REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 8 0F 2017

JOSEPH KAMAU REGINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No. 960 of 2015

in the Senior Resident Magistrate's Court, Engineer, (M. K. Mutegi– SRM)

JUDGMENT

Background

1. The appellant was charged in the lower court with the offence of defilement contrary to section 8(1) as read with **section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that the accused on the 19th day of October 2015, at [Particulars Withheld] in Kinangop within Nyandarua County, intentionally caused his penis to penetrate the vagina of EW a child aged ten years. In the alternative the accused was charged with indecently touching the vagina of the said child contrary to **section 11(1)** of the **Sexual Offences Act**. He pleaded not guilty to the charges.

2. At the hearing, the prosecution called 5 witnesses in support of their case, whilst the accused gave an unsworn statement with no witnesses. Ultimately, the trial magistrate found the accused guilty of defilement and convicted him to life imprisonment.

3. Dissatisfied by the lower court decision the accused filed a petition of appeal on 28th February 2017. Subsequently, he filed submissions on the appeal on 30th July, 2018. However, at the hearing on 20th February, 2019, the appellant filed amended grounds of appeal with fresh submissions, and asked the court to expunge his earlier submissions. By consent the court expunged the previously filed submissions and admitted the amended appeal and submissions.

4. The amended appeal is premised on the following grounds:

1. That the appellant did not enter a plea of guilty.

2. That appellant's conviction was vehemently unsafe as charge clung on a defective charge sheet.

3. That trial court erred on matters of law and fact as plea and judgment were based on such defects, hence both were invalid.

4. That trial court erred on matters of law due to such defects contrary to sec 4 of the sexual offences Act No. 3 of 2006; he invokes Article 25(c) and 50 (4) of the Constitution of Kenya 2010 and section 134 of CPC CAP 75 laws of Kenya.

5. That the principles applicable to a case of circumstantial evidence were not to the letter and infringed section 6 of Evidence Act Cap 80 Laws of Kenya.

6. That wrong interpretation of the appellant's language of choice was contrary to sec 15 of CPC.

7. That the court finding the appellant guilty contrary to sec 169(1) of the CPC was not fair contrary to Article 50 of the Constitution

5. The appellant seeks that the amended grounds of appeal be allowed, the conviction be quashed and sentence set aside.

6. The state opposed the appeal.

Issues for determination

7. On perusal of the appellant's grounds and submissions, they can be clustered. I consider that the following are the issues which arise for determination:

1. Whether charge sheet was defective

2. Whether there was wrong interpretation of language used at the trial

3. Whether the charge against the appellant was proved beyond reasonable doubt

8. As this is a first appeal, it is the duty of this court to reconsider and reevaluate the evidence adduced by the prosecution witnesses and the defence before the trial court, so as to arrive at its independent determination on whether or not to uphold the conviction of the Appellant. This court is mindful of the fact that it never saw nor heard the witnesses as they testified and therefore cannot give an opinion regarding the demeanour of the said witnesses (see **Okeno v Republic [1972] EA 32).**

Facts of the case

9. The complainant gave sworn evidence as PW1, after a voir dire trial. She said she was at home on 19/10/2015 at about 7.00pm when the accused, who lived with them, told her to prepare items for milking the cow. She put water to warm and got some milking jelly. She took these to Kamau who got hold of her and told her to enter the house. He told her he would show her something, and removed her leso and told her to remove her pant. She did this and he told her to lie on the bed, then removed his trousers. He then put his "thing for urinating...inside my thing of urinating. I felt pain" After the act she ran away and told her grandmother who reported to another man and woman. The accused was then arrested by members of the public and the following day they went to the police station.

10. PW3 MM, the complainant's grandmother, testified that on 19/10/2015 at about 7.30pm the complainant came into the house and told her what the accused had done. She went and brought her neighbour, MN (PW2) to her house. The complainant explained what had happened. She was dressed in a leso. They called the village elder, who told them to check on the complainant. N checked and confirmed that the complainant had been raped. They reported to the AP and the following morning they went to the police station.

11. PW2, MN testified that she was called by PW3 to her home. On getting there, she found the complainant in a leso, and listened to her story. They agreed to involve a village elder, Michael, who suggested that they check the girl to confirm the story. PW2 checked the complainant on her private parts and she saw semen on her vagina. It was whitish in colour. They reported the incident to Murungaru Chief's camp.

12. Dr Maingi Muchiri, PW4, was the doctor who produced the P3 form and PRC forms. He stated that the complainant was first examined and treated at Murungaru Dispensary. He examined her on 22nd October 2015. His medical report showed that she had a broken hymen and fresh scar and inflamed vulva. The report stated that the injuries were about three days old and was signed on the same day. A PRC form was filled on the same day by one Wandia Muthoni an officer at Engineer District Hospital, whose handwriting he knows as they have worked together for two years.

13. PW5, PC Phillip Gatheru was the Investigating Officer, from Kinangop Police Station. He testified that on 20/10/2015 he found a report in the OB on the alleged defilement of the complainant and the arrest of the suspect, the accused. He commenced investigations. He later received a complaint by the complainant's elder sister and issued her with a note for treatment at Engineer Hospital. He then recorded statements from the witnesses, and later charged the accused.

