REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 46 OF 2014

SAMUEL BEJA MBUI…….....……..…….APPELLANT

VERSUS

REPUBLIC ……...…….RESPONDENT

(Appeal from a Judgment of the Principal Magistrate's court at Kwale in Criminal case No. 1247 of 2010 delivered on 24th October 2013)

JUDGMENT

1 SAMUEL BEJA MBUI (herein after referred to as the Appellant) filed an appeal in this court seeking to have the conviction and sentence imposed against him by Honourabe E. K. Usui, Principal Magistrate vide Criminal Case No. 1247 of 2010 at Kwale.

2 The appellant in this appeal was charged with defilement contrary to section 8(3) of the Sexual Offences Act No3 of 2006, Laws of Kenya. The particulars of the charge are that on the month of October ,2009 on unknown dates in Kinango District within Coast Province, the appellant did an act which caused penetration of the penis to the vagina of KM a girl aged 16 years and a standard five pupil at [Particulars Withheld] primary school and impregnated her.

3 The appellant also faced an alternative charge of indecent act contrary to section 11(1) of the Sexual Offences Act No.3 of 2006

4 The prosecution called six (6) witnesses in support of the charges after which the trial court ruled that the appellant had a case to answer. He chose to give sworn evidence with no witnesses. After consideration of the evidence tendered before it, the trial court found the appellant herein guilty of the offence of defilement and sentenced him to serve twenty (20) years imprisonment.

5 Being aggrieved by the judgment and sentence, the appellant filed this appeal citing the following grounds in his amended grounds of appeal.

(a) That the learned trial magistrate erred in law and fact by convicting and sentencing him to serve 20 years imprisonment but without considering that the charge preferred against him was fatally defective for Section 8 (1) (4) of the Sexual Offences Act No 3 of 2006, which define the act of penetration was omitted.

(b) That the learned trial magistrate erred in law and fact by convicting and sentencing him to serve 20 years imprisonment which is illegal taking into consideration the age of the complainant as adduced before the court.

(c) That the learned trial magistrate erred in failing to consider his reasonable defence statement which had created doubt in the prosecution's case.

6 The appellant, who was unrepresented filed written submissions where all the grounds of appeal were consolidated and argued as follows;

(a) On the ground that the trial magistrate erred in law in convicting the appellant without considering that the charge preferred against him was fatally defective, the appellant submitted that Section 8 (1) of the Sexual Offences Act No. 3 of 2006 which defines the act of defilement was not included in the charge sheet as at page c of the proceedings, it indicates that the appellant is charged with "defilement contrary to section 8 (3) of the Sexual Offences Act No. 3 of 2006…." He submitted that the said section provides that:

"A person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term not less than 20 years."

He stated that he ought to have been charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.

(b) On the issue that the appellant was convicted and sentenced to serve 20 years imprisonment without the age of the complainant being taken into consideration, it was the appellant submissions that the evidence adduced before the trial court did not support the charge against him in so far as the age of the complainant is concerned. The appellant pointed out that from the evidence adduced in court by the complainant, her father, Pw2 and the medical practitioner (Pw3) through the clinic card (exhibitP1), the complainant was 16 years at the time of the alleged offence. The appellant went on to submit that conviction for an offence of defilement falls under three (3) ambits, being section 8 (2),8(3) and 8 (4) depending on the age of the complainant so that for a complainant aged 16 years conviction would be under section 8 (4) of the Sexual offences Act and not Section 8 (3) of the same Act which relates to a complainant aged twelve to fifteen years old.

(c) Finally the appellant submitted that having been charged under Section 8 (3) of the Sexual Offences Act instead of Section 8 (4) of the Sexual Offences Act, the sentence of 20 years imposed on him was illegal, harsh and excessive. He also urged the court to re-evaluate and re-analyze the evidence as adduced and come up with an independent decision and award him the benefit of doubt.

7 The respondent was represented by M/s Ocholla, learned counsel for the state who opposed the appeal.

8 In respect to the first ground, that section 8 (1) of the Sexual Offences Act was omitted from the charge sheet, thus rendering the charge sheet defective, M/s Ocholla submitted that the omission of the definition of the offence is not fatal as the same can be amended under section 382 of the Criminal procedure Code. She stated that on the day he was arraigned in court, the appellant knew the charge he was facing was that of defilement and date and place where it was committed was explained to him when the particulars were explained to him. That the appellant, though unrepresented, participated in the trial and cross examination of all the prosecution witnesses.

She further submitted that the omission was a mere technicality which could not be allowed to override substantive justice. She relied on Article 159 (2) (a) of the Constitution in addressing this argument and urged the court to dismiss the first ground of appeal by the appellant.

9 With regard to the second ground, M/s Ocholla submitted that the appellant was charged under Section 8 (3) of the Sexual Offences Act following the evidence on record which clearly shows that the complainant was 15 years old at the time of the incident. She referred to the

immunization card (exhibit D1) which clearly shows that the complainant was born on 17.3.1994. She acknowledged that the trial magistrate convicted the appellant under section 8 (2) of the Sexual Offences Act instead on Section 8 (3) of the same but urged the court to correct this error.

10 In determining an appeal, the duty of the court is to re-evaluate and analyze the evidence which was tendered by the prosecution and defence before the trial court and come to its own conclusion and findings in line with the case of OKENO VRS REPUBLIC (1972) E.A 32 in which the duty of the first appeal court is set out.

PROSECUTION'S EVIDENCE.

11 Briefly, it was the prosecution's evidence that the complainant KM who testified as Pw1 and told court that she was 16 years old , was a standard five (5) pupil at [Particulars Withheld] primary school in October ,2009.

12 The complainant (Pw1) told court that she always met the accused person, who is a cook in the school and he approached her when she was in standard five(5) wanting to have sex with her. Pw1 said she resisted but he gave her Ksh 50 and told her that he wanted to marry her. He took her to a PEFA church where he was teaching the youth and had sex with her in September 2009. That he continued having sex with her at the church until she realized that she was pregnant.

13 Her mother MK testified as Pw2 and she told court that in April,2010 she heard the neighbors discussing that her child was pregnant. They talked and the complainant admitted that she was pregnant. She told the court that it was BEJA MBUI, the accused who was responsible for the pregnancy.

14 They went to the chief who sent them to Kinango police. She was sent to Kinango hospital where she was examined by Pw3, Titus Kylao Kamu who established that she was 30 weeks pregnant, with a baby. He found she had no injury on the genitalia, no vaginal discharge detected, urinalysis test was normal and so was the high vaginal swab. He filled the P3 which was filled on 21.4.2010 and produced as exhibit P1.

15 Pw4, Pc Rosemary Nyambura told court that on 21.4.2010 she was at the station at Kinango when the complainant and her father went there and reported a case of defilement. She commenced investigations. Escorted the complainant for examination and recorded witness statements.

16 Pw 6, PC Cetric Kirago escorted the complainant and small child to Coast General Hospital where her blood samples were taken and forwarded to Mombasa Government laboratory. He examined the blood samples and prepared the report confirming the 99.999 chances that Samuel Beja Mbui is the father of Salome Kaya. He produced the report as exhibit P3.

17 The accused person was arrested by Ap officers in August who escorted them to the police station.

DEFENCE CASE.

18 The accused person, Samuel Beja was placed on defence and he opted to give a sworn statement defence. He called no witness

19 According to the accused, on 16.8.2010 at about 1.00 pm he saw a group of police officers who raided his home and arrested him. It was at the police station that the accused person was told that he had defiled a girl which he denied.

20 He said that the girl mentioned other people at the chief's and not him. He also said that the card brought to court was just a mix up as the children shared names. He further said that the

complainant was not in school as alleged and that she was not a minor. He said that the complainant never got pregnant. He however admitted that he was taken to Coast General Hospital for examination where his blood was extracted but he never saw what happened. He said he was surprised when the doctor said the child was his as he has never been brought the child.

21 When cross examined, he said that he had a grudge with the girl's family over land.

22 The trial magistrate after considering the evidence adduced during the trial found at page J2"line 2 to 4:

"The complainant immunization card marked exhibit P1 shows that the complainant was born on 17.3.1994. At the time of the offence she was 15 years old.

At lines 9 to 10 of the judgment she went on to state.

" I find he had no justification to presume the complainant was not a minor".

Further at lines 11 to 12 of the judgment ,she stated:

"I find there is sufficient evidence of penetration form the result pregnancy confirmed by the clinical officer, Titus Kamulu, Pw3 on 21.4.2010…"

She concluded at lies 18 to 19 of the judgment:

"I find the charges proved beyond reasonable doubt and find accused guilty of the offence of defilement of a girl contrary to Section 8 (2) of the Sexual Offences Act, 2006….."

ANALYSIS AND DETERMINATION.

23 I have carefully gone through the evidence adduced before the trial court together with the grounds of appeal and submissions by both the appellant and respondent's counsel. I find that the following issues emerged for determination;

(a) Whether the trial magistrate failed to consider that the charge preferred against the appellant was fatally defective since section 8(1) of the Sexual Offences Act which defines the act of penetration was omitted in the charge.

(b) Whether the sentence of 20 years imposed against the appellant was illegal in view of the age of the complainant.

(c) Whether the trial magistrate filed to consider the appellant's defence.

24 On the issue of the charge being defective because section 8 (1) of the Sexual Offences Act which defines the act of penetration was omitted. I find the appellant in his submissions cited the case **of MUTNDA MWAI MUTANA CRIMINAL APPEAL NO. 282 OF 2008,** where Justice Maureen Odero faced with similar circumstances their has thus to say in her judgment.

"I have looked at the charge sheet. The appellant was charged with the offence of defilement contrary to section 8 (3) of the Sexual Offences Act. Section 8 (3) provides that;

> ***"A person who commits and offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term not less than 20 years".***

The charge did not include any mention of Section 8 (1) of the Act which defines the act of defilement thus.

