REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.99 OF 2014

DANSON KARANGE MUCHUNU……...…….…….APPELLANT

VERSUS

REPUBLIC ……..……..RESPONDENT

(Being an appeal from the original conviction and sentence of the principle magistrate's court at Githunguri criminal case no.53 of 2014 delivered on 23/5/2014 by W. Ngumi Ag. S.R.M)

JUDGMENT

The appellant was charged with defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act No.3 of 2006**. The particulars were that on the 19th day of January, 2014 in Githunguri District within Kiambu county intentionally and unlawfully caused his penis to penetrate the vagina of M W M a child aged 4 years. He was charged with an alternative count of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No.3 of 2006**. The particulars were that on the 19th day of January 2014 in Githunguri District within Kiambu County intentionally and unlawfully did an indecent act with M W M a child aged 4 years by touching her private parts (vagina) with his penis.

He was convicted on the main charge and sentenced to serve life imprisonment. He preferred to appeal against the conviction and sentence. He relied on his supplementary grounds of appeal and written submissions dated 8/7/15.

His grounds of appeal are condensed into one which is that he was charged with an offence not known in law and that the trial court proceeded under the wrong section of the law hence he was substantially prejudiced.

In his submissions, he stated that he ought to have been charged under **Section 8(1)** as read with **Section 8(2)** of **the Sexual Offences Act No.3 of 2006** as opposed to **Section 8(1)** as read with **Section 8(4)** since the complainant was four years old. He submitted that as a result, the conviction was unsafe and hence he was prejudiced. He further submitted that the prosecution did not discharge its burden as there was no evidence of penetration. He went on to state that the evidence of PW1 who produced the P3 form only proved attempted penetration therefore the offence for which he was convicted was not proved.

The appeal was opposed. M/s Nyauncho, Counsel for the prosecution submitted that the complainant was aged four years which fact was proved by a Birth Notification Card produced by her mother. She submitted that the appellant was known to the complainant and also to PW3 and PW4 who were children playing with the complainant. The appellant was their neighbour. He called the complaint and went with her. PW3 saw the appellant lying on PW2. Counsel went on to submit that penetration was proved by

PW1, the Clinical Officer who stated that the labia minora was inflamed hence attempt to penetrate the complainant. She stated that even partial penetration amounted to defilement. She submitted that the sentence was in accordance with the law and that the appeal should be dismissed.

Based on the respective submissions, I find that there are two issues for determination namely;

a. ***Whether the appellant was prejudiced by being charged under the wrong provision of the law.***
b. ***Whether the offence of defilement was proved.***

Under issues (a) in offences of defilement, it is important that the charge be stated under the correct provision of the Law: the rationale being that the provisions are categorized under the ages of the complainant which determine the penalties. In the present case, the age of the complainant was stated as 4 years. Hence, the statement of the charge ought to have been drafted under **Section 8(1**) as read with **Section 8(2)** of the **Sexual Offences Act**. Unfortunately, it was drafted under **Section 8(1)** as read with **Section 8(4) of the Act**. Be that as it may, this error did not in any way prejudice the appellant because from the outset he knew that he was facing the charge of defilement which is defined under **Section 8(1) of the Act**. Moreover, once the age of the complainant is proved, the trial court has no alternative but to find the accused guilty for the offence defined under the correct Sub-section of **Section 8 of the Act**. Again, the error is curable under **Section 382** of the **Criminal Procedure Code** which provides that;

> ***"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 complainant, 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."***

On the second issue for determination, it behooves the court to summarize the evidence on record.

PW1, Susan Njeri, a clinical officer at Githanguri Health Centre testified that she personally saw PW2 and examined her in order to fill the P3 form. She stated that PW2 went to the centre on 20/1/2014. On examination, her labia minora was bruised and was tender and inflamed. The hymen was intact but it was obvious that there was attempted penetration. She further stated that the age of injury was 1 day.

PW2, M S P the complainant gave an unsworn testimony. She testified that as she was playing with one S and one F, the appellant picked her and took her to his house, removed her panty and also removed his panty and from the ground did bad manners to her. She testified that she saw his bad thing, and that as he was doing the bad manners, S came. Afterwards the appellant told her not to tell anyone. She went and reported to one Mama Erik what the appellant had done to her. She added that the appellant had sent the other children to buy cigarettes when he took her away.

PW3, C W K recalled that as they were playing in the compound with PW2 and one F, the appellant called her and sent her to buy cigarette from the shop. She went to buy the cigarettes and when she returned she found the appellant doing bad manners to PW2. He threw a stone at her and she went and told one W and F what she had seen. She added that the appellant is her neighbour.

PW4, F A testified that she was told by one S that the appellant had removed the skirt of PW2 down to the knees and was doing bad manners to her. She told PW2's mother who went together with one Wathithi to the scene. They however found that PW2 had worn her skirt and they were not together. One Ngina went and picked her.

PW5, J N W the mother of PW2 testified that on 19/1/2014 at around 5:40pm, she was called by one Ruth Ngina and told that PW2 was in the shamba with the appellant. On the way to go and look for her, they saw PW2 coming from the appellant's place.They found the appellant at his house seated. They asked PW2 to tell them what had happened and she narrated that the appellant had laid her on the grass in the shamba, removed her clothes, applied saliva on her private parts and inserted his thing for urinating.

PW2 took PW6 to the place where the incident had taken place. PW5 then called one Alice Njoki who came with another lady and they examined PW2. They noticed that her panty was wet and had grass on it. They also noticed that PW2's private parts were too wet. PW5 then called one Beatrice Wanja who took PW2 to hospital while the appellant was taken to the police by two other ladies. She testified that she had known the appellant for one year.

PW6 Ruth Ngina, PW7 Corporal Collette Mutua attached to Ngewa Police Post reiterated the evidence of PW5. PW6 added that people started beating the appellant and took him to the police.The appellant was known to her.

The appellant was put on his defence and he preferred to give an unsworn testimony. He denied having committed the offence and stated that nothing was said to him at the police.

Section 8 (1) of the **Sexual Offences Act No. 3 of 2006** provides that:

> ***"a person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

In this case there was no actual penetration as the direct evidence of PW2 and PW3 showed that the offence committed falls under **Section 9(1)** and **(2)** of the **Sexual Offences Act No. 3 of 2006.**

PW3 personally found the appellant in the act and chased him away with a stone. She immediately went and reported the matter to the rest of the witnesses who gave evidence in court. PW1 the Clinical Officer who examined PW2 stated that the labia minora was bruised. She stated that the hymen was intact but it is obvious that there was attempted penetration. Therefore the appellant cannot escape the jaws of justice in so far as the offence of attempted defilement was proved.

Section 9(1) and **(2)** of the Sexual Offences Act No. 3 of 2006 provides that:

> ***"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."***

Under **section 354(3) (a)** of the **Criminal Procedure Code**, in an appeal from a conviction, this court has the discretion to alter a finding and also the nature of sentence.

Therefore, the appellant's appeal succeeds in part. The original conviction is quashed and sentence set aside. The same is substituted with an order that the appellant be and is hereby found guilty of the offence of attempted defilement under **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act** and is convicted accordingly. He is sentenced to serve 10 years imprisonment with effect from the date of sentencing by the Lower Court.

DATED and **DELIVERED** at **NAIROBI** this **17th** Day of **September, 2015**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person

2. Ms. Ngetich for the respondent