REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 198 Of 2013

PETER NALIANYA……..……..…..APPELLANT

VERSUS

REPUBLIC ……..…….RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate's Court at Githunguri Cr. Case No. 418 of 2011 delivered by Hon. W. Ngumi, Ag. SRM on 27th September 2013).

JUDGMENT

Background

Peter Nalianya, the Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars of the offence were that on 23rd April, 2013 at 11.00 a.m. [particulars withheld] in Githunguri District within Kiambu County, intentionally and unlawfully committed an act causing penetration with genital organ(penis) into genital organ(vagina) of MW, a child aged four years.

In the alternative he was charged with committing an indecent act with a female child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006. The particulars were that on 23rd April, 2013 at 11.00 a.m. at [particulars withheld] in Githunguri District within Kiambu County, intentionally and unlawfully committed an indecent act with a female child namely MW by causing contact between his genital organ(penis) and genital organ(vagina) of the said female child.

At the conclusion of the trial, the Appellant was found guilty of the main charge. He was convicted and sentenced to serve life imprisonment. He was dissatisfied with both the conviction and sentence and he preferred the present appeal. In the amended grounds of appeal dated 13th March, 2017 he was dissatisfied that he was not properly convicted as the charge sheet was defective, that he was not accorded a fair trial, that the trial court failed to find that the complainant was an unreliable witness and finally that the prosecution did not prove the case to the required standard.

Submissions

The Appellant relied on written submissions filed alongside the amended grounds of appeal on 13th March, 2017. He submitted that the charge was defective in that it was drafted under the wrong provisions of the Sexual Offences Act. He submitted that the same having been drafted under Section 8 (1) and (3) of the Act he ought to have been sentenced to a minimum of 20 years. Accordingly, the charge offended

Section 134 of the Criminal Procedure Code which provides that *'**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 necessary information as to the nature of the offence charged'.*** In view thereof, the prosecution ought to have seized the opportunity to amend the charge sheet pursuant to Section 214 of the Criminal Procedure Code.

On whether his right to a fair trial was infringed, he submitted that he was compelled to proceed with the hearing when in fact he was unwell. In addition, he was never supplied with prosecution witness statements. He further faulted the evidence of PW2 (complainant) as untrustworthy and lacking in credibility. He cited her testimony that she was four years old and in class four whereas by any standard that was not possible in Kenya. He further submitted that PW2 lied that he did not have brothers yet PW3 was one of her brothers who testified that PW2 was born with other siblings. He was also of the view that he was not properly identified because PW3's evidence was that he saw the assailant retreating. That could not have amounted to a positive identification unless for other factors. Finally, he submitted that the case was not proved beyond a reasonable doubt. He urged that the appeal be allowed.

Leaned State Counsel Miss Sigei submitted that the case was proved beyond a reasonable doubt. More importantly was that the three elements of the offence of defilement namely; identification of the assailant, penetration and age of the victim were adequately established. She submitted that it was not true that the Appellant was not furnished with the prosecution witness statements because the entire trial proceeded without him complaining. She conceded that the charge ought to have been drafted under Section 8(1) and (2) of the Sexual Offences Act. However, she was of the view that the same did not prejudice the Appellant because the age of PW2, having been proved adequately, the error was curable under Section 382 of the Criminal Procedure Code. She prayed that the appeal be dismissed.

Evidence

The prosecution's case was that on the material date, 23rd April, 2013, at about 11.00 a.m., the complainant (**PW2**) was playing with her two siblings namely; **N (PW3**) and N (N) at a playing field near their home. The Appellant went to where they were and sent PW3 to a nearby shop with Kshs. 20/= to go and buy some candies (ngumu and PK). When he returned, he did not find his both siblings. He called N who was their younger sibling and he answered while at the nearby napier grass farm. He enquired from him where PW2 was. He told him that she was inside the napier grass. He advanced into the napier grass and saw PW2 who was holding her pants. The Appellant whom he named as Peter walked on the opposite direction. PW2 then told him that the Appellant had done bad manners to her. They then proceeded home where they reported the matter to their parents. Their father took PW2 to Kigumo Health Centre where she was examined and treated accordingly.

PW1 testified as the mother to PW2 and she entirely corroborated the evidence of PW3. In addition, she testified that on examining PW2's private parts, she noted that she had an injury on the vagina. She also reported the matter to the police where a P3 Form was issued. She confirmed that the Appellant was employed by a neighbor and was therefore well known to her and her children. **PW4, Paul Wambugu Gikungi** was a Clinical Officer at Kigumo Health Centre. He examined PW2 on 23rd April, 2013 and noted that she had an injury on the labia minora and her hymen was broken. He produced in court the treatment notes as exhibits. **PW5, Stanley Mukunga Gitau,** the then assistant Chief of Gathugu Sub-Location rearrested the Appellant on 24th April, 2013 from members of the public and escorted him to Kibichoi Police Station. **PW6, P.C Dorcas Mureu** of Kibichoi Police Station investigated the matter. She summed up the evidence of prosecution witnesses and preferred the charges against the Appellant. In addition, she visited the scene of the incident which she confirmed that it was in a napier grass farm. She found the grass disturbed which was an indication of some activity on the ground. This testimony corroborated that of PW1 who also visited the scene and found the grass disturbed.

