**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL 17 OF 2014**

**FREDERICK MWANZIA……..……...……...…APPELLANT**

**VERSUS**

**REPUBLIC……..……..…….RESPONDENT**

**(An appeal arising out of the conviction of Hon P.M. Mugure RM and sentence of Hon. P. Gesora SPM delivered on 10th February 2014 in Criminal Case No. 948 of 2013 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) as read with section 9 (2) of the Sexual Offences Act. The particulars of the offence were that on 15th August 2013 at [particulars withheld] in Makueni County, the Appellant intentionally attempted to cause his penis to penetrate the vagina of G M M, a child aged 14 years.

The Appellant was also charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2016. The particulars of the offence were that on 15th August 2013 at [particulars withheld] in Makueni County, the Appellant intentionally touched the breasts of G M M, a child aged 14 years, with his hands.

The Appellant was first arraigned in the trial court on 21st August 2013 when he pleaded not guilty to the charges. The hearing proceeded before Hon P. M. Mugure, who wrote the judgment which was delivered on her behalf by Hon. P. Gesora on 10th February 2014. The Appellant in the said judgment was convicted of the man charge, and Hon. P. Gesora then sentenced him to 10 years imprisonment.

The Appellant being aggrieved has appealed the said conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Amended and Supplementary Grounds of Appeal dated 27th November 2015, and Further Grounds dated 3rd August 2016 that he availed to this Court together with three sets of written submissions thereon.

In summary, the Appellant alleges that the trial magistrate erred in fact and in law by convicting him on a defective charge, by upholding his conviction without ruling out the possibility of mistaken identity, by convicting him on the basis of a fabricated, contradictory and uncorroborated evidence; by admitting medical and an age assessment reports which were defective; and by dismissing his firm defence and transferring the onus of proof to him.

The summary of the Appellant's submissions on the above grounds is as follows. On the ground of defective charge, the Appellant claimed that the main charge he was charged with was contrary to section

9(1)(2) of the Sexual Offences Act which does not exist in law, and although there was an amendment inserting the words " as read with section 9(2)", the same was not countersigned and could have been inserted after the trial. It was also urged that the main charge did not have the word "unlawfully" making it defective. Further, that PW1 in her testimony stated that the Appellant ejaculated inside her which was contrary to the charge that the Appellant attempted to cause his penis to penetrate her vagina, and that she did not give any evidence during the trial as to the Appellant touching her breast to support the alternative charge.

On the ground of mistaken identity, the Appellant argued that the circumstances under which his identification was made were unfavorable. According to him, PW1 testified that the attack on her took place at 5.45 am when it was dark and misty, and that the attacker came from behind and was wearing a blue coat. Further, that she knew it was the Appellant due to his behaviours. PW3 on the other hand testified that she saw the attacker get up and run away and did not see his face, and that he was wearing a black coat. Lastly, that PW2 claimed she heard screams from 20 kilometres away which is not possible, and was not an eyewitness to the attack on PW1. The Appellant relied on various judicial authorities including **R vs Turnbull & Others (1976) 3 All E.R 549** and **Kiarie vs Republic (1984) KLR 739** for the position that mistakes can be made even in cases of recognition.

It was submitted by the Appellant that PW1 also contradicted the report she made at the police station by testifying in Court that the Appellant had penetrated her vagina. Lastly, it was also urged that the trial magistrate failed to note the grudge held against the Appellant by the Assistant Chief who arrested him, and who admitted that he had authored a letter the Appellant had produced as an exhibit, which was not proved to be a forgery as held by the trial magistrate. It is also contended that the trial magistrate did not take into account the Appellant's account of his movements on the day the offence was committed. The Appellant cited various judicial decisions in support of his arguments.

Mr. Mamba Vincent, the learned prosecution counsel, opposed the appeal in written submissions filed in Court on 7th October 2016 of even date. It was urged therein that section 9(1) of the Sexual Offences Act describes the offence, and section 9(2) the punishment for attempted defilement, and that the charge sheet was well framed as the relevant particulars were given. Further, that the Appellant was positively identified by PW1 and PW3 as he was seen at 7.45 am in the morning when it was already daylight, and that PW2 who met him running also placed him at the scene of the crime.

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 prosecution witnesses gave evidence during the trial. PW1 was G M M, and was the complainant and a minor. She testified as to the events of the morning of 15th August 2013 while on her way to school, when she stated that the met the Appellant who pushed her to the ground and inserted his penis to her vagina. She stated that she knew the Appellant due to his behaviours. A N M (PW2) was also a minor, and she testified that while on her way to school the same morning between 5.30 and 5.45 am, while with her brother and another girl, she heard screams and met the Appellant coming from the direction of the screams and he appeared to have been running.

