REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 13 OF 2013

JUSTUS MUSYOKA MUTIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. A. Odawo RM delivered on 5th February 2013 in Criminal Case No. 1236 of 2012 in 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) (3) of the Sexual Offences Act, after pleading not guilty to the offence and undergoing trial. The particulars of the offence were that on the 28th day of July 2012 at [particulars withheld] in Yatta District within Eastern Province, the Appellant intentionally and unlawfuly caused his penis to penetrate the vagina and anus of K M N a child aged 8 years. He 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 .

The Appellant has filed an appeal against his conviction and sentence. He in this respect filed a petition and grounds of appeal on 18th February 2013, and he also filed supplementary grounds of appeal and submissions dated 14th September 2016. His grounds of appeal are that firstly, the trial magistrate erred in law and in fact by giving an imprisonment term under Sec. 8 (1) (3) while the complainant's age was not within this provision of Sexual Offences Act and the charge was therefore defective.

It was submitted in this regard that section 8(1) (3) of the Sexual Offences Act prescribes a term of imprisonment of not less than 20 years where it is established that the victim is aged 12 to 15 years. In addition that the charge sheet indicated that the victim was aged 8 years, but no medical evidence was tendered by the prosecution to prove the complainant's age. Therefore that the charge sheet was defective and sentence of life imprisonment was erroneous, and reliance was placed on the decision in **Kilome vs Rep, (1990) e KLR** in this respect.

Secondly, the Appellant also argued that the trial magistrate erred in law and facts when he relied on incredible evidence and by not analyzing exhaustively, the credibility of PW1, PW2, PW3, PW4 and PW6, which left their testimonies unreliable under section 163 (1) (c) of the Evidence Act. It was submitted in this respect that PW1, PW2 PW3 and PW4 did not report the incident of defilement promptly, and that PW3 and PW4 contradicted the evidence of PW6 as to the date of the Appellant's arrest. It was also contended that according to PW1, it was a strange smell emitted from PW2's vagina that caused the suspicion and subsequent discovery of alleged defilement of PW2. In addition that both PW2 and PW4's testimony do not reveal that the Appellant's arrest was as a result of PW1's discovery of PW2's bad smell from her vagina, since they received the report on the material date of the incident,

being 28th July 2012.

Thirdly, that the learned trial Magistrate erred in law and facts to conclude that prosecution proved its case beyond reasonable doubt when the prosecution relied on exhibit 1 which was a P3 form with 1-3 weeks old injuries, which contradicted the alleged date of the offence. It was in this respect submitted that according to PW5 who testified in respect of the P3 form, the injuries causing urine and stool incontinence were effected on PW2 between a duration of 1- 3 weeks from the date of the alleged examination on 30/7/2012, which do not concur with the date of 28/7/2012 when PW2 was defiled, and which was a difference of only two (2) days . Therefore, that the P3 form was t irrelevant and immaterial as evidence confirming the defilement of PW2. It was also submitted that one Dr. Kimwele, who examined PW2 never testified and was not cross examined in respect the said irregularities. Further, that PW5 did not state in court that the P3 form was filled by or in Dr. Kimwele's handwriting.

Lastly, that the learned trial magistrate erred in law and fact when he did not consider and dismissed the Appellant's alibi defence, thereby contravening section 169 of the Criminal Procedure Code.

Ms Rita Rono, the learned prosecution counsel, filed written submissions in response dated 16th November 2016, wherein she urged that the charges against the Appellant were proved beyond reasonable doubt, as PW1 who was the complainant, gave an account that she was defiled by the Appellant on the 28th July 2012 when she had gone to fetch water in river. Further, that the complainant was able to positively identify the Appellant as the person who defiled her as the offence occurred at broad daylight. PW5 also confirmed that the complainant's hymen was perforated, there was a tear of the vagina and elasticity of anus. In addition that on the issue of the age of the complainant, an age assessment report was produced and showed the complainant was a minor. Reliance was placed on the decision in **Fred Omar Omondo vs Republic, Eldoret H.C.Criminal Appeal Number 59 of 2011** in this regard**.**

It was further submitted that if the Appellant was to rely on the defense of alibi, he should have informed the Prosecution at the earliest time possible and not during defense, to give the Prosecution enough time to ensure that the alibi establishes reasonable doubt as to whether or not the Appellant was at the scene of crime. Further, that this position is supported by **Basil Okaroni vs Republic, Busia HC Criminal Appeal 49 of 201**2. Lastly, that the trial magistrate complied with section 169 of the Criminal Procedure Code as he discredited the Appellant's defence.

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**).

In this regard after going through the grounds of appeal and the arguments made thereon, I note that the three issues for determination are whether the Appellant was convicted for the offence of defilement on the basis of a defective charge; and if not, whether his conviction was on the basis of sufficient and satisfactory evidence; and lastly whether his defence was considered.

The prosecution called six witnesses to prove their case against the Appellant. PW1, F K N, was the complainant's mother, and she testified that on 30th July 2012 while bathing the complainant she experienced an unusual smell from the complainant's vagina, and upon inquiry, the complainant informed her that the Appellant had done bad manners to her on 28th July 2012. PW1 then reported the matter to the community police and took the complainant to hospital.

PW2 was M K N, the complainant, who after a *voire dire* examination testified about the events of 28th July 2012 when the Appellant is alleged to have defiled her. PW2's testimony will be examined in greater detail later on in this judgment.

PW3 (Kavuve Mutune) and PW4 (Kalia Mbuten) were both community policing officers, and they testified as to the arrest of the Appellant on 28th July 2012 after receiving the report of the defilement from PW1 and examining PW2. PW5 was Dr Emmanuel Loiposha who was stationed at Machakos Level

5 Hospital, who produced a P3 form with the results of the medical examination conducted by a Dr Kimwele on the complainant as the prosecution's exhibit 1 .He also produced the post rape care form as the prosecutions exhibit 2 and the complainant's age assessment note as exhibit 3. The last witness (PW6) was PC Thomas Kinyanze, who testified that he brought the Appellant from Katangi patrol base to Masii Police station and charged him

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 home area with his grandmother, and not in his work place. He also alleged that PW1 had a grudge against him because he caught her having an affair with another man.

On the first issue, the Appellant alleges that the charge sheet was defective as he was charged with defilement contrary to section 8(1) (3) of the Sexual Offences Act which provides for defilement of a child aged 12 to 15 years, and a penalty of imprisonment for not less than twenty years. However, that the complainant was aged 8 years and he was sentenced to life imprisonment.

Section 8(1) and (3) of the Sexual Offences Act provides as follows in this regard:

> "**(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **((3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a termof not less than twenty years."**

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."***

I have perused the charge sheet and it is evident that the applicable penalty section of the law was section 8 subsection 2 of the Sexual Offences Act, which provides follows:

> **"2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life**."

This mistake ought to have been corrected by the Prosecution or trial court by amendment of the charge sheet under section 214 of the Criminal Procedure Code. Other than the mistake made as to the penalty section, the charge sheet otherwise clearly spelt out the correct section creating the offence of defilement which is section 8(1) 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.

Turning to the second limb as to whether the noted mistake in the charge sheet 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 charge sheet 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 eight years old which the Appellant knew from the time of pleading to the charge.

The Court of Appeal in this regard in ***Moses Nato Raphael vs Republic*** **[2015] eKLR** clarified the difference between proof of age for purposes of establishing the offence of defilement and for purposes of sentencing as follows:

> ***On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.***

The mistake as to the applicable penalty section is therefore one which in my view is curable under section 382 of the Civil Procedure Code, as it only became relevant for purposes of sentencing, once the ingredients of defilement have been proved. In addition, as the key section creating the offence of defilement and the particulars reflecting the nature of the said offence were indicated in the charge sheet, no prejudice was caused to the Appellant in indicating the penalty section to be section 8(3) of the Sexual Offences Act.

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."**

The Appellant alleges that there was contradictory evidence given by the witnesses as to the date of his arrest and the date of the alleged offence. I note in this respect that the date of arrest is not a key element of the offence of defilement, and the inconsistencies in the evidence of PW1 and PW3 and PW4 as to whether the date of the Appellant's arrest was 30th July 2012 and 28th July 2012 respectively are immaterial.