After the close of prosecution case, the learned trial magistrate ruled that the prosecution had established a prima facie case warranting the Appellant to be put on his defence. He gave an unsworn statement of defence in which he denied committing the offence. He testified that on the material date, 23rd April,

2013 (shown as 24th April, 2013 on the proceedings) he was at his place of work where he was employed as a herdsman. He did his usual chores and never left the homestead. On the following day he continued with his usual work then he was arrested on allegation of defiling a child, an offence he denied committing.

Determination

I have accordingly considered the evidence and the respective rival submissions. I summarize the issues for determination to be whether; the charge sheet was defective, the Appellant was accorded a fair trial the complainant's evidence was reliable and the offence was proved beyond a reasonable doubt.

The Appellant contends that the fact that he was charged under Section 8(1) as read with Section 8(3) of the Sexual Offences Act rendered the charge bad in law and the trial a nullity. He submitted that this was because the evidence that PW2 was aged fours years did not support the charge and further, because he was sentenced under other provision of the law. It is settled law that the age of a complainant in a charge of defilement must be properly established because penalties under Section 8 are determined by the age of the complainant. It behooves the prosecution to draft the charge under the correct subsection of Section 8 of the Sexual Offences Act which both defines the offence of defilement and spells out the respective penalties. In the present case, the particulars of the offence indicated that the child was aged four years. Indeed, the evidence adduced also established her age at four years. Accordingly, the charge ought to have been drafted under both subsections (1) and (2) of Section 8 of the Act. In that case, the test is whether the omission to draft the charge under the correct subsection rendered the charge sheet defective and therefore the trial a nullity.

*I*n my view, this defect is one of want of form and not substance. It must have been occasioned by a typographical error. This is attested by the fact that the statement of the offence was one of defilement and the particulars clearly indicated that the child was aged four years. This demonstrated that the charge was drawn in unambiguous manner save to state the correct provision of the law. Furthermore, from the outset, the Appellant knew he was charged with the offence of defilement for which the complainant was a child aged four years. It is the offence for which he defended himself. No prejudice was thus occasioned to him by the charge being drafted under Section 8(3). See the Case o*f* ***July v.The State 2006 (1) BLR 496(HC)*** *in which it was held thus:*

> ***"It seems to me elementary that where in charging a person, a wrong section of the law is cited but the offence is nonetheless correctly described in a manner that the accused cannot be said not to have understood what he was charged with, such a charge, though technically defective does not vitiate the proceedings taken under it. To argue otherwise would be to be pedantic. In my view, the only basis upon which an argument of this nature could prevail would be where the charge was cast in such vague terms that no offence is disclosed or the accused could not appreciate what he was charged with."***

I do accordingly find and hold that the defect is curable under Section 382 of the Criminal Procedure Code.

The Appellant submitted that he was not furnished with witness statements so as to enable him prepare himself for his defence. Record shows that the court ordered that he be furnished with the same on 31st May, 2013. The matter was next in court on 14th June, 2013. Both himself and the prosecution were not ready to proceed. There was a mention on 19th June, 2013 to confirm that the same was supplied. On this date, there was no indication of whether or not the statements were supplied. The only business that the court transacted was to vary the terms of bond of the Appellant. Therefore, the Appellant not having complained that he was not supplied with witness statement makes me conclude that indeed, he had the witness statements prior to the mention date. This ground of appeal cannot therefore hold.

The Appellant did also submit that he was compelled to proceed with the trial when he was sick, thus violating his right to a fair trial. On 2nd July, 2013, he informed the court that he was unwell and the trial

did not proceed even though the prosecution was ready. The matter next came up on 12th July. The prosecution had three witnesses but the Appellant informed the court that he was not ready to proceed. He gave no reason why he was not ready to proceed. The court then made the following order:

> ***"I have noted that the accused has never been ready despite the witnesses being in court. He says that he can proceed while seated. He has issues when standing."***

Although it was never stated by the Appellant or recorded, it is clear that the court acknowledged that he had made a request to proceed when seated which request was granted. Nevertheless, on this date, the matter did not proceed because the court noted that the victim was traumatized and unable to speak. The hearing was stood over to 16th July, 2013. On this date, the Appellant did not complain to the court that he was either sick or was not ready to proceed. The court took the evidence of PW1, 2 and 3. Accordingly, the Appellant was not forced to proceed when he was unwell. His claim that his right to a fair trial was violated in this respect cannot hold in the circumstances.