J M T was PW3, and he testified that he was over 60 years old and that on 15th August 2013 at 5.30 am he heard screams from near [particulars withheld] river which is about 60 metres from his home, and went to check with his wife if someone was drowning. Upon arrival they found that someone had taken a child hostage. They screamed, whereupon the person ran away, and the child came to where they were and told them what had happened. He testified that he met the Appellant for the first time that day.

PW4 was PC Davis Kamboni, who testified as to receiving the report of the attempted defilement from the complainant, and he produced the clothes worn by the complainant on that day as prosecution exhibits. He also stated that he called the assistant chief who arrested the complainant. The last witness was PC Johnson Gitonga Mwangi (PW5), who produced the age assessment report on the complainant

showing that on 8th October 2013 the complainant was 16 years of age.

The Appellant was put on his defence after the trial Court found that a *prima facie* case had been established by the prosecution. He gave sworn testimony and called one witness. His defence was that on 15th August 2013 he was at Kitengela where he works, and on 18th August 2013 while preparing to go back to work the Assistant chief called Lawrence Mwau came to his house and took him to the AP Camp where he was arrested. Further, he was not told why he was being arrested . He elaborated on a grudge he had with the said Assistant chief, and claimed that the Assistant chief had written him a threatening letter which he produced as a defence exhibit 1.

The trial Court then summoned the said Assistant chief Lawrence Mulei Mwau, who testified as DW2. He stated that he had received various complaints about the Appellant, including the complaint that the Appellant had defiled the complainant, and that he arrested the Appellant on 20th August 2013 after receiving information from the members of the public that the Appellant was at home. DW2 admitted writing a letter to the Appellant. He stated that there were additions to the letter produced by the Appellant which were not in his handwriting. He produced the copy of his letter as the defence exhibit 2.

DW3 was Mueni Mutiso Victoria who stated that on 15th August 2013 she was at home at Kitengela with the Appellant who is her husband, and where she had gone to visit him. Further, that he was with his other workmates.

I have considered the grounds of appeal, the arguments made thereon, and the evidence given by the prosecution and defence witnesses. I find that the issues being raised by the Appellant are whether the charge under which the Appellant was charged was defective; whether the Appellant's identification as the person who committed the offence was proper; whether the Appellant was convicted for the offence of attempted defilement on the basis of sufficient and consistent evidence, and whether the Appellant's defence was given due regard by the trial magistrate.

On the first issue, In **Peter Ngure Mwangi v Republic, [2014] eKLR** the Court of Appeal sitting at Nairobi held that there are two limbs to the issue of a defective charge sheet. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not.

The first question as to whether a charge is defective is to be examined in light of the requirements of the law as regards the framing of charges as stated in section 134 of the Criminal Procedure Code which 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 charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

In addition it was held in **Sigilani vs Republic, (2004) 2 KLR, 480** that:

> ***"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."***

I have perused the charge sheet and find that there was an insertion stating "as read with sec 9" between the words section 9(1) and the figure (2) in the charge sheet. The said insertion was not countersigned nor dated, and it is therefore not possible to tell when the amendment was made, and if the procedure after amendment of a charge was followed as provided under section 214 of the Criminal Procedure Code. However, other than this doubt, the charge as presently drafted is clear as it provides the section which provides for the offence which is section 9(1) of the Sexual Offences Act and the section which provides

for the punishment which is section 9(2) of the Act.

Even if this Court were to resolve the doubt in favour of the Appellant and find that indeed the insertion noted in the foregoing was not properly made, it still needs to address the second limb as to whether any irregularity in the charge sheet is curable. Section 382 of the Criminal Procedure Code provides as follows in this regard:

> **"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 instant appeal, I note that the section of law under which the Appellant was charged would read "section 9(1)(2)" if the impugned insertion was to be removed from the charge sheet. Therefore there is a missing word of "and" as between the figures (1) and (2). This missing word in the charge sheet in my view did not prejudice the Appellant as the section cited in the charge which was section 9 of the Sexual Offences Act clearly has a subsection 1 and 2 which clearly indicate an offence that exists in the law. This error is therefore one that is curable under section 382 of the Civil Procedure Code. In addition the particulars of the offence of attempted defilement were clearly spelt out, which included the date of the offence, the place of the offence, the act constituting the offence and the name of the victim.

