REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.201 OF 2010

SANKARE KOTIKASH Alias MOSE ....….. APPELLANT

VERSUS

REPUBLIC ………………………...………… RESPONDENT

(An Appeal from original conviction and sentence in Narok S.P.M.CR.C. No.479 of 2009 by Hon. A.G. Kibiru, Principal Magistrate dated 9th June, 2010)

JUDGMENT

SANGARE KOTIKASH alias MOSE (the appellant) was convicted on a charge of defilement of a child with mental disability contrary to **Section 7** of the **Sexual Offences Act 2006**. He denied the charge and after trial in which four witnesses testified on behalf of the prosecution, and appellant was the only defence witness, he was convicted and sentenced to serve 20 years imprisonment.

The charge against him was that on the day of May 2009 at E[...] in NAROK District, within the Rift Valley Province, he intentionally and unlawfully did an act which causes penetration with his genital organ to N.K, a child who is mentally retarded and aged 14 years.

ANNA KERUBO (PW1) the mother of N.K told the trial court that she had traveled on 12/5/09, leaving her daughter and son **D.O (PW2)** at their home in E[....].

Upon her return, she did not find N.K and learnt from her son that the appellant had taken her to his place to go and feed her. She decided to go to the appellant's home but on the way she met N.K whose dress was torn and who said the appellant had defiled her. The dress was taken by police and the girl was taken to hospital.

PW1 explained to court that the girl was using signs to communicate that appellant had defiled her and that she was feeling pain. It was her evidence that the family never used to leave the girl unattended. When she checked the girl's private parts, she saw a tear and noticed that her dress was blood stained. It was her evidence that N.K is dumb and epileptic which was why she would never be left unattended. She further testified that she recovered a blood stained dress from the girl, and the same was identified in court by the witness. When she checked the young girl's private parts, she noticed that she had been injured and had fluid substances dripping. She gave the complainant's age as 13 years and informed the trial court that appellant was a frequent visitor to their home.

On cross-examination she stated:

"I found complainant coming out of your place. There was a path to your farm."

She also stated on cross-examination that she had left the minor with an aunt named Caren Kerubo who was not present when appellant took the minor away.

D.O (PW2), a minor aged 9 years, told the trial court that appellant whom he knows as Moses lives in E[...] and he saw appellant who sent him to go and buy food but PW2 declined. Appellant then held his sister N.K by the hand and took her to his house. This was during the day and PW2 did not follow them. Later when their mother came, he informed her that appellant had taken N.K, so his mother went to look for her.

On cross-examination he stated that his sister told his mother what had happened and that she was using signs to describe what appellant had done to her.

PC Hussein Mohamed Ibrahim of Narok police station (PW4) received a call while on duty to the effect that there as a suspect who had been attacked by members of the public on allegations that he had defiled a minor. He saw the minor who was deaf and dumb – he took both the minor and the appellant to the police station and issued the minor with a P3 form. Later he charged the appellant.

It was relayed to the trial court that the minor had passed away by the date of trial.

DANIEL CHERONO (PW3) a Clinical Officer at Narok District Hospital examined N.K 24 hours after the incident. His findings were that she had a broken hymen and the vagina was torn. She also had a whitish discharge although analysis did not show any spermatozoa. He confirmed that she had a history of mental retardation and epilepsy and was on treatment and she had treatment notes. The P3 form was produced as Exhibit. His conclusion was that complainant had a tear in her vagina which was possible in a defilement.

Upon being put on his defence, the appellant gave unsworn testimony in which he confirmed being a resident of E[....]. His evidence was that he was watching over a water well on instructions of the owner – his task being to stop women from fetching water there. One lady would come early and fetched water before he arrived at the well.

One day appellant laid an ambush and found the lady – they quarrelled and he told her she would be arrested for making illicit brew. Shortly thereafter the lady was arrested and she said he had set her up. After her release she accosted the appellant and insulted him, then he was charged with offences he did not know about. This was after complainant had threatened him saying he would know who she was.

