REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL 21 OF 2015

ENOCK ALUKWE INGOSI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. L.A Mumassabba RM

delivered on 17th December 2014 in Sexual Offences Case No. 11 of 2014

in the Principal Magistrate's Court at Mavoko)

JUDGMENT

The Appeal

The Appellant was convicted of, and sentenced to serve twenty years 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 were that on diverse dates between 25th December 2013 and 22nd April 2014 at [particulars withheld] area in Athi River District within Machakos County, he intentionally caused his male genital organ (penis) to penetrate into the female genital organ (vagina) of M N, a girl aged 11 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. His Advocates, Marrirmoi, Chemurgor & Company Advocates, in this respect filed a Memorandum of appeal on 1st July 2015 and submissions dated 7th March 2017. His grounds of appeal in summary from the twenty four grounds proffered in the memorandum are that firstly, the trial magistrate erred in law by convicting the Appellant on a charge that was defective, on evidence that was insufficient, and on a wrong interpretation of the law; and that the Appellant's rights to a fair trial were breached.

It was submitted in this regard that the charge sheet was premised on a girl aged 11 years old, yet PW1 stated that she was 13 years old, and the charge sheet was not amended to this effect. Further, that the evidence adduced did not support the particulars of the charge sheet on the various dates the complainant was alleged to have been defiled, the complainant did not indicate the date of defilement, and the testimony of PW2 and PW4 was contradictory as to the date the offence occurred.

Secondly, the Appellant also argued that the trial magistrate erred in law and facts when he relied on

insufficient evidence as a first hand witness, Mama S, was not called to testify, and the medical evidence could not attribute any penetration to the Appellant. Therefore, that as a result the Appellant's rights to a fair trial were breached. It was however not stated which specific rights to a fair trial of the Appellant were breached and in what manner.

Ms Mogoi Lillian, the learned prosecution counsel, filed written submissions in response dated 20th April 2017, wherein she urged that the charges against the Appellant were proved beyond reasonable doubt by the evidence of four witnesses called by the prosecution. In addition that section 124 of the Evidence Act stipulates that there is no need for corroboration in sexual offences, hence there was no need for further evidence from the said Mama S.

Further, that the complainant was able to positively identify the Appellant as the person who defiled her as the offence occurred at broad daylight. Lastly, that the age of the complainant was proved by PW3 who produced the age assessment indicating that the complainant was 13 years old, which formed the basis of the trial Court sentencing of the Appellant under section 8(3) of the Sexual Offences Act as opposed to section 8(2) as indicated in the charge sheet.

The Evidence

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**).

The prosecution called four witnesses to prove their case against the Appellant. PW1 was M N, the complainant, who after a *voire dire* examination testified that she was playing with her friend when the Appellant called her into his house, removed her clothes and inserted his penis into her vagina. PW2 was E M P, the complainant's grandmother who testified that on 12th April 2014 she was in her house and did not know anything until the next day when she was told a man had defiled PW1. She testified that on that day PW1 had difficulty walking.

PW3, Cpl. V M, testified that she received a report of the defilement on 23rd April 2014 and of the arrest of the Appellant by members of the public, took PW1 to hospital for medical examination, and charged the Appellant with the offence. PW3 also produced an age assessment report as an exhibit, that showed PW1 to be 13 years old.

The last witness (PW4) was Winfred Musembi a clinical officer working in Athi River Health Centre who produced a P3 form filled by Dr. Mwende who examined PW1 and who was a colleague at the clinic. PW4 stated that Dr. Mwende's handwriting was known to her, and that the P3 form indicated that PW1's hymen was broken, her genital organs were foul smelling with discharge, with no spermatozoa noted.

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 defiling the complainant, and stated that on the alleged date of the defilement he was at his work place.

The Determination

I have considered the grounds of appeal and the arguments made thereon, and I note that the two 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.

On the first issue, the Appellant alleges that the charge sheet was defective as he was charged with defilement contrary to section 8(1) (2) of the Sexual Offences Act which provides for defilement of a child aged eleven years and less, and a penalty of life imprisonment. However, that the complainant was aged 13 years and he was sentenced to twenty years imprisonment.

Section 8(1), (2) 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.**
>
> (**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.**
>
> **((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 term of 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 3 of the Sexual Offences Act, and 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. 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.

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 as to the penalty section was not material, 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 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.

However, and this finding notwithstanding, this Court finds that there were defects in the charge sheet in relation to the particulars of the offence, which included the date of the offence, the place of the offence, the act constituting the offence and the age of the victim. 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."**

In the present appeal, the charge sheet clearly indicated the age of the child to be eleven years, when the evidence of PW1 and PW3 was that the complainant was 13 years of age. In addition the particulars were that the Appellant defiled the complainant on diverse dates between 25th December 2013 and 22nd April 2014 , whereas PW1 did not testify that she was defiled severally, and her testimony was with regard to defilement on one occasion. In addition, she did not indicate on which date this defilement occurred. The report of this particular defilement was made to PW2 on 13th April 2014 according to her testimony, while the report of the same defilement was made to PW3 on 23rd April 2014.

The effect of these inconsistences is that the evidence of PW1 placing her with the Appellant as the person who defiled her needed to be corroborated under section 124 of the Evidence Act. However, no other evidence was called to show that the Appellant was with the complainant on the various dates stated in the charge sheet. The medical evidence of penetration of the complainant cannot in this respect determine who caused the penetration in the absence of such corroboration.

The charge was therefore defective to the extent that it was not supported by the evidence that was presented by the Prosecution, and the Appellant was thereby prejudiced as he had to defend himself on new particulars presented during the trial and not disclosed in the charge.

I accordingly quash the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (3) of the Sexual Offences Act for the foregoing reasons. I also set aside the sentence of twenty 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.

It is so ordered.

DATED AT MACHAKOS THIS 28th DAY OF JUNE 2017.

P. NYAMWEYA

JUDGE