, it was the wrong provision of the law; the wrong citation left the charge sheet in no better place than it would have been if the law wasn't stated at all.

Having found, for the reasons I have given, that the appellant's conviction was not safe, it would be futile for me to venture into other grounds of appeal. I will rather allow the appeal, quash the conviction and set aside the sentence. Accordingly, the appellant is set at liberty unless he is lawfully held.

Signed, dated and delivered in open court this 30th January, 2017

Ngaah Jairus

JUDGE