"Section 8 (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement".

This section therefore creates the offence. The proper procedure would be to have charged the appellant with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act. No.3 of 2006. To charge the appellant with the contravening only penalty sections is fallacious. I do agree that the charge is defective. A trial, conviction and sentence flowing from a defective charge cannot stand. I therefore allow this appeal, quash the appellant's conviction and set aside the 20 years sentence"

25 The appellant in the instant case was only charged under section 8 (3) of the sexual offences Act which provides that;

"A person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a terms of not less than 20 years."

26 The appellant therefore submitted that since section 8 (1) of the Sexual Offences Act No 23 of 2006 which defines the act of defilement was not indicated in the charge, the same was defective and hence his appeal should be allowed.

27 I have read through and considered the decision of Justice Maureen Odero in Criminal Appeal No 282 of 2008, MUTINDA MWAI MUTANA and appreciate the same noting that it was a decision arrived at in 2008 before the promulgation of the Constitution of Kenya, 2010.

28 It is not in doubt that the appellant went through the entire proceedings so that he was fully aware of the offence he was charged with the date and place it was allegedly committed, and to who it was committed against. The appellant also participated in the trial by cross examining the prosecution witnesses and offering his defence despite his being unrepresented.

29 I hence agree with counsel for the state, M.s Ocholla that the appellant was not prejudiced as he fully understood why he was before court, that he had been charged with the offence of defilement.

30 In view of the seriousness of the offence of defilement. I find that the omission of section 8 (1) of the sexual Offences Act No. 3 of 2006 from the charge a mere technicality which cannot be allowed to override substantive justice.

31 This finding is based on the provisions under Article 159 (2) (d) of the Constitution of Kenya, 2010 which provides as follows;

"In exercising judicial authority, the courts and tribunals shall be guided by the following principles:

(d) Justice shall be administered without undue regard to procedural technicalities.

32 In fact, as submitted by M/s Ocholla, learned counsel for the state a mere omission of the definition of an offence is not fatal as it is curable under Section 382 of the Criminal Procedure Code which stipulates as follows:

"Subject to the provisions herein before contained no findings, 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, production order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under the 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"

I find no merit in this the ground and it is dismissed.

33 In the appellant's second ground of appeal, he has faulted the trial magistrate for imposing a sentence of 20 years against him which is illegal in view of the age of the complainant.

34 Section 8 (3) of the Sexual Offences Act under which the appellant was charged, provides, Sentence upon conviction for an offence of defilement of a child the age of twelve and fifteen years to be imprisonment for a term of not less than twenty years. In Kaingu Elias Kasomo vs Republic, the court of appeal said:

"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved ……..it is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

35 The particulars of the charge show that the complainant was 16 years old when the offence was committed against her.

From the evidence of Pw1, the complainant, her mother, Pw2 and the clinic (immunization card) exhibit P1, it is clear that the complainant was 15 years old at the time of offence of defilement was committed against her. When she said she was 16 years in her evidence, she was referring to her age at the time of testifying which appears to be the age the investigating officer indicated in the particulars of the charge.

36 Although in her judgment the trial magistrate convicted the appellant under Section 8 (2) of the Sexual Offences Act, she sentenced him to serve twenty (20) years imprisonment which I believe was in consideration if the age of the victim at the time of the alleged offence as adduced in the evidence of the prosecution witness.

37 Since it is obvious that there was an error in the judgment by the trial magistrate in convicting the appellant, I revise the same so that the conviction is under section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006 as there was no miscarriage of justice. In view of this, this ground of appeal also has no merit and is hence dismissed.

38 Finally, the appellant contested that the trial magistrate failed to consider his defence. I have carefully examined he evidence adduced by both the prosecution and accused together with the judgment of the trial magistrate.

39 I find that in her judgment, the trial magistrate had this to say about the allegations of the accused person in his unsworn defence that the complainant was not a minor and that the immunization card (exhibit P1) had been mixed up with those of her other siblings first so as to fabricate the offence against him.

"I however found the issue was not raised in cross examination of the complainant and on facts. The accused is a close relative of the complainant. It is the complainant's father's step brother. There was no reason why he could not confront the complainant's father with these allegations. ….I find he had no justification to presume that the complainant is not a minor" (see lines 7 to 10 of page 2 of the judgment)

He even alleged that there was a grudge between him and family of the girl but he did not interrogate the girl and her mother, Pw2 over this and yet he had a chance of cross examining them.

40 It is clear that the trial court considered the appellant's defence which was found not permissible again. I find that ground of appeal unmaintainable and dismiss it.

41 All in all, I find the appeal has no merit in view of the grounds raised I hence uphold the conviction and confirm the sentence that was imposed by the learned trial magistrate against the appellant.

Judgment signed, delivered and dated this 16th day of February 2016.

D. CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

The appellant in person.

C/Assistance – Kiarie