REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 330 OF 2013

SIMON MUTINDA MUNYAO ……..……...……APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

(An appeal arising out of the conviction and sentence of Hon. M.K Mwangi Ag. SPM delivered on 9th October 2013 in Criminal Sexual Offences Case No. 25 of 2009 in the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was convicted and sentenced to serve 10 years imprisonment for the offence of attempted defilement , contrary to section 9(1) of the Sexual Offences Act. The particulars of the offence were that on the 31st July 2009 at in Mwala District, within Eastern Province, the Appellant intentionally and unlawfully attempted to penetrate the genital organ of W M a girl aged 16 years.

The Appellant was first arraigned in the trial court on 3rd August 2009 when he pleaded not guilty to the charge. The hearing commenced before Hon. E. Nderitu SRM who heard one witness before he was transferred. The hearing then started *de novo* before Hon. J. Omange PM on 21st June 2011 who heard 4 witnesses, before a new trial magistrate, Hon. M. K. Mwangi, took over the hearing and again started the trial *de novo* on 10th October 2012. Hon M. K. Mwangi is the trial magistrate who delivered the judgment being appealed from.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Petition of Appeal dated 18th November 2013 and Amended Grounds of Appeal availed to this Court on 14th March 2016. In summary, the Appellant alleges that the prosecution had not proved the case to the required standards; there was no sufficient evidence; the Appellant's defence was not considered and the provisions of section 169(1) of the Criminal Procedure Code were not adhered to; the charge sheet was defective; the evidence was inconsistent and contradictory; there was no nexus between the accused and the evidence; and that his right to a fair hearing under Article 50(j) of the Constitution was violated.

The Appellant availed submissions dated 14th March 2016, which were filed together with his amended grounds of appeal. He submitted therein that there was an error in the charge sheet, since it only indicated section 9(1) of the Sexual Offences Act which section cannot be used to convict on its own. Further, that the charge indicated that the offence was committed on 31st July 2009, yet the evidence on record states that the incident occurred on 3rd July 2009 and 29th July 2009, while PW1 stated that the incident occurred on 29th August 2009. The Appellant cited the decision in **Ndege Maragua vs R, EACA 156**

(1964) as regards the discrepancies in the dates, stating that the prosecution had not proved it case beyond reasonable doubt.

The Appellant further argued that his right to fair hearing was contravened, when he proceeded with the trial without being informed in advance of the evidence to be used against him. He also submitted that the evidence as a whole was not corroborated and that the P3 form had been filled on 31/06/2009 weeks before the alleged incident. He also noted that his mental status was not fit at the time of his arrest, and the prosecution had taken advantage of his state. Lastly, the Appellant contended that there was contradictory evidence on the age of PWI, and therefore that the prosecution had not proved their case beyond reasonable doubt.

Shijenje Johnson, the learned prosecution counsel, opposed the appeal in written submissions filed on 12th April 2016. It was urged therein that the amended grounds of appeal ought to be struck out as no notice was issued to the Registrar of the Court nor to the Director of Public Prosecution, and no leave of court had been granted as per section 350 of the Criminal Procedure Code. On the issue of the defective charge sheet, it was submitted that it was an afterthought by the Appellant and the matter should have been raised at trial. Further, that the omission to state the section containing the punishment did not occasion any prejudice to the Appellant.

On the burden of proof, it was submitted that the prosecution through PW1's testimony which was corroborated by PW2, PW4 and PW6 had proved its case to the required standards. It was further submitted that the judgment and the record showed that sections 169 and 382 of the Criminal Procedure Code had been adhered to. As regards the violations of Article 50(j) of the Constitution, it was submitted that at no one time did the Appellant at trial allege that he had not been supplied with statements and the materials that the prosecution would rely on.

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**).

Five witnesses testified for the prosecution at the trial in the lower court. The key aspects of the evidence by the W M who was the complainant and PW1, was that she was accosted by the Appellant on her way home on 29th July 2009, and thrown on the ground, whereupon the Appellant sat on her stomach, pulled her petticoat and started to unzip his trousers. She thereupon screamed and was rescued by neighbors. Muthina Muia (PW2) who was in the neighborhood, and PW3, PC Anne Nyaga who was then stationed at Masii Police station, testified as to the arrest of the Appellant.

PW4 was Elizabeth Kauli Mwanza who testified that she was in their house together with her mother, Philomena Ndithini Nzwili (PW6), when they heard PW1's screams and ran and rescued her from the Appellant. The last prosecution witness was Micheal Mutisya Ngila (PW5) of Kambi health centre, who assessed the age of the complainant at about 10 years, and produced a P3 form as to the injuries she suffered from the ordeal.

After the close of the prosecution case, the Appellant was put on his defence and made an unsworn statement. He stated that he was coming from his farm, when he met a crowd which alleged that he had defiled a girl and beat him up. He was then taken to Masii police station, and he claimed to have been framed as the girl had a grudge with his mother. He further testified that he was not interested in girls.

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 if not, secondly, whether the Appellant's right to a fair trial was violated; thirdly, if the Appellant's conviction for the offence of attempted defilement was based on sufficient and satisfactory evidence, and lastly, whether the judgment of the trial court conformed to section 169 of the Criminal Procedure Code.

On the first issue as to whether the charge sheet was defective, the first question to be answered is

whether the inclusion of the wrong date when the offence was committed was a material defect in the charge sheet. The charge sheet indicated that the offence was committed on 31st July 2009, while a perusal of the evidence by PW1, PW2, PW3 and PW4 shows that they testified that the offence was committed on 29th July 2009, with PW1 testifying upon being recalled that the date on the charge sheet was wrong. The answer to this question is to be found in section 214(2) of the Criminal Procedure Code which provides as follows:

"(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."