In his judgment, the trial magistrate noted that appellant did not deny that PW2 knew him and had seen him taking the complainant away. He was persuaded that PW2 was telling the truth, observing that he was firm and consistent in his testimony and denied suggestions on cross-examination that he had been coached by PW1 on what to tell the trial court.

He also noted that appellant did not give an account of his movements on the date in question and he held that prosecution had mounted a credible case which was not contested by the appellant. Appellant's defence was considered and described as not convincing and same was not corroborated. It did not cast any reasonable doubt on the prosecution case. The trial magistrate noted that although appellant was charged under **Section 7** of the **Sexual Offences Act** which deals with commission of acts which cause penetration or indecent acts within the view of a family member, child or person with mental disability, he found that the proper provision ought to have been **Section 8(3)** of the Act and that no prejudice was occasioned to the appellant by the defect and ordered the charge be annulled.

Appellant now challenged the findings of the trial court on grounds that:

1. The charge was defective.

2. The charge was not proved

3. The trial magistrate failed to evaluate his defence.

Appellant relied on his written submission in which he pointed out that the provision of the law under which he was charged related to a different offence and the case ought to have been by way of an amendment under **Section 214(1) Criminal Procedure Code** and so his conviction should not hold.

He also contends that the minor's torn and muddy dress which was referred to in the evidence was not produced in court as exhibit and although there were claims that the blood stained pants were taken to the Government Chemist for analysis, no report was produced in court so there was no proof that he blood belonged to the minor.

He also wonders how the trial could have been adversely concluded without the testimony of the minor whom the court was informed had passed away in the course of the trial – yet no death certificate was produced to confirm that and his argument is that this case is just a tale made up by the prosecution.

He also argued that his defence gave a reason as to why there was friction between him and the girl's mother. He also poured cold water on the evidence of PW2 saying it was obvious he could not give evidence contradicting his mother.

The appeal is opposed and Mr. Omutelema on behalf of the State submits that although the improper provision was cited, no prejudice was occasioned because the particulars clearly showed the charge was defilement of a child aged 14 years and the evidence demonstrated that. The wording of the charge is correct as are the particulars but the provision that was cited is wrong.

Indeed under the Sexual Offences Act the offence does not exist and remains an offence under the Penal Code Section 146 – In fact when the offences against morality were repealed so as to include them under the Sexual Offences Act, that particular offence remained under the Penal Code. An offence under Section 8(3) of the Sexual Offences Act was deemed to have been disclosed by the trial magistrate – was such a finding prejudicial to the appellant? Certainly section 179 of the Criminal Procedure Code was not available to the trial court as the offence for which he was being convicted was not minor to the one contemplated under Section 146 of the Penal Code. In fact the maxim sentence provided in section 146 is far more lenient than the mandatory minimum sentence provided under section 8(3) of the Sexual Offences Act.

Secondly is the stage at which the amendment was made – the trial magistrate directed that the charge be deemed as amended at the point when he was reading the judgment.

Section 214(1) of the Criminal Procedure Code provides that:

"Where at any stage of a trial before the close of the case for the prosecution it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge necessary to meet the circumstances of the case provided that:-

(i) Where a charge is so altered, the court shall thereupon call upon the accused person to plead the altered charge;

(ii) Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and in the last mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

Obviously as contemplated such a scenario was not made available to the appellant and he was prejudicial.

In the decision of **Yongo V R** 1983 KLR, the Court of Appeal held that:

(i) The court has power to order an amendment or alteration of the charge provided:

i. The court shall permit the accused person if he so requests to re-examine and recall witnesses.

(ii) It is a mandatory requirement that the court must not only comply with above conditions but it shall record that it has so complied.

It was indeed recognized in the case of **Chengo V R** 1964 EA 122 that:

"An amendment of the charge at a late stage of trial cannot be said to be made without prejudice."

My finding is that owing to the late stage at which the charge was amended, injustice was caused to the appellant and I need not delve into the other grounds raised by the appellant. The appeal has merit and is allowed. The conviction is quashed and sentence is set aside – the appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 3rd day of February, 2012 at Nakuru.

H.A. OMONDI
JUDGE