REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 50 OF 2018

JUDITH KHAYOSA WANDERA .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

[Being an Appeal against both the conviction and sentence of the Chief Magistrate's Court at Kisumu (J.N. Wambilyanga PM) dated the 23rd day of May 2018 in Criminal Case No. 4 of 2017]

JUDGMENT

The Appellant, **JUDITH KHAYOSA WANDERA**, was convicted for the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**.

1. She was then sentenced to 15 years imprisonment.

2. In her appeal to the High Court, the Appellant has challenged both the Conviction and the Sentence.

3. The first issue raised was about the Charge Sheet. The Appellant submitted that the Charge Sheet was incurably defective because the particulars of the offence were not clearly set out. Her view was that the particulars ought to have brought out the definition of *"Penetration"*.

4. There is no doubt whatsoever that;

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

5. That is the position as spelt out at **Section 134** of the **Criminal Procedure Code.**

6. The purpose and intent of that requirement is that an accused person can only benefit from a fair trial if, right from the outset, the offence he was to be tried for was so clear and unambiguous that the accused would understand it, and thus be in a position to prepare his defence appropriately.

7. The Appellant cited the case of **SIGILANI Vs REPUBLIC (2004) 2 KLR**

480 as authority for her preposition that the charge sheet herein was incurably defective.

8. Attached to the Appellant's submissions was a copy of the decision in **BRIAN KIPKEMOI KOECH Vs REPUBLIC, CRIMINAL APPEAL NO. 25 OF 2010** (at Eldoret).

9. In that appeal, the Appellant had urged the court to hold that the charge sheet was defective because it did not reflect the definition clause.

10. It is noteworthy that that case was also in relation to the offence of Defilement.

11. In her reasoned judgment, Lady Justice Ngenye – Macharia said;

> ***"The mere omission of inclusion of the definition section in the statement of the charge would not render the charge sheet***

defective. After all, the inclusion of the definition section is not a major component of a charge sheet as outlined under

Section 134 of the Criminal Procedure Code."

12. I share the view expressed by my learned sister Judge above, and reiterate that the law does not require a charge sheet to incorporate the provisions which define the words which constitute the ingredients of the offence.

13. In this case, the charge sheet gave the following particulars of the offence;

"JUDITH KHAYOSA WANDERA:

On the 7th day of July 2017 at Kicomi area at Kisumu township within Kisumu County, intentionally caused her vagina to be penetrated by the penis of …….. a child aged 16 years."

14. In my understanding, those particulars are absolutely clear and unambiguous.

15. The particulars also provide all the necessary information which the Appellant needed in order to be able to adequately prepare her defence.

16. In the event, I find that the charge sheet was not defective at all.

17. The second issue raised by the Appellant was that the trial was a nullity, because the trial court did not explain to her the rights she had under **Article 50(2) (h) and (k)** of the **Constitution of Kenya 2010.**

18. It was the Appellant's submission that she ought to have been accorded the services of a lawyer.

19. As she was a person without any legal training, the Appellant said that it was the responsibility of the learned trial magistrate to explain to her that it was important to challenge the evidence tendered and also to tender her own evidence.

20. The Appellant cited the decision of Lord Denning in the case of **PETT Vs GREYHOUND RACING ASSOCIATION**, in which it was held as follows;

"It is not every man who has ability to defend himself on his own. He cannot bring out the point in his favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day.

A magistrate says to a man; 'You can ask any questions you like;' whereupon the man immediately starts to make a speech.

If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task."

21. Those words were quoted with approval, by Mativo J. in **JOSEPH NDUNGU KAGIRI Vs REPUBLIC, CRIMINAL APPEAL NO. 69 OF 2012** (at Nyeri). The learned Judge went on to find that the right to legal representation was fundamental if an injustice may otherwise be visited upon an accused person.

22. In my understanding of those two authorities, they do not advance the assertion that a trial court had an obligation to explain to an accused person that it was important for him to challenge the evidence adduced against him, and that he also had to adduce his own evidence.

23. Indeed, Lord Denning's view suggests that even when a magistrate would have told the accused that he could ask witnesses, any questions, that is not necessarily useful.

24. Secondly **Article 50(2) (h)** and **(k)** do not impose an obligation on the trial court to **ALWAYS** inform the accused person that he has a right to an advocate.

25. An accused person has the right;

"to have an advocate assigned …….. by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

26. In effect, if the court came to the conclusion that substantial injustice would result if an accused did not have legal representation, the court had an obligation to inform the accused that he had a right to have the State appoint an advocate for him, and at the expense of the State.

27. If the Constitution intended to make it mandatory for every accused person to be given an advocate who was appointed by the state, (unless an accused had appointed his own advocate), it would have expressly said so.

28. In the case of **MACHARIA Vs REPUBLIC, HCCRA NO. 12 OF 2012**, which the Appellant highlighted, the Court of Appeal noted that any accused person may receive a state appointed advocate if the situation requires it. The Court went on to express itself thus;

> ***" Such cases may be those involving complex issues of fact or law; where the accused is unable to efficiently conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence."***

29. In the case of **JOSEPH NDUNGU KAGIRI Vs REPUBLIC, HCCRA NO. 69 OF 2012**, Mativo J. had occasion to discuss the law governing the rights of accused persons to have an advocate appointed for them, by the state. His conclusion was that;

> ***"Not every accused person is entitled to legal representation at state expense. Each case is considered on the basis of its own merit."***

30. So far, the courts are in agreement that when an accused is charged with capital offences, he is entitled to a state appointed advocate.

31. I share the same considered opinion, and find that the Appellant has failed to demonstrate that the state had an obligation to appoint an advocate to represent her.

32. I nonetheless hold the view that the state should take a much more pro-active position, to allocate more resources which the courts could make available to accused persons who require legal representation.

33. In practical terms, the Justice system does not have funds that would enable it provide optimum support to those who may require support.

34. Witness Statements and Documentary Evidence ought to be made available to each accused person; that requires funding.

35. Witnesses need to be facilitated to travel from home to court and back home: that requires funding.

36. Advocates who are appointed by the state require to be paid their fees; and that too means that monetary provisions need to be made by the state.

37. Unless the state can put together sufficient resources to support the Justice system, those who may bear the brunt of lack of appropriate support are the vulnerable in society.

38. The rule of law is paramount in every society which deems itself to be civilized and democratic.

39. Even when the society perceives you to be guilty, it must jealously safeguard your rights to a fair trial.

40. I believe that that is one of the reasons why the Constitution declares loudly, at **Article 25** that the right to a fair trial cannot be limited.

Statutory Defence to a charge of Defilement

41. Pursuant to **Section 8(5)** of the **Sexual Offences Act**;

> ***"It is a defence to a charge under this section if –***
>
> ***(a) it is proved that such child deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
>
> ***(b) the accused reasonably believed that the child was over the age of eighteen years."***

42. According to the Appellant any reasonable person would infer that a person who operates a motor cycle for purposes of ferrying members of the public from one point to another is licenced and has thus obtained the age of majority under the law.

43. First, it must be emphasized that the test to be applied is not that of a reasonable person, in general terms.

44. Section 8(b) specifically says that it shall come into play if it is proved that the child deceived the accused that he had attained the age of 18.

45. There is no question of any presumption that in the circumstances, the accused may have been deceived.

46. The law demands proof that the child deceived the accused, and that the accused reasonably believed that the child was over the age of 18 years.

47. According to the Appellant, she met the Complainant at a club and the Complainant bought her an alcoholic drink.

48. The Appellant also said that the Complainant had dreadlocks at the material time.

49. Therefore, the child is said to have presented himself to the Appellant as an adult.

50. At no time did the Appellant testify that the Complainant deceived her.

51. It is not enough that from his appearance, the Complainant looked like an adult. The Complainant should be shown to have deceived the Appellant, if the statutory defence was to become available.