The Appellant further faulted the complainant's evidence which he claimed was unreliable. He cited her testimony when the voire dire examination was conducted. She stated that she had no siblings yet the prosecution evidence revealed that she had two brothers. She also stated that she was four years old and was in class four. According to the Appellant, common sense dictates that no child of four years could be in standard four.

It is factual that the voire dire examination was done twice; first, in the absence of her mother when she was unable to talk and the trial magistrate had to halt her testimony to allow her testify in the presence of her mother. On the second chance, the complaint (PW2) was able to talk more and answered more questions during the examination. On the first examination, she informed the court she did not have a brother. On the second examination she indicated that she was four years old and attending class four. I agree with the Appellant that the prosecution case was that before PW2 was defiled, she was in the company of her two brothers namely; PW3 and one N. It is also common sense that a child of four years cannot be in class four.

I do however note that on 12th July, 2013, when the matter was due for hearing, the court noted that PW2 was traumatized, she could not speak and the hearing had to be adjourned to 16th July, 2013. It is on this date that she refused to speak in the absence of her mother. In both instances when voire dire examination was done, the court noted and ruled that PW2 at her age did not appreciate the meaning of taking oath and was directed to give an unsworn statement of evidence. It is then clear that although the answers given in the voire dire examination contrasted the evidence in chief, the same may have been occasioned due to her age and trauma. That notwithstanding, the court held that she spoke the truth and her evidence was a true account of what transpired on the fateful day. This court would equally rely on the evidence given in chief as opposed to answers given in the voire dire examination. I hold the same view that although PW1 gave an unsworn statement of evidence, the same was consistent and even corroborated by PW3, her brother who was playing with her before the Appellant defiled her. The submission by the Appellant that PW1 did not give consistent evidence is therefore not meritorious.

On prove of the offence, there is no doubt that the Appellant was known to both PW1, 2 and 3. He worked as a casual labourer in a neighbouring home. He used tricks to ensure that he executed his mission of defiling PW2. At the time, the victim was playing with her two brothers, PW3 aged 10 and a younger brother named N. He wittingly sent PW3 to a shop with Kshs. 20/= to buy candies. After PW3 had left, he pulled PW2 into a nearby napier grass bush where he defiled her. When PW3 returned to where they were playing, he found PW2 and N missing. Both were in the napier grass bush. N then informed him that PW2 was further inside the farm with Peter. He then met with PW2 carrying her pant on her hand. The latter informed him that Peter (Appellant) had done bad manners to her. PW3 was well known to the said Peter and in the company of PW2 went home and informed their parents what had happened. The offence was perpetrated in day time and so the issue of mistaken identity could not arise. Accordingly, the identification of the Appellant was by recognition as he was well known not to only PW2 but PW3. The evidence of the two witnesses was corroborated by PW1, their mother who confirmed that the information given to her was as narrated by the two witnesses.

On penetration, PW2 herself testified that the Appellant defiled her which fact was confirmed by PW1 after examining her vagina and noting that the same was injured. The evidence was corroborated by PW4, Paul Wambugu Gikungi, a Clinical Officer at Kigumo Health Centre who treated PW2 on the date of the incident. He noted injury on the labia minora and a broken hymen which were consistent with defilement.

The age of PW2 was proved by PW1, the mother of PW2 who testified that the latter was born on 9th April, 2008. She adduced an Immunization Card to prove the date of birth. The same placed PW2 at four years as at the time of the incident. In effect, the Appellant's defence that he was arrested and charged for no apparent reason did not dislodge the strong prosecution's case. I dismiss it entirely.

On sentence, the Appellant appealed on ground that the sentence was inconsistent with the offence charged. Earlier in this judgment, I emphasized the fact that the charge sheet indicated that he was charged under Section 8(3) as opposed to Section 8(2) of the Sexual Offences Act did not render the charge sheet defective nor vitiated the trial. The evidence having established that defilement was perpetrated against a minor aged four years meant that the sentence would be imposed in accordance to Section 8(2). The same provides that ***"a person who commits an offence of defilement with a child of 11 years or less, shall upon conviction be sentenced to imprisonment for life."*** The sentence imposed was therefore lawful.

In the result, I find that the case was proved beyond a reasonable doubt. The appeal lacks merit and the same is entirely dismissed. I uphold both the conviction and sentence. It is so ordered.

Dated and Delivered at Nairobi this 20th day of April, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Appellant present in person.*
2. *Miss Aluda for the Respondent.*