REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 1 OF 2015

STANLEY MURIUKI ……..…….. APPELLANT

versus

REPUBLIC……RESPONDENT

(Being an appeal from the original conviction and sentence in

Nanyuki Chief Magistrate's Court Criminal Case No. 189 of 2009

by Hon. E. N. GICHANGI Resident Magistrate on

3rd June 2011).

JUDGMENT

1. **STANLEY MURIUKI** the appellant herein faced 2 counts before the Chief Magistrate's Court Nanyuki. On the **first count** he was charged with **attempted defilement of a child aged 8 years old contrary to Section 9 (1) (2) of the Sexual Offences Act**. On **count 2** he was charged with **sexual assault contrary to section 5 (1) (b) as read with section 5(2) of the Sexual Offences Act.** He was tried before that court and was convicted on the first count but was acquitted in respect of the second count.

2. He was sentenced to imprisonment of 10 years on conviction of that first count. He filed an appeal against his conviction and sentence.

At the hearing of the appeal it became clear that the gravament of his appeal was that the first count was defective. His Learned Counsel Wahome Gikonyo in this regard submitted that the sexual offences act did not have a section as stated in count 1 that is **section 9(1)(2).** He submitted that the appellant was charged with a non-existent law. In this regard learned counsel for the Office of DPP (DPP) Miss Kinyanjui submitted that the error thereof was amenable to amendment and that failure to state that the appellant was charged with the offence contrary to section 9(1) and (2). That the only failure was to fail to put the word 'and' between the two subsections.

3. I have considered that submission by the appellant and I am in agreement with Miss Kinyanjui that the irregularity of failing to put the word 'and' is curable under **section 382** of the **Criminal Procedure Code.** The appellant in my view will not suffer prejudice if that charge is so cured.

4. It is perhaps the second submission by the learned counsel for the appellant that will determine whether the appellant will succeed in his appeal. It is in that regard important for the particulars of the offence of count 1 to be reproduced as follows:

"ATTEMPTED DEFILEMENT CONTRARY TO SECTION (9)(1)(2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

STANLEY MURIUKI: On the 8th day of August 2008 at Kwa Nganga village within Timau Division in Meru Central District within Eastern Province, attempted to defile S. N. a child aged eight years."

5. Learned counsel for the appellant after reading out to the court the particulars set out above asked a rhetorical questions as follows: **"attempted to defile, by doing what?"** Counsel submitted that the prohibited actions under section 9(1)(2) were missing from the particulars of charge. To that extent he submitted that the appellant before the trial court would not have known what he had done which amounted to defilement. In this regard he relied on the case ACHOKI vs REPUBLIC EA (2000)2 283 where it was held:-

> **"The particulars of the offence of attempted rape upon which the appellant was convicted did not state that the attempted carnal knowledge was unlawful and was without the consent of C K K (PW 1). That charge did not disclose an offence known to the law and the Appellant was wrongly convicted on it."**

He also relied on the case **CHARLES KARUGA KINYUA VS REPUBLIC HCCRA 319 OF 2008** at **NYERI(Unreported)** . That case in respect of a defective charge had this to say:-

> **"Given the foregoing, a charge under the said section must, ipso facto in the particulars thereof include the word, "unlawful" failure to state in the particulars, that the sexual assault as unlawful, renders the charge fatally defective. For this holding, I would draw corollary from the court of appeal decision in the case of Achoki vs Republic (2000) 2E.A. 283."**

6. The state in response to that submission was of the view that the charge was not defective. Learned Counsel Miss Kinyanjui submitted that whatever was lacking if at all in that count could be cured under **Section 382 Criminal Procedure Code Cap 75**. Counsel proceeded to read the provision of **section 134** of the Criminal Procedure Code and submitted that the information in the first count was sufficient because it stated the specific offence together with the particulars.

ANALYSIS AND DETERMINATION

7. I have considered the submission's made by both counsels. Section 9(1) and (2) are in the following terms:-

> **"9(1) a person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.**
>
> **2) a person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."**

8. Those two subsection show that a person who attempts to commit an act which causes penetration with a child is guilty of the offence which is termed as attempted defilement. It follows that the particulars of an offence under section 9(1) must categorically state the act which was committed which was likely to cause penetration. Referring to the particulars of count 1 reproduced above it becomes clear that the act which the appellant was said to have committed was not stated. The particulars simply stated that the appellant attempted to defile a child who was 8 years old. The particulars should have revealed the exact act that the appellant undertook. The child in giving evidence stated that the appellant lifted her skirt and having put saliva on his penis touched her private parts. The particulars should have brought out that act. She also stated that the appellant put saliva on his fingers and attempted to insert it in the place where she urinates. This too ought to have been revealed in the particulars. Having failed to bring out the specific act that was undertaken by the appellant the court finds that the prosecution brought a defective charge. It

was defective because it failed to meet the standards under section 134 of the criminal procedure code. That section 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 charge, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".**

9. What constitutes a defective charge was discussed in the case **YOSEFU & ANO VS UGANDA (1960)EA 236.** The East African court of appeal held as follows:-

> **"The charge was defective in that it did not allege an essential ingredient of the offence; ….."**

In the case of **SIGILANI vs REPUBLIC (2004) 2KLR 480** it was held as follows:-

> **"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."**

10. It is clear that the charge under count one which the appellant was tried and convicted failed to set out the essential ingredients of the offence of attempted defilement. In that view the appellant could not plead to a charge which was not specific. He also must have been impeded in carrying out his defence. It is because of the above that I find the appellant's **appeal against conviction and sentence must and has succeeded because the charge he faced when convicted was defective. The conviction against the appellant is hereby quashed and his sentence is hereby set aside. He shall be set free unless he is otherwise lawfully held.**

DATED AND DELIVERED THIS 8TH DAY OF JUNE 2016.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue

Appellant: Stanley Muriuki …….

For the State: ….....

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE