REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 230 OF 2014

A M M……..……..…….……..…APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

[Being appeal from original conviction and sentence in Criminal Case No. 3 of 2013 made on 17th September 2014 by the Principal Magistrate's Court at KITHIMANI (the Hon. M. A. O OPANGA, AG. SRM)]

JUDGMENT

INTRODUCTION

1. This is a judgment on an appeal from the decision of the Principal Magistrate's Court at Kithimani (Hon. M. A. O. Opanga, Ag. SRM) in cri case No. 3 of 2013, in which the Court on 17th September 2014 convicted the appellant for the offence of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act and sentenced him to imprisonment for 20 years.

2. The appellant was charged with the defilement of a girl contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006 with particulars as follows:

> *"**CHARGE- DEFILEMENT CONTRARY TO SECTION 8(1) (4) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006***
>
> ***Particulars – A M M** – On diverse dates between 19th November, 2012 and 9th January, 2013 at [particulars withheld] Market in Masinga District within Machakos County, intentionally caused his penis to penetrate the vagina of M M M a child aged 15 years."*

3. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 with particulars that:

> *"**COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF SEXUAL OFFENCES ACT NO. 3 OF 2006***
>
> ***A M M** – On diverse dates between 19th November, 2012 and 9th January, 2013 at [particulars withheld] Market in Masinga District within Machakos County, intentionally touched the vagina of M M a child aged 15 years with his penis."*

TRIAL AND JUDGMENT.

4. The prosecution called 5 witnesses to prove the charge and when put on his defence the appellant gave an unsworn statement denying the charge, and judgment was reserved.

5. In the Judgment of the Court, the learned trial magistrate after considering the charges against the appellant and evidence presented by the prosecution, found the appellant guilty of the offence of defilement and sentenced him as follows:

> *"I have analyzed the evidence on record and find for a fact that the accused had cohabited with PW1 as his wife notwithstanding the fact she was a minor.*
>
> *PW1 testified that she lived in the house of the accused from 19.11.2012 to 9.1.2013 when she was rescued by her father PW2 and a police officer PW3. She stated that during that time he defiled her severally. Medical examination done by PW5 show that her hymen was not freshly torn. She was on her menses during examination so presence of spermatozoa could not be confirmed due to the flow. HIV test done on both PW1 and accused turned out to be positive an indication that the two had sexual contact. The accused had even confirmed having cohabited with PW1 to PW5. PW1 is said to have been born on 29.3.1997 to mean that as at the date of the offence she was 15 years and not 16 years as stated in the charge sheet. In the foregoing circumstances, I am constrained to find the accused person guilty of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The offence carries a penalty of not less than 20 years in imprisonment.*"

THE APPEAL

6. The appellant was aggrieved and in his appeal sought the quashing of the conviction and setting aside of the sentence in 'Amended Supplementary Grounds of Appeal' set out his grounds of the appeal as follows:

1. *"That my conviction was manifestly unsafe and a nullity as the trial proceeded on a defective charge sheet in that there was variance of evidence in relation to the person who is alleged to have the complainant.*
2. *That the plea taken on 11.1.2013 invalidate the same was in respect of a none-existence child namely M M M who actually never testified in court.*
3. *That the provisions of section 214(1) of the CPC was violated as the charge sheet ought to have been amended soon after the testimony of PW1 and PW2 so as to reflect as to real name of the complainant, hence the omission was prejudicial and not curable under section 382 of the CPC as the same occasioned a failure of justice.*
4. *That I the appellant was substantially prejudiced and unable to defend myself properly due to the confusion or variance of evidence in relation to the name of the complainant.*
5. *That in the present appeal, I am unable to argue my appeal properly due to the fact that the complaint indicated in the particulars of the charge sheet never testified hence non existence.*
6. *That the burden of prove was not discharged."*

SUBMISSIONS

7. The appellant filed written submissions while the State Counsel made oral argument to which the appellant then responded. The principal contentions of the appellant were that the charge was defective because the names of the complainant on the charge sheet was different from that given by the witnesses in their testimony before the court and the court had failed in directing that the charge sheet be amended in accordance with section 214 of the Criminal Procedure Code, and that the prosecution did not discharged its burden of proof with regard to the age of the complainant and the confusion as to the name of the victim.

8. For the Respondent, Counsel for the DPP submitted that the difference in names appeared to be typographical errors which did not cause any prejudice to the appellant and were thus cured by section 382 of the Criminal procedure Code. On the age of the child, the Respondent relied on the testimony of the complainant and her father as to her age and to the Health Card produced as PEX 1 to indicate that she was born on 29/3/1997 which made her 15 years at the time of the offence. It was contended that the testimony of the complainant PW1 as to the defilement was corroborated by that of the examining clinical officer PW5 and that of the father PW2 corroborated by the arresting officer PW3 who testified that they rescued PW1 from the appellant's house.

ISSUES FOR DETERMINATION

9. The twin question in this appeal is whether the charge against the appellant was defective having regard to the discrepancy in the names and age of the person alleged to have been defiled in the charge sheet and the testimony of witnesses before the court and whether in view of such discrepancies in the name and age of the complainant, the Prosecution had proved its case to the required standard.

DETERMINATION

Defects on the charges as to the names of the complainant

10. I have noted that although the typed record showed the complainant's name as variously M M, M M and M M, the original handwritten record clearly shows the name as M M, and it would appear to have been typographic error only. However, no prejudice is shown to have been occasioned on the appellant as the record clearly shows that he participated fully in the cross-examination of the complainant who testified that the appellant had forced her to stay with him and have sexual intercourse with him over a long period at his house. The appellant clearly knew who his complainant was, even though the name may have been wrongly recorded in the charge sheet or in the proceedings. Indeed, a defect as to the name of a person in the charge sheet is not fatal and is cured by both the provisions of section 137 and 382 of the Criminal Procedure Code as shown below.

11. Section 137 of the Criminal Procedure Code on the preparation of charges provides that no objection will be entertained where the charge is drawn in conformity with the provisions of the section, which is in terms as follows:

> ***"137. The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code - "***

12. Specifically, section 137 (d) of the Criminal Procedure Code provides that mis-descriptions or indeed non-description of a person in a charge is not fatal –

> "*(d)* ***the description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation;*** *and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, a description or designation shall be given as is reasonably practicable in the circumstances,* ***or the person may be described as "a person unknown";***

It is sufficient that the statement of the offence described the complainant as a girl of 15 years as charged in this case, and her correct name is immaterial as an offence of defilement would have been committed on such girl irrespective of her name. Such a charge would properly put the accused to notice as to the nature of the charge that he faced and he cannot be heard to say that he was confused as to the offence that he faced and had to defend himself against because of the misstatement or misspelling or, indeed, no-statement of the complainant's name.

13. In addition, section 382 of the Criminal Procedure Code would excuse such an error where, as here, the appellant was in no way prejudiced as, by whatever name, the complainant was present before the Court for cross-examination by the appellant and indeed, the appellant did cross-examine her without raising any question as to the correct names or age of the complainant. Section 382 of the Criminal Procedure Code provides as follows:

> *"**382.** 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."*

Moreover, the objection as to the name of the complainant could have been raised at the trial court, if it were considered by the accused that he did not, on account of the different names used in the charge and evidence, know the person the defilement of whom he was charged. It was clear to the accused that he was charged with the defilement of the person variously named as M M or M M [and it appears to be a case of pronunciation], a girl aged 15 years who testified as PW1 and whom the accused extensively cross-examined as shown above in the full text quote of her testimony. The appellant was not prejudice in any way.

Analysis of Evidence

14. The key witnesses were PW1 and PW2. PW1, the complainant stated in examination in chief as follows:

> *"My name is M M M. I go to school at [particulars withheld] Primary School. I repeated class six. I was born on 29.3.1997. I am fifteen years. I have a child health card [particulars withheld]. On 19.11.2012 at about 1.00p.m I was sent by my parents to [particulars withheld] market. I was with M. We had gone to sell a chicken and thereafter bought things we had been sent. Mwent to buy credit.* ***Accused came and greeted me. He was a stranger to me. He got hold of my hand and led me to his house. He locked me inside. He increased volume of his radio. He warned me not to dare make noise. He removed my trouser and inner pant. He also removed his clothes and laid on top of me. He defiled me for several minutes. He told me not to scream or else he would kill me. He left me in the house and locked the door from outside. He came back at 8.00p.m. He bought food I ate because I was hungry. He undressed me again and defiled me again. My mother had given me a mobile phone to call her when I reached my granny's home. Accused took the phone away and removed my line. Accused locked me in his house since 19.11.2012 upto 9.1.2013. My mother was searching for me all the while. A girl came and found me. Accused refused to give me my clothes. I was sick by then. Accused had wanted to sleep with that girl also. When I was eventually rescued we went to Ekalakala Administration post. I was taken to hospital.*** *P.3 form MFI – 2. I recorded my statement. Accused was not known to me before."*

