REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.193 OF 2013

DAVID MWANGI NJOROGE…...……....…….……..…. APPELLANT

VERSUS

REPUBLIC ……..……..…..RESPONDNET

(Being an appeal from the judgment of the Hon. C. Oluoch Principal Magistrate) in Kiambu Chief Magistrate's Criminal Case No.614 of 2012 delivered on 08/10/ 2013)

JUDGMENT

David Mwangi Njoroge the appellant herein was in the main count charged with the defilement of a childcontrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006. It was alleged that on diverse dates between November and December 2012 at ***[particulars witheld]*** village Kiambu County, caused his genital organ namely the penis to penetrate into the genital organ namely vagina of B N a girl aged 17 years. In the alternative he was charged with Indecent Act contrary to Section 6(a) of the Sexual Offences Act No.3 of 2006, in that on the same dates at the same place he unlawfully touched the private parts namely the vagina of the complainant B N.

After considering the evidence of record the trial court found the appellant guilty on the main count and convicted him accordingly. She however observed that the appellant had been wrongly charged under Section 8(2) as opposed to Section 8(4) of the Sexual Offences Act. Since the complainant was aged 17 years. She then invoked the provisions of Section 186 of the Criminal Procedure Code in order to apply Section 8(4) of the Sexual Offences Act in sentencing. The appellant was accordingly sentenced to serve 15 years imprisonment.

He was aggrieved by the judgment of the trial court and preferred this appeal. His main grounds of appeal are that the complainant was over 18 years at the time of the commission of the offence, that the charge sheet was incurably defective, that the prosecution's evidence was contradictory in material facts and that the P3 form which was the Medical Examination Report and the basis on which the material evidence was given was invalid.

The respondent opposed the appeal by written submissions filed on 14th May, 2015 by Miss Kule Wario, prosecuting counsel. She conceded to the error in the charge sheet but added that the error did not prejudice the appellant or negate the evidence on record that the appellant sexually assaulted the complainant. She submitted that the omission by the learned trial magistrate to observe that the complainant was not a minor was curable under Section 382 of the Criminal Procedure Code. She urged the court to exercise its powers under Section 354(a) (ii) and 186 of the Criminal Procedure Code and a substitute the trial court's finding and make an order that the appellant was guilty for the offence of rape

as opposed to defilement and convict him accordingly.

Miss Wario further submitted that the complainant was above 18 years but since she was mentally challenged, she was not capable of giving consent to having sexual intercourse with the appellant. Furthermore, the complainant properly identified the appellant as the assailant and her testimony was corroborated by that of PW2 and 3. In addition, the baby conceived as a result of the offence was proved to have been sired by the appellant by way of a D.N.A. test. There was therefore direct evidence against the complainant.

I will first address myself on whether the charge sheet was defective. There is concession by both the appellant and the respondent that 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 an attempt to cure this defect, the learned trial magistrate applied Section 186 of the Criminal Procedure Code in order to substitute Section 8(2) with Section 8(4) for purposes of sentencing. My reading of Section 186 of the Criminal Procedure Code is that it is applicable where the offence in question is defilement of a girl under the age of 14 years. The said section reads as follows:-

> **"When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it."**

Therefore, the court having found that there was sufficient evidence to found a conviction for the main charge ought to have made an observation that the error or omission in the charge sheet was curable under Section 382 of the Criminal Procedure Code. And had the court found that the evidence adduced proved an offence other than that the appellant was charged with, would have applied Section 179 of the Criminal Procedure Code. This section provides that an accused person can be convicted for an offence other than the one he was charged with if the evidence proved that other offence.

But again there is also the question of the age of the complainant which this court thinks that the trial court did not adequately address itself to. The charge sheet indicated the age of the complainant as 17 years. Her birth card exhibited in court showed her birth date as 18th July, 1994. The charge sheet further indicated that the offence was committed on diverse dates between November and December, 2012. The P3 form on the other hand showed the date of examination as 14th February, 2012. Evidence on record has it that the appellant was arrested on 8thFebruary, 2012. Therefore, the offence must have been committed on an earlier date that the one indicated on the charge sheet. Further, if the offence was committed in the year 2012 and the complainant was born on 18th July, 1994, it means that she was 18 years as at the time of the commission of the offence. She was therefore not a minor as at the date of the offence. Consequently, the evidence disqualified the offence of defilement and instead the appellant ought to have been charged with the offence of rape under Section 3 of the Sexual Offences Act. I then ask myself whether the appellant not having been charged with the proper offence negated the trial and qualifies him to be set free.