The Appellant also argued that the charge was defective as the offence was not supported by the evidence that was presented by the Prosecution. The Court of Appeal in **Yongo vs Republic** ***[1983] KLR, 319*** did hold that a charge that is not disclosed by evidence is defective and stated as follows in this regard:

> **"In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:**
>
> > **(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or**
> >
> > **(b) it does not, for such reasons, accord with the evidence given at the trial; or**
> >
> > **(c) it gives a misdescription of the alleged offence in its particulars."**

This holding was explaining the circumstances when a charge is considered to be defective in substance, so as to guide a court when it is altering the said charge. In order to find out if there was an error made in this respect, one must interrogate the elements of the offence of attempted rape. Section 9(1) 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. "**

Section 2 of the Act defines penetration as "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

Section 388 of the Penal Code in addition defines an attempt as follows;

> **" (1) When a person, intending to commit an offence, begins to put his intention into execution**

**by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.**

**(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.**

**(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."**

In **Francis Mutuku Nzangi v Republic [2013] eKLR**, the Court of Appeal explained these provisions 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 offence under section 9(1) of the Sexual Offences Act is therefore committed when a person attempts to causes penetration with his genital organs, manifested by facts that point to an act of penetration. However, in an offence of attempted defilement, no penetration takes place, and this is what distinguishes the offence from that of defilement. The complainant's evidence in this regard was that the Appellant inserted his penis into her vagina and ejaculated inside her, which was evidence pointing at penetration. The evidence of the victim therefore clearly did not support a charge of attempted defilement, but of actual defilement. I also noted as submitted by the Appellant that the complainant did not testify during the trial as to the Appellant touching her breast to support the alternative charge.

I have perused the proceedings of the trial court and note that at no time did the Court find any variance between the charge and the evidence, or make any orders as to the amendment or alteration of the charge. The trial of the Appellant therefore proceeded on the basis of a charge for the offence of attempted defilement and alternative charge of committing an indecent act with a child. To this extent therefore, the charges on which the Appellant were tried and convicted was incurably defective, and the trial court made no attempt to rectify it. This error or mistake in the charge was also **a substantial one** which cannot be cured under section 382 of the Criminal Procedure Code as it occasioned a failure of justice on the Appellant.

While this finding is sufficient to dispose of this appeal, I will also make observations on the identification of the Appellant. The Court of Appeal in the case of **Mwaura v Republic [1987] KLR 645** provided the following guidelines as regards visual identification by witnesses:

**"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

PW1, PW2 and PW3 were the witnesses who testified as having seen the Appellant on the material day. However PW2 did not witness the commission of the alleged offence, neither was she at the scene of the crime and her evidence as to the identification of the Appellant therefore cannot be given any weight. PW3 on his part stated that he did not know the Appellant before the day of the offence, and it is therefore not clear as to how he identified the Appellant as no identification parade was carried out. His identification of the Appellant was therefore one of dock identification, which is not reliable. This leaves

the Court with the testimony of PW1 as to identification, making her the sole identifying witness of the Appellant.

I am guided by the holding as to what constitutes favourable conditions for a correct identification by a sole testifying witness in ***Maitanyi vs Republic*** **, *(1986) KLR 196*** as follows:

> **"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".**

PW1 and PW3 stated that the alleged offence took place between 5.30am and 5.45 a.m on 15th August 2013. PW1 stated that it was misty and that the Appellant attacked her from behind. PW3 stated that it was almost bright. From the evidence adduced there is doubt as to whether the circumstances in the present appeal were favourable for positive identification, particularly as the state of visibility at the time of the commission of the offence was not conclusively established, neither was the opportunity that the complainant had to properly examining the attacker, given that she was attacked from behind and testified that she was struggling with the assailant.

As regards the evidence by PW1 that she knew the Appellant, the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** did hold that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other. PW1 in this regard testified that she knew the Appellant from before because of his behaviours.

No evidence was given of the particulars of the alleged said behaviours and how they came into PW1's knowledge. In addition no evidence of PW1 previous personal acquaintance or interactions with the Appellant was adduced. This Court cannot in the circumstances make a finding that this was a case of recognition. I therefore find that the Appellant was not properly and positively identified as the person who had sexual intercourse with PW1.

I accordingly quash the conviction of the Appellant for the charge of attempted defilement contrary to Section 9(1) as read together with section 9(2) of the Sexual Offences Act, and set aside the sentence imposed upon him for this conviction. I also order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

**DATED AT MACHAKOS THIS 23RD DAY OF NOVEMBER 2016.**

**P. NYAMWEYA**

**JUDGE**