On Cross-examination, she said:

> *"You held my hand on the road behind the market. The girl I was with had gone to buy credit. You took me to your house. You threatened to kill me if I screamed. I was afraid of you. You even told me if I went away I would never get married. Yes, during one occasion you took me to my grandmother's home when I was sick. She told you to take me back to*

where you found me. You bought me clothes. You sent a motorbike to pick me up. I boarded and came to where you were. Yes, you came to my grandmother's home and you discussed something. Another girl came and told me she was your wife. She came to demand from you money for food. On that day I went to my grandmother's home that day. When we went to Nairobi with you we came from your home. On 7th and 8th I was admitted in hospital. You paid this bill. My father took me away thereafter."

15. PW2, the complainant's father confirmed that he had gone to get back his daughter following report that she was unwell and she had been sighted at the appellant's house but the appellant would not let him take the girl. He testified that –

> *"I recall the 28.12.2012 at about 7.00p.m I was at work when I received a phone call from my wife she told me M M was sick. I asked her which child he told me the one who got lost.* ***I came to*** *[particulars withheld]* ***and talked to a lady who informed me M had been found. I traced her and found her in a single roomed house. M M told me she was unwell. She told me she was seeing strange things voices, cats etc jinis she started crying. It was at night. I told her I would return the following morning. We returned and found accused. He greeted us. He told us he had married M. We took pawpaw and oranges to her. We went and accused told me they had taken M to a witchdoctor. We went to accused's home thrice. He wanted us to take M to a witchdoctor. Accused refused us to take her away. She was taken to hospital. Accused was arrested. Last December she was sixteen years."***

On cross-examination he said:

> *"I came to your house on three occasions. I looked for means to get her out of your house. I received a phone call from a strange number that informant told me where M was. I saw her on your bed."*

16. The Other witnesses supported the testimony of PW1 as follows:

> **PW3,** Administration Police Constable Grace Katumo of Ekalakala AP post was arresting officer who testified that on 9/1/2013 one K and A had reported that their daughter aged 16 years had been locked in a room and they went and arrested the appellant and handed him over to the Police at Matuu. On cross-examination she said that they had received a report that the girl had stayed with the appellant for two weeks.
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> PW4, Police officer Sammy Kipkurui of Matuu Policve Station confirmed receipt on 9/1/2013 of the appellant from PW3 in the company of the complainant and her father, with a report that the appellant had [from] 22/12/2012 upto 9/1/2013 been staying with the complainant minor and had abused her sexually. He had recorded the statements of witnesses and escorted the appellant and the complainant to hospital the next day. On cross-examination, the witness said that the report was that the appellant had stayed with the minor and had sexual intercourse with her and that she (the complainant) had stated that the appellant had taken her as his wife for two weeks.
>
> PW5, Philip Jaramba was the clinical officer at Matuu District Hospital who had on 10/1/2013 received and examined the appellant and the complainant. He said that the complainant had given a history of defilement by a person well known to her on diverse dates between 19/11/2012 upto 9/1/2013. On examination of the two, he found that both were HIV positive, that the complainant's hymen was not freshly torn and concluded that she had been defiled. The witness stated that the appellant had 'reported that he had cohabited with the girl from 19/11/12 upto 9/1/2013. On

cross-examination, the witness maintained that the appellant had admitted that he was 'cohabiting with the girl.'

17. When placed on his defence, the appellant narrated how he was arrested by a police officer who escorted him for a search at his house and that he was later taken to Matuu Police station from where he was charged with the offence before the court which he denied.

18. Weighed as a whole the prosecution evidence and the unsworn statement of the appellant (although technically not evidence as held in *May v. Republic* (1981) KLR 129), there was evidence that leads the Court to believe the prosecution case that -

a. The appellant accosted the complainant and pulled her into his house where he defiled her. The complainant's testimony in this regard was clear, coherent and consistent, and this court would convict the appellant on the basis of the testimony in terms of section 124 of the Evidence Act, even if there was no other corroborative evidence. Section 124 of the Evidence Act provides for the taking of testimony from a victim of sexual offence and empowers the court rely on such evidence, without corroboration, where for reason to be recorded the court considers that the witness is telling the truth:

