REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 14 OF 2014

BERNARD MUTUA……..……APPELLANT

VERSUS

REPUBLIC……..…….....…RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. S Gacheru SRM in Sexual Offences Case No. 22 of 2009 delivered on 4th May 2011 at the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was convicted of, and sentenced to serve life imprisonment for the offence of defilement of a child, contrary to section 8(1) (2) of the Sexual Offences Act. The particulars of the offence were that on 12th July 2009 at [Particulars withheld] slums, Athi Division in Machakos District within Eastern Province, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of C N, a child aged 11 years. The Appellant had also been charged with the alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2016.

The Appellant is aggrieved by the judgment of the trial magistrate, and has preferred this appeal against the conviction and sentence. The grounds of appeal are in his Petition of Appeal filed on 13 January 2014 and Amended Supplementary Grounds of Appeal and submissions dated 13th July 2016 that he availed to the Court. The grounds are as follows:

1. THAT, his conviction was manifestly unsafe and a nullity in that the same was based under the wrong Section of the Sexual Offences Act NO. 3 of 2006, namely Section 8(i)(e) which is non-existent.

2. THAT, his fundamental rights to fair trial was violated in that the trial commenced without an age assessment report of the complainant hence the plea taken was a nullity.

3. THAT, the entire evidence adduced prior to the age assessment report being obtained violated Article 50 (4) of the constitution.

4. THAT, the Appellant was substantially prejudiced and unable to conduct his trial properly due to the omission of adequate proof as to the victims age until PW-7 produced Exhibit 3 and his right to a fair impartial trial under Article 50 of the constitution was violated .

5. THAT, the burden of prove was not discharged.

6. THAT, the learned trail magistrate made an error in both law and facts and misdirected himself

by shifting the burden of proof upon the Appellant, whereas in law the same doesn't shift more so on defences of alibi.

These grounds were reiterated in the Appellant's submissions wherein he also cited various judicial authorities in support of his arguments. He stated that Section 8(i) (e) of the Sexual Offences Act NO. 3 of 2006 under which he was convicted in the judgment by the trial magistrate in non-existent, and that this was not a typographical error. Further, that the judgment was based on a wrong section of the Sexual Offences Act, and that these acts by the trial magistrate contributed to a miscarriage of justice. Reliance was placed on the decision in **Nyamai Musyoka vs Republic, Cr Appeal No. 213 of 2009** where the charge was predicted upon a non-existing section of the Sexual Offences Act.

It was also argued that the Appellant's appearance in court on 15/7/09 without ascertainment of the victim's age violated his fundamental rights to a fair and impartial trial under Article 25 (c) of the constitution. Further, that the plea taken on 15/7/09 and 11/2/2010 was invalid and the same vitiated the entire trial process, and that even though that amendment of the charge was made on 11/2/010 and a fresh plea taken, the fact remains that the age of the victim was unknown and no birth certificate or age assessment report was produced until PW7 gave his evidence. In addition that the victim first claimed to be 9 years old and thereafter claimed to be 11 years old, and the Appellant was prejudiced as the determining factor in sexual offences is the age of the complainant. The Appellant cited various judicial authorities for this position.

Lastly, that the burden of proof was not discharged as the origin of the spermatozoa present on the complainant was not established and there was no link of the Appellant's participation in the commission of offence. Further, that the trial magistrate shifted the burden of proof to the Appellant by indicating in the judgment that the Appellant did not challenge the evidence by the Prosecution, and lost sight of his alibi defence contrary to section 169 of the Criminal Procedure Code.

The Appellant also submitted that there was no evidence of bleeding at the scene or complainant's clothing to confirm that her hymen was broken, and there was no corroborative evidence of PW1 being defiled in a toilet, or of the evidence by PW3 that the Appellant was found with his trousers unbuttoned and zip open. The evidence by Dr. Isika was also faulted as he did not state that he had worked with the maker of the treatment notes, who was unknown.

Mr. Cliff Machogu, the learned prosecution counsel, filed written submissions in response dated 12th November 2015, wherein he urged that the charges against the Appellant were proved beyond reasonable doubt, and analyzed the evidence of the various prosecution witnesses.in this respect. Further, that during trial the burden of proof was never shifted to the Appellant, and it fully rested on the prosecution who proved beyond any reasonable doubt that there was sufficient evidence to support the charge

It was also submitted that during judgment the trial court referred to a charge contrary to section 800(2) of the Sexual Offences Act, and when convicting the Appellant at also referred to section 8(1) (e) of the Sexual Offences Act, which are none existing sections in the Sexual Offence Act. Reliance was in this regard placed on the decision by the Court of Appeal in **Joseph Maina Mwangi vs. R, [2000] eKLR** where it was held that where there are such discrepancies, an appellate court must be guided by the wording of section 382 of the Criminal Procedure Code, as to whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence. It was submitted that the discrepancies in the trial court's judgment were human typing errors and thus they are not fundamental and did not prejudice the Appellant.

Lastly it was submitted by the Prosecution that no fundamental rights of the Appellant were violated as the Appellant was initially charged with the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act of having defiled a minor aged 9 years old. However, that the prosecution later amended the charge sheet and charged the Appellant with Defilement contrary to section 8(1)(2) of the Sexual Offences Act of having defiled a minor aged 11 years old. Further, that section 214 of the Criminal Procedure Code allows the prosecution to amend the charges sheet at any stage before the close of the prosecution case. In addition, that the Appellant then pleaded not guilty to the amended

charge, and the particulars of the charge sheet indicated the age of the minor to be 11 years which was also confirmed by PW1 and PW7 who conducted the age assessment.

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**).

The prosecution called seven witnesses to prove their case against the Appellant. PW1, was C N, the complainant, and she narrated the events of 12th July 2009 at 9.00pm when the Appellant is alleged to have defiled her in a toilet in the plot she was living in. Her testimony will be analsyed further later on in this judgment. Jane Mumbua (PW2) and Mercy Mwikali (PW3) who were neighbors of the complainant in the same plot, testified as to how they heard noise and screams from the toilet, and PW2 who had a hurricane lamp opened the door of the toilet and found the Appellant holding the complainant by the neck. PW3 then also came, and they held on to the Appellant when he came out of the toilet with PW2 as they called for help.

PW4 was Stephen Mutua Matheka, the chairman of the community policing at Sofia Estate, and he testified on the report he received from the complainant's mother about the defilement, and went to the scene of the crime where they found the Appellant and complainant, and took them to Athi River Police station.

Dr. Daniel Mukirana, who was stationed at Machakos General Hospital, testified as PW5, and he produced the P3 form with the results of the medical examination conducted by a Dr Isika on the complainant as the prosecution's exhibit 2. He testified that he had worked with Dr. Isiska and knew her handwriting, and also produced the treatment notes relied upon by Dr. Isika as the prosecutions exhibit 1.

PW6 was Cpl. Jemima Murugu and was the Investigating Officer in the case, and she testified that after conducting the investigation on the report of defilement by the Appellant, she charged the Appellant with the offence. The last witness (PW7) was Dr. Patrick Litunga, who was based at Machakos General Hospital Dental section, and he produced an age assessment report on the complainant wherein the complainant was found to be aged 11 years old.

The Appellant was found to have a case to answer and put on his defence. He gave sworn testimony and did not call any witnesses. He denied knowing or defiling the complainant and stated that on the alleged date of the defilement he was at his place of work at Steel Apex in Athi Riverwhere he was arrested. He also alleged that the complainant's mother had a grudge against him because he owed her Kshs 2,000/= for bhang and changaa that he used to sell for her.

After going through the grounds of appeal and the arguments made thereon and evidence adduced in the trial Court, I note that there are three issues for determination. These are whether the Appellant was convicted for the offence of defilement on the basis of a defective charge, and if not, whether his rights to a fair trial were violated, and lastly whether his conviction for the offence of defilement was on the basis of sufficient and satisfactory evidence.

