REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 28 OF 2016

DAVID MWANGI MUNYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Othaya Senior Resident Magistrate's Court Criminal Case No. 446 of 2015 (Hon. B.M. Ekhubi, Senior Resident Magistrate) on 11th April, 2016)

JUDGMENT

The appellant was charged with the offence of defilement contrary to **section 8 (1)(4)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 6th day of May, 2015 within Nyeri County the appellant intentionally caused his penis to penetrate the vagina of C N M, a child aged 15. He faced an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act** and the particulars here were that on the 6th day of May, 2015 in Nyeri County, the appellant intentionally touched the vagina of C N M , a child aged 15, with his penis.

The appellant was convicted on the principle count and sentenced to 20 years imprisonment; he has now appealed to this court against both the conviction and sentence. In the amended memorandum of appeal which he filed alongside his handwritten submissions on 9th November, 2016 the appellant raised five grounds of appeal which he set out as follows:

1. The learned magistrate erred when he convicted the appellant on a defective charge sheet;

2. The learned trial magistrate equally fell into error when he failed to consider the fact that the complainant and her grandmother whom she was living with never made any report of the complaint against him to the police;

3. The learned trial magistrate erred in law and in fact in relying on the prosecution evidence that was characterised by contradictions and inconsistencies;

4. The learned trial magistrate erred in law in failing to note that crucial prosecution witnesses were not called to testify; and,

5. The learned trial magistrate erred in failing to consider the appellant's defence.

When the appeal came up for hearing, the appellant adopted his written submissions. On the issue of the defect of the charge sheet, he cited the Court of Appeal decision in **Achoki versus Republic (2002) EA 288** where it was held that, as a matter of law, certain words must be adopted in the particulars of an

offence; according to the court, failure or omission to state those words renders the charge fatally defective.

I understood him also to say that the charges against him were not in good faith because he was charged only because he declined to cater for the complainant during her pregnancy yet the complainant herself admitted that the appellant was not responsible for the pregnancy. In any event, it took the complainant and her grandmother three months to lodge the alleged complaint of the sexual assault.

On the question of penetration, the appellant testified that the evidence of the complainant was not consistent with that of the clinical officer and the rest of the prosecution witnesses. According to the medical evidence, the complainant was sexually assaulted between 6th May and 14th July, 2014 yet the other prosecution witnesses testified that the offence was committed on 6th May, 2015.

Mr. Okeyo, the learned counsel for the state, on the other hand, opposed the appeal. In his submissions, however, he conceded that the appellant ought to have been charged under **section 8(3)** rather than **section 8(4)** of the **Sexual Offences Act**, in view of the complainant's age.

It was his submissions that the offence against the appellant was proved beyond reasonable doubt and in particular, the complainant was proved to be 15 years of age at the time the offence was committed. The act of penetration was also proved, although he conceded it could also have been perpetrated by some other person and not just the appellant alone. According to the learned counsel for the state, the trial court considered the appellant's defence but it held it be a mere denial.

To appreciate the arguments by the appellant and the state, it is necessary at this stage to lay out the evidence as presented at the trial. A further obligation on this court is to evaluate that evidence afresh and come to its own conclusions which may or may not be consistent with the conclusions reached by the trial court. Whichever conclusions I make, I am minded that unlike this court which is restricted to the record only, the trial court had the advantage of seeing and hearing the witness first hand.

The appellant's evidence was that she was aged 15 as at the time she testified on 17th September, 2015 and that she lived with her grandmother (PW2) at [particulars withheld] village. On 7th May, 2015, she met the appellant on her way from school. The appellant, whom she had known for two months, asked her to accompany him to his house. She followed him and ended up spending four days there. During this period, they had sexual intercourse which the complainant claimed was non-consensual. After she left and went back home, she never went to school again. On 21st July, 2015, the appellant is said to have told her grandmother that he was the cause of the complainant not attending school. It is then that her grandmother reported the matter to the police.

She also informed the court that she was pregnant, as at the time she testified, although the person responsible for her pregnancy was not the appellant but one Christopher Kariuki.

The complainant's grandmother, **C N W (PW2)** confirmed that she not only lived with the complainant but she also lived with her mother who happened to be mentally unstable. She exhibited a birth certificate showing that the complainant was born on 16th August, 2000.

It was her evidence that the complainant spent four days with the appellant with whom she had been having sex; she got this information from the complainant herself when she returned home. She also testified that the appellant confronted her on 21st July, 2015 and questioned her why she was spreading rumours that he had stopped the complainant from going to school. She then reported the matter to the police but three months later. The witness admitted that she demanded money from the appellant to cater for the complainant and her unborn child and that the issue was even negotiated with police constable Macharia of Gatugi police station. However, she admitted that she was not aware of who was responsible for the complainant's pregnancy.

Ian Ngumo Waitere (PW3) the clinical officer who filled and signed the complainant's P3 form testified

that the complainant visited the hospital on 21st July, 2015 and alleged to have been defiled between 6th May and 14th July, 2015. According the medical officer, the complainant's hymen had been broken but apparently healed; in his words, it was not freshly perforated. The complainant was also established to be pregnant.

The investigations officer, **Police Constable Benard Kiminza (PW4)** testified that both the appellant and the complainant were brought to Othaya police station on 21st July, 2015 by the administration police officers from Gatugi camp. He escorted the complainant to hospital for treatment and examination on the same day. It was his evidence that the complainant dropped out of school in June, 2015 when she was found to be pregnant. He also testified that the complainant informed him that she visited the appellant on several occasions between May, 2015 and July, 2015; it was on these occasions that the complainant is alleged to have been defiled. The officer also admitted that he did not record any statement from the complainant's grandmother though she testified as a prosecution witness.