It was therefore not necessary to amend the charge on account of a contestation by the Appellant as to the time when the offence was committed. The inclusion of a wrong date in the charge sheet was thus not a fatal defect.

On the argument about the charge sheet not indicating the section prescribing the sentence, it is the position as stated by the Court of Appeal in **Sigilani vs Republic (2004) 2 KLR 480** and **Amedi Omurunga v Republic, Malindi Criminal Appeal No. 178 0f 2012, [2014] eKLR**, 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 charge sheet in the present appeal as it did not include the section that prescribes the punishment for attempted defilement which is section 9(2) of the Sexual Offences Act.

The effect of this defect in the charge sheet, and in particular as to whether it will vitiate the proceedings and the conviction entered by the trial Court depends on whether the defect occasioned a failure of justice and thereby prejudiced the Appellant. This is determined by applying the test provided for under **section 382** of the Criminal Procedure Code 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."**

In the present appeal, the charge in the present case was clear enough that the Appellant was charged with attempted defilement of a girl contrary to *section 9(1)* of the Sexual Offences Act. The particulars of the offence were also given, the material part of which disclosed when and where the offence was alleged to have been committed and the name and age of the victim. In my view the particulars were clear enough to the Appellant even if he was unrepresented.

To this extent I am satisfied that the irregularity in the charge sheet did not imperil the Appellant or occasion him a failure of justice. I am persuaded by the decision of the Court of Appeal in Malindi in **Robert Mutungi Muumbi v Republic, [2015] eKLR**, where the said Court found in similar circumstances that the failure to refer to the punishment section in the charge sheet did not occasion a miscarriage of justice.

On the second issue, the Appellant claimed that his right to a fair trial as enshrined in the Constitution were violated, as he was not availed the evidence that the prosecution was relying on. I have perused the record of the trial court, and note that the Appellant did not request for witness statements, but that there

is also no record of the same having been supplied to him.

Article 50(2)(j) of the Constitution provides that the right to a fair trial includes the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. This right was explained in ***Dennis Edmond Apaa and Others v Ethics and Anti-Corruption Commission,*** **Nairobi Petition No. 317 of 2012 [2012] eKLR** as follows:

> ***"The words of Article 50(2)(j) that guarantee the right "to be informed in advance" cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2) (c)guarantees the accused the right, "to have adequate facilities to prepare a defence.***
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> ***This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence ….. The obligation to disclose was a continuing one and was to be updated when additional information was received."***

In the present appeal, the omission to indicate in the court record if the Appellant was availed with witness statements can only be construed in the Appellant's favour, as he had a right to receive the witness statement before proceeding with the trial. The appeal therefore succeeds on the ground that the Appellant was not provided with witness statements to help him prepare for his defence.

I am of the view that while the ground of failure to afford the Appellant the witness statements is sufficient to dispose of the appeal, I will address the other issues raised by the Appellant.

The third issue was that of the sufficiency of the evidence used to convict the Appellant. Section 9 of the Sexual Offences Act refers to an attempted defilement as an act which would cause penetration. It states as follows:

> **"A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement. "**

The word "*penetration"* is the operative word in the above definition which is defined in Section 2 of the Sexual Offences Act to mean:-

> *" **the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

The Court of Appeal elucidated the meaning of an attempt in **Francis Mutuku Nzangi v Republic [2013] eKLR**, as defined by section 388 of the Penal Code as follows:

> **Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible."**

The evidence of PW1 in this regard was that on 29th July 2009 at about 6.30 pm, she was from the river was going home alone, and that the Appellant followed her from behind, held her and started touching her

breast. She stated that she had seen the accused before and recognized him, and she asked him why he was holding her. The accused then started pulling her to a thicket and strangled her and threw her to the ground. PW1 stated that the Appellant then sat on her stomach, pulled and tore her petticoat, hit her on the cheek and started to unzip his trousers. She then screamed a neighbour's (PW6's) name, who came with her daughter and told the Appellant to leave, which is when he went away.

From the evidence I have outlined, I find that the actions of the Appellant point not only at the intention, but also attempt to effect penetration, which was thwarted by the arrival of PW4 and PW6. In particular, he attempted to remove the complainant's underwear and his attempt to also remove his trouser could only have been for purposes of effecting penetration. The offence of attempted defilement was therefore proved.

On the last issue it was argued by the Appellant that section 169 of the Criminal Procedure Code was not complied with because his defence was not given due regard. The said section 169 provides as follows:

> **"(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.**
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> **(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.**
>
> **(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."**

I have examined the judgment by the learned trial magistrate, and I find that the Appellant's claim is not supported. The trial magistrate set out the salient elements of the defence as narrated by the Appellant in the said judgment, and expressly stated that he had considered the same. He however found that there was overwhelming evidence tendered by the prosecution. I am also of the same view and I see no fault on the part of the magistrate.

In light of the finding that there was a violation of the Appellant's right to a fair trial, the only outstanding issue is whether I should acquit the Appellant or order a retrial. The principles governing a retrial were enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal as follows:

> **"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person."**

I have reviewed the evidence before the trial Court and it is my view that it raises the possibility of a conviction. However, it is my view that taking into account the time that has lapsed since the Appellant's arrest in 2009, and that he had to go through three trials in the trial Court as explained in the foregoing, it would be unjust to take him through another trial. I accordingly allow his appeal, and quash the conviction of the Appellant by the trial Court. 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 22ND DAY OF JUNE 2016.

P. NYAMWEYA

JUDGE