52. I also note that whilst the Appellant testified that she first met the Complainant at a club, that evidence is at variance with the evidence tendered by the Complainant.

53. Ordinarily, one would not expect the evidence of the prosecution to corroborate the evidence tendered by the accused.

54. However, when the accused person makes a choice not to raise questions to challenge the evidence of a prosecution witness, such evidence is deemed as uncontroverted.

55. In this case, the Appellant and the Complainant both confirmed having been friends to each other. The Complainant said he met the Appellant at the Railways Estate.

56. By not questioning the Complainant about that evidence, the Appellant is deemed to have accepted it as accurate.

57. However, the Appellant later testified that she said that she had met the Complainant at the Signature Club.

58. Obviously, it cannot be true that the first meeting was at Signature Club, if the meeting was actually at the Railways Estate.

59. The law does not excuse an adult who has sex with a minor, even when it might appear that it is the said minor who may have behaved in a manner that could have enticed the adult.

60. The **Sexual Offences Act** was legislated for purposes of, inter alia, providing protection of all persons from harm from unlawful sexual acts.

61. Under the **Children Act**, a child is any person who was under the age of 18.

62. Such persons have no legal capacity to, amongst other things, enter into a contract.

63. They are deemed as having not yet been fully developed in terms of their mental capacity. Therefore, whether or not they might be academic giants, the law provides them with protection, so that they might not be taken advantage of.

64. As part of that intended protection, the **Sexual Offences Act** makes it an offence for a person to commit an act which causes penetration with a child.

65. In my considered view, the words of the statute were carefully put together, so as to make it possible to charge both males and females with the offence of defilement.

66. If the statutory provision said that defilement would only occur if the act of penetration occurred on the genital organs of the child, the offence would have been limited.

67. Similarly, if the statutory provision said that defilement would only occur if penetration was caused by the genital organs of the offender, the offence would have been limited accordingly.

68. The offence of defilement occurs when a person commits an act which causes penetration with a child. Thus penetration can be on the child or by the child.

69. In this case, the penetration is said to have been committed by the child: if that was proved, the offence of defilement would still have been proved.

70. Both the Complainant and the Appellant admitted that the two of them had had sexual intercourse.

71. The evidence tendered by the said Complainant and the Appellant provided sufficient proof of the act of penetration.

72. This was not a case which required the identification of the perpetrator of the offence. I so hold because the Appellant expressly told the court that she and the Complainant had had sex together, and that she could not even recall the number of times they had done so.

73. The age of the Complainant was not in doubt. The mother not only gave oral evidence about it, but she also produced the Complainant's Birth Certificate.

74. As the Complainant was under the age of 18 when the Appellant deliberately caused him to penetrate her, she committed the offence of defilement.

75. Pursuant to **Section 8(4)** of the **Sexual Offences Act**, a person who commits the offence of Defilement with a child whose age was between 16 and 18 years, is liable to imprisonment for a term of not less than 15 years.

76. Accordingly, I find that the learned trial magistrate complied with the letter of the law when she sentenced the Appellant to 15 years imprisonment.

77. The sentence was not only lawful, it was the lowest under the law. Therefore, the trial court cannot be faulted for handing down the said sentence.

78. In the result, I find that conviction was founded upon solid evidence, which proved the case against the Appellant, beyond any reasonable doubt. The conviction is thus upheld.

79. And in doing so, I feel obliged to point out that the conviction was not contributed to by the ineptitude of the Appellant.

80. I say so because when she was giving her evidence, the Appellant expressly said;

> ***"I do know the charges against me. I heard and understood all the evidence adduced in court by prosecution witnesses."***

81. Therefore, when she now contends that the particulars of the charge or the evidence was anything but clear, that cannot possibly be true.

82. In the final analysis, the appeal is dismissed as it has no merits.

83. Both the conviction and sentence are upheld.

DATED, SIGNED and **DELIVERED** at **KISUMU**

This **7th** day of **February** 2019

FRED A. OCHIENG

JUDGE