If the submissions by both the appellant and the learned state counsel for the state are considered against the foregoing background, alongside the appropriate law, it is possible to ascertain whether the learned magistrate made the correct conclusions on facts and the law.

To begin with the appellant was charged under **section 8 (1) (4)** of the **Sexual Offences Act**; this provision of the law states as follows: -

> ***8. Defilement***
>
> ***(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.***

Penetration as a technical term is defined in **section 2** of **the Act** to mean "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*" There was sufficient evidence from the clinical officer that the complainant's genital organs must have been 'penetrated'. This is because he testified that her hymen was broken and the complainant had conceived though he couldn't tell when either of these things occurred.

A major component of this offence is the age of the complainant for 'defilement' is only defilement as known in law if it involves penetration of the genital organs of *a child*. According to **section 8(4)** of the **Act**, if the victim child is between the age of sixteen and eighteen the accused person is liable to imprisonment for at least 15 years.

The complainant was born 16th August, 2000 and therefore she was 14 when the offence is alleged to have been committed on 6th day of May, 2015; her fifteenth birth day was 15th August of that year. This being the case the appellant ought to have been charged, as the learned counsel for the state conceded, under **section 8(1)(3)** which states:

> ***(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.***

The learned magistrate also found as a fact that the appellant ought to have been charged under this provision of the law; however, he proceeded on the mistaken belief that the complainant was aged 15 at the time of the offence.

Be that as it may, if the learned magistrate was aware that the appellant was charged under the wrong provision of the law, he ought to have taken the initiative to have the charge sheet amended under **section 214** of the **Criminal Procedure Code, Cap.75**. That section provides for amendments of the charge sheet whenever it appears that the charge and the evidence are inconsistent; it states:

> **214**. **Variance between charge and evidence, and amendment of charge**
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> ***(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***
>
> ***Provided that—***
>
> > ***(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***
> >
> > ***(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.***
>
> ***(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.***
>
> ***(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.***

When the learned magistrate realised that the charge was defective in substance and in form, he ought to have made an order for alteration of the charge either by way of amendment or by substitution of a new charge. He fell into error and misdirected himself in law when he proceeded to convict and sentence the appellant as if he had been charged under **section 8(1)(3).** To conclude, as he did in his judgment, that this defect in the charge was not prejudicial to the appellant, was also erroneous at least for two reasons; first, it is obvious that evidence produced was inconsistent with the charge and ultimately, the charge was not proved at all. Second, **section 214(2)** of the **Criminal Procedure Code** states that it is only in limited cases of variances related to the time when the offence was committed that court may ignore as immaterial defects and need not amend the charge for purposes of correcting dates. By necessary implication, the other variances including, as is the case here, variances between the charge and the evidence, are material and cannot be disregarded. I suppose it is because of this materiality that the alteration of the charge whenever occasion demands is expressly provided for.

The other aspect of the defect which the appellant made reference to is the omission of the word "unlawful" from the particulars of the charge. The particulars of the charge against the appellant were stated as follows: -

> ***<u>David Mwangi Munyi</u>: on the 6th day of May, 2015 within Nyeri County, intentionally caused his penis to penetrate the vagina of C N M, a child aged 15 years.***

Here, I have to disagree with the appellant because the definition of the offence of defilement does not incorporate the word unlawful; as noted the offence is defined in **section 8(1)** of the Act which says:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

According to this definition the act of penetration, *ipso facto*, is sufficient. Penetration of a child's genital organs by genital organs of another person is, by itself, unlawful; I certainly cannot envisage circumstances under which this sort of an assault on a child can be regarded as lawful such that the charge would be deemed defective if the word "unlawful" is not included in the particulars thereof. For this reason, I am satisfied that the decision in **Achoki versus Republic (supra),** is of little help to the appellant. In that case the Court of Appeal held that failure to use the words "unlawful and without consent" in a charge of rape was fatal to a conviction under the relevant section because those particular words largely define what the offence of rape is.

There is some merit in the appellant's submission that his prosecution may have been actuated by malice or otherwise by reasons other than upholding criminal justice. I have come to this conclusion because although the offence is said to have been committed in May, 2015, it is only in July of the same year, almost two and a half months later, that the offence was reported. What I gathered from the evidence of the complainant's grandmother is that, even then, the case was only reported because the appellant had declined to cater for the complainant during her pregnancy. She was categorical that she demanded money from the appellant to take care of the complainant and her unborn child. She, however, admitted that she was not aware who it was that impregnated her daughter. The complainant herself identified the father of her unborn child as one Christopher Kariuki. The complainant's grandmother went further to say that the issue of providing for the complainant during her pregnancy was even discussed at the police station and it is only when the negotiations failed that the appellant was charged.

In my humble view, these circumstances under which the appellant was charged raised reasonable doubt whether he was the person who defiled the complainant. Having identified some person other than the appellant as the one responsible for her pregnancy and considering that the appellant was charged only because failed to maintain the complainant I cannot say that the offence for which the appellant was charged and convicted was proved beyond reasonable doubt. In my view, his conviction was unsafe.

For the foregoing reasons, I am inclined to conclude that the appellant's appeal is meritorious and I hereby allow it; his conviction is quashed and sentence set aside. He is set at liberty unless he is lawfully held.

Signed, dated and delivered in open court on 18th August, 2017

Ngaah Jairus

JUDGE