First, the prosecution ought to have warmed itself that the evidence on record did not support the charge sheet and ought to have substituted the same under Section 214 of the Criminal Procedure Code so as to reflect the proper offence. This was not done which means that from the outset there was a defect in the trial. The defect could only have been cured by the application of Section 179 of the Criminal Procedure Code. But again, Section 179 applies when the evidence on record establishes a minor offence than the one the accused person was charged with. On the other hand, Section 191 outlines the directions for application of Section 179 to 190 of the Criminal Procedure Code. The same provides as follows:-

> **"The provisions of Sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of Sections s180 to 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of Section 179."**

This Section properly applied means that where the offence in question is not provided for in the specific provisions, nothing prohibits the court from invoking the provisions of Sections 179 being the general provision. I duplicate the same as under:-

> **"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but he remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**
>
> **(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."**

The application of Section 179 was given by the Court of Appeal in the case of **Rashid MwinyiNguisya and Another –Vs- Republic**in which it was held:-

> **"In short this means that apart from recognizing that Section 179 sets out the principle of law applicable in a trial with respect to conviction for offences other than those charged, and that this general principle shall apply as such notwithstanding that Sections 180 to 190 deal with special cases in a trial…..Section 179 of the Criminal Procedure Code cannot be in derogation of the appellate powers of the High Court contained in Section 354(3) (a) of the same code."**

In my view therefore, the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with. The reasoning was adopted again by the Court of Appeal in the case of **Kalu –Vs- Republic (2010) 1 KLR.** It observed as follows:-

> **"With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading:-"Convictions for Offences Other than Those Charged" and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder".**

The Black's Law Dictionary 9th Edition page 1186 defines a cognate offence as:-

> **"A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category."**

I then delve into defining whether rape is a cognate offence to that of defilement. I will dissect the elements of each of the offences. For the offence of defilement to be complete the element of penetration as defined by Section 2 of the Sexual Offences Act must be complete. The other element is proof of the age the complainant as under Section 8, the penalties meted against an offender depends on the age of the complainant. Consent is not a major element under the offence of defilement. Rape is defined under Section 3 of Sexual Offences Act. For the rape to be established the following elements must be demonstrated:-

a. **The intentional and unlawful penetration of the genital organ of a person by another.**
b. **The absence of consent.**
c. **Where consent is obtained by force or by means of threat or by intimidation of any kind.**

Under Section 42 of the Act consent is obtained if the person agrees by choice and has the freedom and capacity to make that choice.

In the present case, the complainant was mentally challenged and for this reason the respondent submitted that she was not in a position to consent and the appellant ought to have been convicted for the offence as established by the evidence. Section 43(1) of the Sexual Offences Act outlines what constitutes intentional and unlawful acts. That is to say:-

a. **In any coercive circumstance.**
b. **Under false pretence or by fraudulent means; or**
c. **In respect of a person who is incapable of appreciating the nature of an act which causes the offence.**

Section 43(4)(e) further provides that:-

> **"The circumstances in which a person is incapable in law in appreciating the nature of an act referred to in Subsection 1 include circumstances where such a person is, at the time of commission of such an act –**

(e) mentally impaired.

As such if Section 43 is read in isolation its implication is that a person who is mentally challenged cannot consent to appreciate the nature of an act that causes an offence under the act. But again, Section 44 sets out instances where court can make evidential presumptions about consent to reach a finding that the complainant did not consent to a sexual act. The said section provides as follows:-

> **"(1) If in proceedings for an offence under this Act, it is**
>
> a. **That any of the circumstances specified in subsection (2) existed; and**
> b. **That the accused person knew that those circumstances existed.**
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> **The complainant is to be taken not to have consented to the act unless sufficient evidence is adduced to raise an issue as to whether he or she consented, and that the accused is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he or she reasonably believed it.**
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> **(2) The circumstances are that:-**
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> > **(a) any person was, at the time of the offence or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;**
> >
> > **(b) any person was, at the time of the offence or immediately before it began, causing the complaint to fear that violence was being used, or that immediate violence would be used, against another person;**
> >
> > **(c) the complainant was, and the accused was not, unlawfully detained at the time of the commission of the act;**
> >
> > **(d) the complainant was asleep or otherwise unconscious at the time of the commission of the act;**

(e) because of the complainant's disability, the complainant would not have been able at the time of the commission of the act to communicate to the accused whether the complainant consented;

(f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the commission of the act.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the act is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began."

