REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 81 OF 2011

GEOFFREY KIRINYA IGWETA…….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Appeal against conviction and sentence in Nanyuki Senior Principal Magistrates' Court Criminal Case No. 2765 of 2009 (Hon. J.N. Nyaga) delivered on 13th May, 2011)

JUDGMENT

On 16th December, 2009, the appellant was charged with the offence of defilement contrary to **section 8(1) and (3)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars of the offence were that on the 12th day of November, 2004 at [particulars withheld] in Buuri District within Eastern Province, the appellant unlawfully penetrated D M who was then a child aged 15.

Alternatively, the appellant was charged with the offence of indecent Act with a child contrary to **section 11(1) of the Sexual Offences Act** the particulars being that on the 12th day of November, 2004 at [particulars withheld] in Buuri District within Eastern Province, the appellant did an act of indecency with D M a child aged 15 by touching her private parts namely, vagina.

The learned magistrate convicted the appellant but in his judgment he did not specify whether the appellant was convicted of the principal count or the alternative charge. Be that as it may, he sentenced him to twenty years imprisonment.

The appellant appealed against both conviction and sentence; on 29th May, 2012 he filed an amended petition in which he raised eleven grounds against the decision of the learned magistrate. Of those grounds I found two to be the primary grounds on which this appeal turns and which, for this reason, ought to be disposed of at the preliminary stage. Accordingly, it will not be necessary to enumerate the rest of the grounds; it will also not be necessary to reproduce the evidence at the trial and evaluate it afresh as the disposal of these issues will eventually dispose of the appeal without the need to consider whether or not the learned magistrate made correct findings of fact.

As I understand them the first of these two grounds is that the charges against the appellant were defective to the extent that they could not sustain his prosecution and subsequent conviction; second, to the extent that he was charged, prosecuted and convicted on defective charges, the appellant's constitutional rights were violated.

Though he was unrepresented, the appellant ably argued out these grounds at the hearing. His case was simple; he submitted that, as the particulars of the offence suggested, the offences for which he was

charged were committed in 2004 yet he was charged under the law that came into force in 2006. In a nutshell, he was charged under a law that did not exist at the time the offences are alleged to have been committed.

While opposing the appeal, counsel for the state argued that the appellant was previously charged and convicted under the law that was in force at the time the offence was committed; however, the appellant appealed against the conviction and while his appeal was pending for hearing and determination in this Court, the new law, which is the Sexual Offences Act, No. 3 of 2006 came into force. The appellant's appeal succeeded ultimately and the Court ordered for his retrial. According to the learned counsel for the state, since the retrial commenced in the dispensation of the Sexual Offences Act, No. 3 of 2006, there was nothing wrong with the appellant being charged under that Act despite the fact that offences were allegedly committed before the Act came into force.

There is no doubt that the offences with which the appellant was charged are defined under the law; they were defined under the Penal Code under which the appellant must have been previously charged and they are also defined under the Sexual Offences Act; it must be noted, however, that this latter Act amended or completely repealed those provisions in the Penal Code relating to sexual offences. The provisions in the Code that were repealed by the Sexual Offences Act are **sections 139, 140, 141, 142, 143, 144, 145, 147, 148, 149, 161, 164, 166, 167 and 168**. (See **clause 1(2)** of the **Second Schedule** to the **Sexual Offences Act**).

It was not clear under which of these repealed provisions in the Penal Code the appellant was previously charged with but there is no doubt that if he was charged under the Penal Code, then any or some of those repealed provisions must have been cited as the provision or provisions that were broken.

As far as I could gather from the submissions by Mr Njue for the state, the dilemma which the state found itself in was whether it could possibly charge the appellant under the repealed provisions of the Penal Code when this Court ordered a retrial; in his view, this was not the proper course and that is why the state opted to charge the appellant under the law that was then in force, which is the Sexual Offences Act. The only question is whether the state was right in taking this course and whether the court was also correct in sanctioning it.

The answer to this question can be found in the **Constitution**, the **Sexual Offences Act** itself and the **Interpretations and the General Statutes Act, (Cap. 2).**

Article 50. (2) (n) (i) of the Constitution expressly forbids the conviction of any person for an act or omission that at the time it was committed or omitted was not an offence in Kenya. An 'offence', has been defined under **section 2** of the **Penal Code, cap. 63** to mean an act, attempt or omission punishable by law.

At the time the appellant is alleged to have committed the offences for which he was convicted, the law that defined those offences was the relevant provision or provisions of the Penal Code. Under **article 50. (2)(n)(i)** of the **Constitution** those acts were only offences because they were so defined and punishable under particular provisions of the **Penal Code**. Much as the same acts may have subsequently been defined in the **Sexual Offences Act,** they cannot be said to have been offences under that Act, because this latter Act was not in existence. Put simply, the offence of defilement as defined under **section 8(1)** and **(3)** of the **Sexual Offence Act** could not have been such an offence in 2004 before this Act was conceived and therefore in the words of **article 50. (2)(n)** of the **Constitution** the appellant could not have been tried and convicted for an act that at the time it was committed was not an offence.

This article embraces the rule against retrospective application of the law that carry with it criminal sanctions. It does not, however, follow that one cannot bear criminal responsibility for his act or omissions merely because the law that defined those acts or omissions has been repealed; **section 23** of the **Interpretations and General Statutes Act,** and in particular parts **(3) (a) (b) (c)** and **(d)** thereof are clear that a repeal of a written law does not diminish any liability under that law; it says:-

23. Provisions respecting amended written law, and effect of repealing written law

(1)…

(2) …

(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

For our purposes and in answer to the dilemma that the state faced, **section 23(3) (e)** is more to the point; the repeal of the certain provisions in the Penal Code could not affect the investigation of the appellant or any legal proceeding against him under the Code with regard to the allegations raised against him. Legal proceedings in the nature of a criminal trial could still be instituted against him and subject to proof of the prosecution case, he could still be convicted and sentenced under those repealed provisions of Penal Code as if they had not been repealed.

Clause 3 of the **First Schedule** to the **Sexual Offences Act** itself acknowledged that despite the repeal of certain provisions on sexual offences in the Penal Code, proceedings commenced under those provisions would continue to their logical conclusion as if those particular provisions were still in force; this provision is clearly consistent with **section 23(3) (e)** of the **Interpretation and general Statutes Act.**

In the face of the foregoing provisions of the **Constitution**, the **Interpretation and General Provisions Act** and the **Sexual Offences Act,** the state ought not to have charged the appellant under **section 8(1) and (3)** or under any other provisions of the Sexual Offences Act, for crimes allegedly committed before the Act came into force; it was simply not applicable. The learned magistrate did not address this legal point in his judgment and had he put his mind to it he probably would have concluded that the charges against the appellant were fatally defective; to the extent that he failed to do so and proceeded on the presumption that the appellant was appropriately charged, the learned magistrate misdirected himself on the law and arrived at the wrong conclusion. The entire trial was a nullity and it is for this reason that it would not have been worthwhile to relate the evidence at the trial and evaluate it afresh as this court is always obliged to do in exercise of its appellate jurisdiction. With the benefit of hindsight, this appeal ought to have been summarily allowed. For reasons I have given I find merit in it and I hereby allow it. The appellant's conviction is quashed and sentence set aside. He is set at liberty unless he is lawfully held.

Dated, signed and delivered in open court this 19th day of August, 2016

Ngaah Jairus

JUDGE