On the first issue, the Appellant alleges that the charge sheet was defective as the judgment by the trial magistrate referred to sections he was charged and convicted under that were non-existent. Upon perusal of the said judgment, it is indeed the position that the trial magistrate did indicate in the judgment that the Appellant was charged with defilement contrary to section 800(2), and convicted of the offence of defilement contrary to section 8(1)(e) of the Sexual Offences Act. The charge that was read to the Appellant to which he pleaded however indicates that he was charged with defilement contrary to section 8(1) (2) 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.

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."**

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."***

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)(2) of the Sexual Offences Act, and particulars of the offence, which included the date of the offence, the place of the offence, the act constituting the offence and the name and age of the victim.

The only mistake made was in the judgment by the trial magistrate, and turning to the second limb as to whether this 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."**

In the instant appeal, I find that the mistake in the judgment did not materially affect the proceedings in the trial Court, as the charge sheet clearly cited the section creating the offence which is section 8(1) of the Sexual Offences Act, which creates the offence of defilement of a child which is an offence that exists in the law. The charge sheet also clearly indicated the age of the child to be eleven years old which the Appellant knew from the time of pleading to the charge, and he was thereby not in any way prejudiced by the mistake in the judgment. 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.

As to the second issue as to whether the Appellant's right to a fair trial where violated, the Appellant relied on Article 25 of the Constitution which provides that the right to a fair trial is one of the rights and fundamental freedoms that cannot be limited. He also claimed that PW7's testimony was obtained in a manner that violated Article 50(4) of the Constitution. Article 50(4) of the Constitution provides as follows in this regard:

> **Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.**

The Appellant's arguments in this regard in summary is that he took a plea before the age of the complainant was established by PW7. I find this ground not to have any basis for the following reasons. Firstly, the right as regards taking of plea is provided in Article 50 (2)(b) of the Constitution, which provides that an accused person has the right to a fair trial which includes the right to be informed of the

charge, with sufficient detail to answer it. The procedure to be applied in taking a plea of guilty were well enunciated in the case *of* **Adan vs Republic, [1973] EA 445** where the Court held as follows:-

> ***"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.***
>
> ***(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.***
>
> ***(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.***
>
> ***(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.***
>
> ***(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."***

The procedure as laid out in ***Adan vs Republic*** (**supra**) is also provided for under *section 207* of the Criminal Procedure Code which provides as follows:

> **(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.**
>
> **(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:**
>
> **Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.**
>
> **(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.**
>
> **(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.**

Coming to the present appeal, the record of the trial court indicates that the Appellant took plea firstly on 15th July 2009 and later on 11th February 2010 when the charge sheet was amended and the trial started *de novo*. On 11th February 2010, the trial record shows that the charge was read out and explained to the Appellant in Kikamba language and he replied that "it was not true". A plea of not guilty was then entered. The Court has in this regard found in the foregoing that the said charge had no defect and included all the relevant particulars.

There is no requirement in law that the evidence as to the age of a complainant in sexual offences should be availed during the plea stage, and the whole purpose of the processes of the trial that follows thereafter is for this evidence to be produced by the prosecution to prove the charge, during which an accused person is also given the opportunity to challenge any such evidence, In this regard the trial record also shows that when PW7 was called to testify on 15th December 2010, he was duly cross-examined by the Appellant, who therefore had the opportunity to challenge the age assessment report produced by PW7.

Lastly, the report produced as exhibit 3 by PW7 shows that the complainant's age assessment was undertaken on 23rd October 2009 before the charge sheet was amended, and before the Appellant took

plea on the amended charge. Therefore, the Appellant's assertions that the complainant's age was unknown at the time of taking plea have no basis, and there is no valid reason to exclude the evidence by PW7.

As regards the last 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."**

The Appellant alleges that evidence given by the witnesses did not prove the ingredients beyond reasonable doubt. The key witness in this regard was PW1 who testified as to her defilement by the Appellant as follows on 11th February 2010:

> **I live at [Particulars withheld] Estate in Athi River. I am in std. 5 at [Particulars withheld] Primary School. I am the complainant in this case and I am aged 11 years old. I was assessed my age on 23.10.09 at Machakos General Hospital and I was found to be aged 11 years old. On 12.7.09 at about 9.00 pm I was in our house with my brother called B M in [Particulars withheld] Estate. My mother was away as she had been called to see her brother who was unwell in a nearby house. Then I started to have some stomachache and I told my brother that I wanted to go for a long call. I then left my brother in the house and I went to a latrine which was outside at about 30 meters away. The said latrine was built of iron sheets on the roof and on its wall as well as the door. I closed the latrine door and as I was lowering my skirt someone entered the latrine and he held me on my neck with one hand and he removed his pair of trousers with the other hand. I had already removed my pants partly and the said person removed it fully accused then warned that- he would harm me if I raised an alarm. Accused then inserted his penis in my vagina as we were standing in the latrine. Accused also touched me on my breast. I did not scream but I hit the inner side of the latrine using my elbow. Accused also touched me on my buttocks. Accused was with me in the latrine for about 3 minutes. When I hit the side of the latrine a neighbour called Jane Mumbua heard and she came to the latrine Jane knocked the door. accused was still holding me by the neck. Mercy then pushed the door of the latrine and she opened it and she held Bernard Mutua (the accused) Accused stopped defiling me when he saw Mercy then got out of the latrine"**

It is my view in this regard that the evidence of PW1 was sufficient on its own under section 124 of the Evidence Act as she was consistent in her evidence and upon cross-examination. 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."**

This testimony proved beyond doubt that there was penetration by the Appellant, who was seen by the complainant during the incident when PW2 came with a lit hurricane lamp. The Appellant was also found in the act of defiling the complainant by PW2 and PW3 on the material night, and was also found and arrested at the scene by PW4 shortly after the defilement. He was thus positively identified by PW1, whose identification was corroborated by PW2, PW3 and PW4.

The act of defilement was also corroborated by the evidence by PW5 that upon examination, the complainant was found to have vaginal lacerations and her hymen was broken. The fact that there was no blood at the scene does not preclude penetration on that material date. In addition in his evidence PW5 stated that he had worked with Dr. Isika who was not available and was familiar with her handwriting.

The P3 form and treatment noted produced by PW5 as prosecution's exhibits 1 and 2 were thus admissible under section 33 of the Evidence Act which provides as follows:

> **"Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases–…**
>
> **(b)when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;"**

The age of the complainant was in addition proved by the age assessment report produced by PW7 as the prosecution's exhibit 3, which showed that on 23rd October 2009 the complainant was assessed at Machakos General Hospital and found to be eleven years old.

Lastly, it was argued by the Appellant that section 169 of the Criminal Procedure Code was not complied with because his defence was not given due regard. The said section 169 provides as follows:

> **"(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.**
>
> **(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.**
>
> **(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."**

I have examined the judgment by the learned trial magistrate, and I find that the Appellant's claim is not supported., I note that the trial magistrate did in his judgment record the testimony given by the Prosecution witnesses and Appellant, and found the Appellant's defence to be a mere denial and not believable, after noting that the evidence by the prosecution against him was overwhelming. The evidence by the prosecution did indeed place the Appellant at the scene of the crime and he was also arrested at the said location. His defence was thus considered, and did not weaken the prosecution's case

On the appeal against the sentence, I note that the even though the Appellant was a first offender, the minimum sentence for the offence of defilement of a child aged 11 years is life imprisonment, and this Court therefore has no discretion to revise or reduce the sentence imposed upon the Appellant.

I accordingly uphold and affirm the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (2) of the Sexual Offences Act, No. 3 of 2006, and the sentence imposed upon him of life imprisonment is also upheld.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 28th DAY OF APRIL 2017.

P. NYAMWEYA

JUDGE