As to the date of the alleged offence, the evidence of PW2 was clear that it was on 28th July 2012. PW2's

evidence was sufficient on its own and did not require to be corroborated under section 124 of the Evidence Act, as she was consistent in her evidence the first time she testified on 22nd October 2012 and on being recalled on 6th December 2012 .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."**

The Appellant also relied on the evidence of PW5 that the injuries noted in the P3 form were 1 to 3 weeks old, for the position that there was inconsistency as to the date of the alleged offence. In this respect an examination of the said P3 form that was produced as the Prosecution Exhibit 1 shows that the said form was filled by Dr Kamwele on 13th August 2012, and a stamp of Machakos Level 5 Hospital on the form also bears the same date. The period of 1 to 3 weeks prior to 13th August 2012 placed the date of the injuries to be from about 24th July to 13th August 2012, and the date of 28th July 2012 when PW2 testified she was defiled therefore falls within this period. There was thus no inconsistency as regards the date of the alleged defilement.

On proof of the elements of defilement, on 22nd October 2012 the complainant testified that on 28th July 2012 at around lunch time, she had gone to the river to fetch water with her friend called M, and when they reached the river the Appellant whom she named in Court as Musyoka, came and chased after them, and caught her. Her friend M managed to escape but the Appellant caught PW2 and took her to the bush, removed her clothes and panty and also removed his panty, and did a bad thing to her. On that date the trial record indicates that PW2 was shy to explain where the bad thing was done.

PW2 further testified as follows upon being recalled on 6th December 2012:

> **It was the accused who removed my clothes. (minor positively points the accused). When he removed my clothes I was lying on the ground on my back. He lay on me with his stomach, he was facing me. He was wearing his clothes. He removed his inside clothes, his shorts. There is a part of his body that got into mine. He removed his penis and put it in me. He put it here (shows court what appears to be her vaginal area) Yes, I saw his penis (witness asked how it looks like, she keeps quiet). When he put it in, I felt pain. When he put in his penis, he removed it again and left. I stood up, dressed and went home. I wore my clothes_on own. When I got home, I didn't find anyone- home. My mother is in court. Positively identifies her mother by pointing at her) she had gone to the market .**
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> **I was at the river when the accused did this to me. It was at the side of the river. The river is called** [particulars withheld] **river, I had gone to fetch water. Ididnt tell mother what happened on that day, I don't know why. Mother got to know when she was washing me. I knew the Accused before the incident. I know he is called Musyoka. I had seen him herding cattle. He was an employee at N's house. N is a mother, she used to be our neighbor but she moved houses."**

This testimony proved beyond doubt that there was penetration by the Appellant, who was recognised by the complainant during the incident having been known to her before. PW5 also collaborated the defilement in his testimony as to the injuries caused to PW2 as a result of the defilement, and he testified in this regard that PW2's hymen was perforated, there was a tear of the vagina and elasticity of anus. The

age of the complainant was also proved by the age assessment note produced by PW5 as the Prosecution's exhibit 3, which showed that on 11th October 2012 the complainant was assessed at Machakos Level 5 hospital and found to be eight 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.**
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> **(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 feeble attempt to mislead the Court, after noting that the evidence by PW2 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 near the said location. His defence was thus considered, and did not weaken the prosecution's case

On the appeal against the sentence, this Court has already found that there was an error in the penalty section in the charge sheet, and that the trial magistrate in his judgment did proceed to convict the Appellant under section 8(1) and (3) of the Sexual Offences Act, which provides for a minimum sentence of twenty years imprisonment. The sentence imposed of life imprisonment was however not erroneous, as section 8(3) of the Sexual Offences Act only provides for a **minimum sentence which can be enhanced by the Court to life imprisonment if the circumstances warrant it.**

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, and confirm the sentence of life imprisonment imposed upon the Appellant.

It is so ordered.

DATED AT MACHAKOS THIS 25th DAY OF APRIL 2017.

P. NYAMWEYA

JUDGE