JOSEPH MWAMUYE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case no. 56 of 2010 of the Principal Magistrate's Court at Malindi before Hon. D. W. Nyambu - PM)

JUDGMENT

1. The appellant was charged with the offence of Defilement of a girl contrary to section 8(2) of the Sexual Offences Act, it being alleged that on 15th December, 2010 at Magarini District he defiled S.H. a girl aged 12 years.

2. The appellant pleaded guilty. He was convicted and sentenced to 20 years imprisonment. He has now appealed to this court against both conviction and sentence on several grounds which basically challenge the plea taking process and the correctness of the charge as drawn. He made written submissions in support of these grounds.

The appeal was opposed by the state, MR KEMO submitting that the plea was unequivocal as the appellant understood the charge.

3. The legal requirements for proper procedure for taking of pleas was settled since the case of **ADAN VS REPUBLIC(1972)EA 445**. In that case the correct procedure was outlined as follows;-

i. "the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

ii. the accused`s own words should be recorded and if they are an admission, a plea of guilty should be recorded;

iii. the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts"

4. The record of the Lower Court shows that the appellant was first arraigned before the court on 17/12/10. The charges were read to him in Kiswahili and he pleaded not guilty. The case was set down for hearing on 3.1.11 but on the next mention on 30.12.10, the appellant addressed the court as follows;-

"May the charge be read out to me again"

The charge was read out and explained to him in Kiswahili. He admitted the same by saying: True. The facts were then given by the prosecutor. The appellant stated that the "facts are correct". Whereupon he was convicted. In mitigation he said he had a large family of 11 and sought leniency.

5. From this record, there can be no issue of the appellant being "disoriented" or "confused" as he claims in his Petition. Neither is there a legal requirement on the part of the plea court to warn him of the consequences of pleading guilty to the charge of the nature brought against him.

6. The fact that the statement of the offence did not cite in addition to Section 8 (2), section 8(1) of the Sexual Offences Act does not by itself render the charge incurably defective in the circumstances of this case. The purpose of a charge is to present the specific offence preferred and particulars thereof as are sufficient for giving "reasonable information as to the nature of the offence charged". (see Section 134 of the Criminal Procedure Code). It is true that it would have been ideal to also cite section 8 (1) of the Sexual Offences Act but in this case the statement of the offence, the particulars as well as the facts by the prosecution, all which the appellant apparently understood left no doubt as to the nature of the offence he faced.

7. I have seen two legal authorities including one by myself in **SAMUEL FONDO GONA Malindi High Court Cr. Appeal No.119 of 2009** which have been cited by the appellant in this regard. Both are distinguishable, from this case where the appellant pleaded guilty. Secondly, the Fondo appeal demonstrated major charge defects and turned ultimately on the issue of identification. I have also come across many authorities by the Court of appeal where charges framed under section 8 (3) or 8 (2) of Sexual Offences Act alone have been left undisturbed. One such case is **JACOB ADHIAMBO OMUMBO VS REPUBLIC (2008)eKLR**. Restating the submissions of the state in that case, the court of appeal said:

"He said that the charge as drafted was proper under sections 8 (2) of the Sexual Offences Act, 2006, and the appellant was convicted on ground evidence".

8. The court went to state as follows;-

"The offence of defilement is defined in section 8 (1) of the Sexual Offences Act, No. 3 of 2006 as follows;-

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

"From the above definition, it is clear that "penetration" is an important ingredient in a charge of defilement under the sexual offences Act which must be proved by the prosecution in this case, the evidence of Meshack the clinical officer confirmed that there was penetration".

The Court of Appeal in the exercise of its mandate on a second appeal could have, but did not fault the charge as farmed. In the final analysis the conviction in that case was upheld.

9. The consistent argument I have heard in many appeals in defilement cases is that the failure to cite section 8 (1) Sexual offences act renders the charge defective regardless of the citation of other subsections in the statement of the offence. And as I observed some high court decisions say so too. The argument in my considered view appears to run against the grain of the general practice regarding the framing of other charges as we have come to know it. As an example, the definition of stealing in contained in section 268 of the Penal Code. However, it has never been a requirement in our criminal jurisprudence that any charge of stealing contrary to any of the sections 275 Penal Code to section 284, be framed as being contrary to section 268 as read with say, section 275 of the Penal Code or vice versa.

10. What is required is that the elements of the charge as created by statute be contained in the charge. There can be no justification for imposing a different standard with respect to the Sexual Offences Act, which then results in the unwarranted release of otherwise guilty persons on technicalities. A Court of Law cannot abdicate its duty to uphold the rule of law and in so doing must always bear in mind the objectives behind the enactment of the Sexual Offences Act: to curb rising sexual abuse especially of children.

11. In the present case, the charge contains all the essential elements of the offence defined in section 8 (1). Thus it is sufficient. The era when technicalities were allowed to override substantive justice is hopefully behind us, with the enactment of section 159(2) (d) of the constitution. The appellant's right to a fair trial were upheld in as much as he was charged with a recognised offence and the proper plea taking procedure was, followed and I do not accept that the mere failure by the prosecution to insert section 8 (1) of the Sexual Offences Act in the statement of the offence ought to be fatal.

12. The definition of the offence of defilement is what is contained in section 8(1) but a reading of section 8 (3) clearly shows the nature of the charge it states;

"A person who commits an offence of defilement with a child between the age of 12 and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years"

The P3 form tendered in court during the plea showed penetration of the hymen and bruises on the vagina of the victim minor. Reference was made thereto at the time the facts were read.

13. For the foregoing reasons, I find no merit whatsoever in the appeal and will dismiss it in its entirety. The conviction and sentence of the lower court are confirmed.

Delivered and signed in court this 20th July 2012 in the presence of the appellant, Mr. Naulikha for the state, court clerk Evans/Leah.

C. W. MEOLI
JUDGE