REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 68 OF 2010

BETWEEN

DANIEL MUNYAU KIBATI……..……APPELLANT

AND

REPUBLIC……RESPONDENT

JUDGEMENT

The appellant in this matter was convicted by the Senior Resident Magistrate in Chuka Senior Principal Magistrate's Court criminal case number 1512 of 2009 and sentenced to life imprisonment. He had been charged of defilement contrary to **section 8(1)(2) of the Sexual Offences Act**, with the alternative of committing an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act.**The particulars in support of the defilement charge were that the appellant had on divers dates between 5thMay 2009 and 5th August 2009 at [Particulars Withheld], Chuka in Meru South District within Eastern Province defiled R M a child aged eight (8) years old. The particulars in support of the charge of committing an indecent act with a child were that the appellant had on the same dates and at the same place committed an indecent act with the said child. He pleaded guilty.

He was aggrieved by the said conviction and sentence, and filed the current appeal through counsel. In the appeal, he listed several grounds. At the hearing of the appeal, the appellant was represented by Mr Solonka. He urged several grounds – that the charges were defective as the particulars of the two charges did not specify the particular acts that constituted defilement and indecent conduct with a minor, that the plea was equivocal, that there were no medical records to support the charges, that the record does not indicate the specific counts that were pleaded to, neither does it indicate the specific count to which the particulars related. He finally submitted that in the event the court allowed the appeal it should not consider ordering a retrial on the grounds that the appellant has been in custody for a very long period of time. He cited numerous decisions of both the High Court and the Court of Appeal to support his contentions.

The state, represented by Mr Ongige, opposed the appeal. Mr Ongige argued that the charges were not defective in any way. On the medical reports, his opinion was that the appellant had pleaded guilty and admitted the facts, the absence of the medical reports was of little consequence. He asserted that the appellant very clearly understood the charges that he faced. He urged the court if it finds merit in the appeal to consider a retrial given the nature of the offences charged..

On the first ground argued by Mr Solonka, it would be prudent to consider the two offences as defined in the Sexual Offences Act. **Section 8(1) of the Sexual Offences Act** which defines defilement states as follows:

> ‘(1)A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.’

According to this provision there are three elements of the offence of defilement – an act, which causes penetration, with a child. All three elements must be stated in the charge, as the charge should include all the allegations against the accused person. The charge must state the elements of the offence as set out in the statutory provision creating the offence. It Is these elements that the prosecution seeks to prove against the accused, and it is imperative that they be stated in the charge so that the accused can then adequately prepare his defence in line with the elements of the offence as set out in the charge.

Section 11(1) of the Sexual Offences Act on the other hand defines the offence known as committing an indecent act with a child. It states:

> ‘any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.’

‘An indecent act’ is defined in **section 2 of the Sexual Offences Act**, the provision states:

> ‘’indecent act’ means an unlawful intentional act which causes –

a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration
b. Exposure or display of any pornographic material to any person against his or her will’

Committing an indecent act from this definition clearly covers several acts. It is imperative that the particular or specific acts complained of are stated in the charge. It must be indicated whether the indecent act complained of is the one envisaged in (a) or that contemplated in (b). A plea founded on a charge which does not state all the elements of the offence as defined in the law creating it is equivocal, and the said charge defective.

The second ground was that the plea of guilty as recorded was equivocal. The argument was that the plea offered by the appellant by merely saying ‘guilty’ was not unequivocal. Mr Solonka’s position was that the exact words used by the appellant in his plea ought to have been recorded. He cited several decisions where this point was made. These decisions include ***Wanjiru vs. Republic*** (1975) EA 5, ***Adan vs. Republic*** (1973) EA 443 and ***Mose vs. Republic*** (1977) EA 163. He also referred to ***Tomasi Mufumu vs. R*** (1959) EA 625, to emphasise that where the offence attracts a stiff sentence, such as death or life imprisonment, the court ought to approach a plea of guilty with caution. He submitted that such caution was not taken in this case.

When plea was taken on 5th November 2009, it is recorded that the charge was read over to the appellant and explained to him in a language that he understood, and on being asked whether he admitted or denied the truth of the charge he replied in English – ‘Guilty.’ The record indicates that the charge was read in English, and there was a Kiswahili translation. Without prejudice to what I have said with regard to the first ground, I find nothing amiss so far as the recording of the plea was concerned. There is nothing to show that the appellant did not plead in English and did not use the word ‘guilty.’ There is nothing to indicate that he did not understand the charge, and that there was need for the court to exercise caution before recording the plea. In my view the decisions relied on by Mr Solonka are distinguishable. The circumstances of plea taking in the matters where those decisions were made were different from the set of facts in this case. This, however, does not prejudice what I have stated with respect to the first ground. The plea was equivocal to the extent that it was founded on a defective charge, one that does not state all the constituent elements of the offence charged.

On the claim that the conviction was not supported by any medical evidence, I do agree with the submission by Mr Ongige. This is a case of a guilty plea. The appellant admitted the charge. The particulars were read out to him and he confirmed them. The absence of the medical report does not in the

circumstances undermine the plea. Mr Solonka relied on the decision in ***Thomas Mwaluma Mwimwa vs. Republic*** Mombasa CRA No' 2'4 of 2003. However, in that case the circumstances were different, the appellant had pleaded not guilty and the trial court had to conduct full trial, where it had to establish beyond reasonable doubt that the sexual offence alleged had in fact been committed.

The last ground was that the record does not indicate the particular charge, as between the principal count and the alternative, that the appellant pleaded to and in respect of which he confirmed the particulars stated by the prosecution. I have carefully gone through the record and noted that it is not stated which count was read to the appellant, and the particular counts that he pleaded to. The record does not also indicate the charge for which he was convicted and sentenced. These are no doubt serious defects in the trial process of the appellant.

On the whole, I am of the view that the appellant did not get a satisfactory trial taking into account the defects noted above. Every accused person is entitled to a fair trial. This is a constitutional right. The trial must not only be fair, it must be seen to be fair. The conviction and sentence in this case cannot be sustained. I will consequently declare a mistrial and allow the appeal and set aside the conviction and sentence of life imprisonment.

The grounds upon which the conviction and sentence are impugned are technical, founded on procedural improprieties. I need to consider in the circumstances whether the appellant should be tried again.

The principles governing the making of the order fora retrial have been stated in a number of cases. Sitati Ag J in ***Koome vs. Republic*** **(2005) 1 KLR 575**, summarised the principles that should guide the court in determining whether to order a retrial or not into five. That, in general a retrial will be ordered when the original trial was illegal or defective. That, a retrial will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial. That, it does not follow automatically that a retrial will be ordered where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame. That, each case must depend on its own particular facts and circumstances. And that, an order for retrial should only be made where the interests of justice require it and it should not be ordered where it is likely to cause an injustice to the accused person. This decision followed earlier decisions, such **as *Fatehali Manji vs. Republic* (1966) EA 343** and ***Aloys vs. Uganda*** **(1972) EA 469**, where similar principles were stated. The foregoing clearly indicates that the power to order for retrial is discretionary and should be exercised judicially.

I am persuaded that this is a proper case for a retrial given the serious nature of the offence, the fact that the same is prevalent in this part of the country and the fact that the appellant initially admitted the offence. The matter shall be remitted to the lower court for retrial, to be conducted by a magistrate other the one who tried and convicted the appellant in the first instance.

DATED ,SIGNED AND DELIVERED AT MERU THIS 24TH OCTOBER ,2013

W MUSYOKA

JUDGE