REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL 108 OF 2012

TITUS KYALO IKOMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence of J. Omange SPM delivered on 25th July 2012

in Sexual Offences Act Case No. 39 of 2010 in the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was convicted and sentenced to serve 15 years imprisonment for the offence of defilement, contrary to section 8(b) as read with section 8(3)of the Sexual Offences Act. The particulars of the offence were that on 16th September 2010 at [particulars withheld] sub-location, Vyulia location in Mwala District within Eastern Province, he intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of M M, a girl aged 17 years.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The learned counsel for the Appellant in this appeal was Mr. L.N. Ngolya Advocate, while the learned counsel for the State was Ms. Rita Rono.

The Appellant's grounds of appeal are stated in his Petition of Appeal dated 2nd August 2012 and Supplementary Grounds of Appeal dated 28th July 2014. In summary the Appellant alleges that the evidence used to convict him was not credible, was incomplete and untested, t had no nexus with the charge and did not prove penetration. Further, that he was convicted on a charge that was defective, and when the age of the of the alleged victim was not proved.

The learned counsel for the Appellant reiterated these grounds in submissions he filed in Court dated 18th March 2016, wherein it was urged that the Prosecution failed to prove its case beyond reasonable doubt as the complainant's evidence was not specific as to the act of penetration; the trial court attached weight on a P3 form that was incomplete; and PW4 who was the clinical officer who examined the complainant failed to give any conclusions. It was submitted further that the age of the complainant was never proved and was estimated in the P3 form, and the age assessment report was not produced by its maker. Reliance was placed in this regard on the decisions in **Kaiungu Elias Kasomo vs R, Malindi Criminal Appeal No. 504 of 2010,** and **Julius Kioko Kivuva vs Republic, Machakos Criminal Appeal No 60 of 2014**.

On the ground raised on the defective charge sheet, the Appellant's counsel submitted that the charge sheet referred to section 8(b) of the Sexual Offences Act, whereas the judgment of the trial Court made reference to a charge under section 8(1) of the Sexual Offences Act, Therefore, that the judgment was unrelated to the charge faced by the Appellant; no attempt was made to rectify the charge sheet; and the Appellant was tried and convicted of an imaginary offence as there is no section 8(b) of the Sexual Offences Act. The decision in **Yozefu & Another vs Uganda (1969) EA 236** was cited in this respect.

The learned counsel for the State conceded in submissions dated 30th March 2016 that the charge was defective, and that the Appellant was charged with the offence of Defilement contrary to section 8(b)(2) of the Sexual Offences Act, which charge as framed does not exist in law. Reliance was placed on the decision in **Sigilani vs Republic (2004) 2 KLR 480**.

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**).

Four witnesses testified at the trial in the lower court. The key aspects of the evidence by the complainant who was PW1 was she was sent to buy a pen from the Appellant's kiosk on Saturday 16th September 2010, and that the Appellant took her to his house where she stayed on Saturday, Sunday and Monday when her mother came to look for her. Her testimony was that the Appellant during that time did bad manners to her, raped her and that he removed her panty and inserted his thing by force into her.

The complainant's mother who was PW2 confirmed that the complainant went missing for three days, and that she found her in the Appellant's house. PC Ibrahim Gedi (PW3), a police officer attached to Masii Police Station, testified that the complainant and her mother reported an abduction and defilement, and that he issued the complainant with a P3 form and arrested the Appellant. The last prosecution witness was Daniel Musyoka, who produced the P3 form after examining the complainant.

After the close of the prosecution case, the Appellant was put on his defence and made a sworn statement. He stated that when the complainant came to his kiosk she refused to leave, and followed him to his house after he closed the kiosk at 7.00pm. His testimony was that he struggled with the complainant the whole night.

From the foregoing submissions and evidence, I find that the issues raised in this appeal are firstly, whether the Appellant was convicted under a defective charge, and secondly, whether the Appellant's conviction for the offence of defilement was based on sufficient and satisfactory evidence.

On the first issue as to whether the charge sheet was defective, the learned counsel for the State did concede that the Appellant was wrongly charged under section 8(b) of the Sexual Offences Act which is non-existent. The applicable section under which the Appellant ought to have been charged under Section 8(4) of the Sexual Offences Act given that the charge sheet indicated that the complainant was aged 17 years.

In **Sigilani vs Republic (2004) 2 KLR 480** and **Amedi Omurunga v Republic, Malindi Criminal Appeal No. 178 0f 2012, [2014] eKLR**, the Court of Appeal held that an accused person must fully understand the nature of the offence he is facing so that he pleads to it with full knowledge, and that it is preferable that the statement of offence contains a reference to the section creating the offence as well as that prescribing the punishment. There was thus a defect in the trial of the Appellant right from the start, and there was no attempt made to rectify this defect by the trial court.

The question whether a defect in the charge sheet would vitiate the proceedings and the conviction entered depends on whether the defect occasioned a failure of justice and thereby prejudiced the Appellant, by applying the test provided for under **section 382** of the Criminal Procedure Code. In the present appeal, although the charge sheet did state that the offence the Appellant was being charged with was defilement, no offence was disclosed by the section that was cited, and therefore there was also no

applicable section as regards the punishment to be meted out. To this extent I am satisfied that the irregularity in the charge sheet did imperil the Appellant and occasioned him a failure of justice as he was subjected to an inapplicable, harsh and excessive sentence.

This defect is not curable under section 382 of the Criminal Procedure which provides as follows:

> **"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."**

The Appellant was unrepresented in the trial Court, and I am persuaded that he was not in a position to raise an objection as to the defective charge in the proceedings in the trial Court.

While the findings hereinabove on the defective charge are sufficient to dispose of this appeal, I will also comment on the second issue as to whether the conviction of the Appellant was based on satisfactory evidence. I note from the record of the trial Court that the complainant was stood down on 9th November 2010 after the prosecution made an application to clarify issues on an exhibit. The next hearing was on 6th October 2011 when PW2 gave her testimony. Therefore, the complainant did not complete her evidence-in-chief, was never cross-examined on her testimony and her evidence as to penetration was therefore untested and not reliable.

In addition there was an infringement of the Appellant's right to cross-examine a witness in a criminal trial, as found in Article 50 (2)(k) of the Constitution which provides as follows;

> **"Every accused person has the right to a fair trial, which includes the right to:-**
>
> **….*k)* to adduce and challenge evidence"**

Section 208 of the Criminal Procedure Code also provides for the procedure to be followed by a trial Court upon entering a plea of not guilty as follows:

> **"(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).**
>
> **(2) The accused person or his advocate may put questions to each witness produced against him.**
>
> **(3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer."**

It is my finding that the failure to accord the Appellant the opportunity to cross-examine the complainant did prejudice him, as the evidence of the complainant was central in the finding by the trial Court as to the commission of the offence of defilement and the Appellant's subsequent conviction.

I accordingly allow the Appellant's appeal and quash his conviction for the offence of defilement contrary to section 8(1) of the Sexual Offences Act, Act No. 3 of 2006. I also set aside the sentence imposed upon him for the said conviction and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 21st DAY OF APRIL 2016.

P. NYAMWEYA

JUDGE