> ***"124.*** *Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.*
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

b. There was evidence of penetration by PW5 clinical officer and the fact of the appellant and complainant having the same Positive HIV status must in the circumstances of this case reasonably indicate that the two had had sexual intercourse.
c. There was circumstantial evidence of the complainant's cohabitation with the appellant following her forcible taking by the appellant. Such evidence is admissible in terms of section 33 of the Sexual Offences Act, which provides –

> *"**33.** Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove -*
>
> *(a) whether a sexual offence is likely to have been committed-*
>
> *(i) towards or in connection with the person concerned;*
>
> *(ii) under coercive circumstances referred to in section 43; and*
>
> *(b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned."*

d. There was no doubt that the appellant had cohabited with the complainant (PW1), the daughter of D M (PW2) who is named variously as M M, M or M M, and the misstatement or misspelling of her name was immaterial.
e. Age is a matter of fact which in this case was proved by her Child Health Card which showed her

date of birth as 29th March 1997. The Court of Appeal (Koome, Musinga & Otieno-Odek, JJA.) in *J.W.A. v. Republic* (2014) eKLR considered that age of the victim is a matter of fact which could be proved by evidence other than birth certificate and age assessment report, and said as follows:

> ***"The gist of the appellant's appeal is that there is material contradiction in the age of the complainant and it is unclear whether she was 10 or 16 years old; that the prosecution did not produce a birth certificate a birth certificate or adduce medical or other cogent evidence to prove the age of the complainant; that the penalty for various offences under the Sexual Offences Act, 2006, is determined by the age of the complainant. It is our considered view that the age of an individual is a fact and the two courts below established the fact that the complainant was 10 years of age. The complainant testified that she was 10 years old; the medical report produced as Exhibit 1 signed by Dr. K. Malumbe who examined the complainant indicates she was born in 1989 and was thus 10 years old in 2009, when the offence was committed; the P3 Form tendered in evidence as Exhibit 2 shows that the complainant was 10 years old at the time of the offence. On our part, we see no reason to disturb the finding of fact made by the two courts below and we are satisfied that the evidence on record shows that the age of eh complainant was proved to be 10 years."***

f. However, the length of the detention in the house and surrounding circumstances whether or not the two cohabited as husband and wife when the appellant forcibly kept her by taking her clothes from her and locking her inside his house are not material to the present charge; they may be material on a charges of kidnapping or abduction as defined in sections 255 and 256 of the Penal Code.

19. The appellant's alleged admission that he had kept the complainant at his house was not processed as a confession under section 25A of the Evidence Act, which provides as follows:

> *"**25A.** (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice"*

20. Although, the 'confession' cannot, therefore, be proved against appellant there was consistency on the part of prosecution witnesses PW4 and PW5 that the appellant had confessed to them. While this 'admission' cannot be taken as the truth of the statement, that it was made to the witnesses may support the evidence of the complainant who testified that the appellant had forced her to stay in his house. Moreover, the arresting officer PW3 and the police officer who received the appellant at the Matuu Police station were consistent that the complainant had reported that the appellant had stayed with her in his house and had sexual intercourse with her. These reports count for the consistency contemplated under section 165 of the Evidence Act that –

> *"**165.** In order to show that the testimony of a witness is consistent any former statement made by such witness, whether written or oral, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."*

21. However, even if the court did not have the corroborative evidence of the witnesses PW2, PW3, PW4 and PW5, the court would still be entitled to convict on the sole evidence of the complainant whom I have found to have been quite clear, consistent and unshaken in her testimony as to justify a conviction under the Proviso to section 124 of the Evidence Act.

FINDINGS

22. Accordingly, I find the charge of defilement of a girl aged 15 years under section 8 (1) as read with

section 8(3) proved to the required standard of beyond reasonable doubt. The applicable sentence for this offence is an imprisonment term of 20 years, as follows:

> ***8.****(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*
>
> *(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.*

23. The trial Court was right in arriving at its decision that the charge against the appellant had been proved to the required standard and, like this court, was, therefore, not obliged to consider the alternative charge of indecent act with a child.

ORDERS

24. For the reasons set out above, the appellant's petition of appeal dated 3rd October 2014 as amended by the 'Amended Supplementary Grounds of Appeal' herein is without merit and it is dismissed.

DATED AND DELIVERED THIS 16TH DAY OF DECEMBER 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Appellant present in person

Ms. Rono for the Respondent

Ms. Doreen- Court Assistant.