In the instant case, **PW2**, R W M teacher at ***[particulars withheld]*** School of the mentally challenged confirmed that indeed the complainant was a pupil in that school. There was also a letter dated 19thFebruary, 2008 which the witness identified as being a referral by the Ministry of Education for the complainant to be educated in that school due to her mental incapacity. PW3 J W M did also tell the court that PW1 (complainant) was her daughter and was mentally challenged. She also confirmed that she was a pupil at ***[particulars withheld]*** School for the mentally challenged and that indeed that the complainant was mentally challenged. However, there was no medical record to confirm her actual mental inability and so her incapacity to consent to a sexual act. It is my view then that the fact of the complainant being mentally impaired was not conclusively established. As such the absence of consent being a rebuttal presumption which can be dislodged by production of sufficient evidence in that respect was not demonstrated.

On the part of the appellant he only denied that he did not commit the offence and alluded that the charges were false. In fact he went ahead to request for a D.N.A test so that he could exonerate himself from the offence. Interestingly, the results of the said D.N.A. test nailed him 100% and he was found to be the father of the child conceived as a result of the sexual intercourse between himself and the complainant. Accordingly and without a shred out doubts, the appellant was guilty of the offence of rape.

Let me emphasize that under Section 45 of the Sexual Offences Act, it must be determined whether there was evidence to rebut the presumption of consent. The fact of the complainant being mentally impaired is not conclusive proof of absence of consent, rather, it is a rebuttable presumption which can be dislodged by production of evidence. The fact of mental incapacity of the complainant definitely impaired her mental ability to appreciate and consent to a sexual act. However, the issue of mental incapacity not having been conclusive, it followed that the mere assertion was not an automatic proof of existence of incapacity to consent. In that respect, it is my view that the appellant ought to be given an opportunity to rebut the evidential presumption under Section 45. That opportunity did not arise throughout the trial as he was tried and convicted for the offence of defilement. By virtue of there being strong evidence that the offence of rape was committed, it is my view that a retrial should be ordered. In the case of **Opicho –Vs- Republic** the court held that:-

"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 purpose 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 own facts and circumstances and an order for retrial should only be made where the interests of justice requires it."

Other decisions cited were **Muiruri –Vs- Republic (2003), KLR, 552, Mwangi –Vs- Republic (1983) KLR 522 and FatehaliMaji –Vs- Republic (1966) EA, 343** that:-

" Although some factors may be considered, such as illegalities or defects in the original

trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."

In the present case the trial commenced in the year 2012 and judgment was delivered on the 08th October, 2013. It is now about three and a half years since the appellant was arrested. The suggestion by the respondent to substitute the charge of defilement with that of rape, in light of the fact of the mental incapacity of the complainant, lacks legal basis and goes against the duty of the court to uphold the right to a fair trial. Further, Section 382 of the Criminal Procedure Code cannot suffice to cure the defect in the charges in this case. The omission in this case has the effect of occasioning a failure to justice. Given the seriousness of the offence and the attendant penalty if found guilty and convicted and further taking into account the balance of justice, which calls for a fair trial, for both the complainant and the appellant it is my view that the defect in the mistrial shall be corrected by way of a retrial.

In the end, I quash the conviction and set aside the 15 years jail term. I substitute it with an order that a retrial be held. The appellant shall be escorted to Kiambu Police Station on 23rd July, 2015 for purposes of preparing a fresh charge sheet and should appear before the Chief Magistrate's Court in Kiambu not later than 24th July, 2015 for purposes of taking plea.

It is so ordered.

DATED and DELIVED this 21st day of July, 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1…….for the appellant.

2……..for the respondent.