14. I now consider the evidence in light of the issues raised by the appellant.

Analysis and Determination

Whether charge sheet was defective

15. On the issue of the charge sheet, the appellant submitted: that his conviction was manifestly unsafe since the word "unlawful" was omitted from the charge sheet, meaning that the act he was charged with was not unlawful; that the charge facing him was not stated as provided under section 8(1) of the sexual offences act. According to the appellant, these were violations of article 25(c) and 5(4) of the constitution of Kenya.

16. The appellant cited a number of cases where the argument seemed to be that omissions in the charge sheet rendered it defective; that such defects ought to have been amended at the earliest opportunity which the prosecution failed to do; and that as a result of this negligence, the appellant could not have been expected to understand the case.

17. The question is: was the omission of the word "unlawful" in the charge sheet a fatal defect?

18. In the case of **Isaac Omambia v Republic [1995] eKLR** the court considered the ingredients necessary in a charge sheet and stated as follows:

> ***"In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: 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."***

19. Citing the **Isaac Omambia** case the Court of Appeal in **Peter Ngure Mwangi v Republic [2014] eKLR** noted that:

> ***"A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, and Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO V R (1983) eKLR that:***
>
> ***"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:***
>
> > ***(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,***
> >
> > ***(ii) when for such reason it does not accord with the evidence given at the trial."***

20. Additionally, in **Peter Sabem Leitu v Republic CR.A NO. 482 OF 2007 (UR)** the Court held thus:

> ***"The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."***

21. The record shows clearly that the charges were *"read over and explained to the accused person"*. He denied the charges. The particulars of the charge are that the accused intentionally caused his penis to penetrate the vagina of the complainant who was aged ten years. He did not however, object to the charge or the particulars, which he denied. The proceedings of 24/2/2016 show that the accused objected to commencement of the hearing, which was thus adjourned, because he said *"I will need at least 2 days"* to prepare himself. The hearing eventually commenced two months later on 20/4/2016. At the hearing the appellant had opportunity to cross examine the complainant and all other prosecution witnesses.

22. I do not think that in the circumstances the omission of the word *"unlawful"* in the charge sheet in any way prejudiced the appellant. The omission was insufficient to invalidate a charge sheet. The evidence given was not discordant with the charge and it was clear throughout that he was defending himself against a charge of defiling a girl. I do not see anything in the record to suggest that there was a failure of justice occasioned by the content of the charge sheet or, in particular, the omission of the word unlawful. I also note that **Section 382** of the **Criminal Procedure Code** provides:

> ***"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."***

Interpretation of language of proceedings

23. The appellant's complaint on interpretation is that his rights to fair trial were violated. He submitted that he does not understand English and only understands Kiswahili abit. He referred to page 2 line 11 of the proceedings where interpretation has been indicated as *"Eng/Swahili"*, and submits that this the slash means *'or'* and not *" to"* as the court intended. That this this left him prejudiced because he did not understand English and understands Kiswahili a bit. The appellant states that his language is Kikuyu, and even had to be assisted to write submissions.

24. From the record of proceedings, the magistrate has clearly recorded on page 2 as follows :

> ***"Inter: Eng/Kiswahili***
>
> ***.....***
>
> ***.....***

Court: Charge read over and explained to the accused person in Kiswahili language which he understands and he states:

Accused: Not true"

25. There is no confusion on what language is used in the proceedings. The charge was read in Kiswahili. It is not expressly stated that the rest of the proceedings continued in Kiswahili, but it is clear that the accused had expressed that he understood Kiswahili and that that was the language used. A party may indicate a language which he prefers to use in Court. There is no indication that he wanted to use Kikuyu language, nor can it mean that if he preferred Kikuyu he could not understand Kiswahili language.

26. Under **Article 50 (2) (m) of the Constitution** an accused person is entitled to a fair trial which includes the right to an interpreter. The Article provides:

"Every accused person has the right to a fair trial which includes the right (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."

27. Notwithstanding the fact that Article 7 provides that the national language of Kenya is Kiswahili and that the official languages are English and Kiswahili, a court is obligated to ask for an interpreter if the accused person states that he does not understand the languages of the court, or if the trial magistrate realizes that the appellant does not understand the language in use. In this case, it is clear that the court asked the appellant whether he understands Kiswahili, which he said he did. There is thus nothing on record to show that the appellant did not understand Kiswahili.

28. In **Munyasia Mutisya v Republic 2015 eKLR** Dulu J in a persuasive decision stated:

"The subsequent hearing date do not have any indication of the language used either by the court or by the witnesses.

That was a mistake. The court should have indicated the language used by the court and the witnesses and translation if any. I however, note that the appellant participated fully in the trial by cross examining witnesses. He cross-examined P.W. 1. He cross-examined P.W.2. He cross examined P.W. 4, 5, 7, 8 and 9. In my view therefore he understood the proceedings and the language used. In my view if the appellant had not understood the language used he would not have cross examined the witnesses. He would also have raised the issue of him not being able to cross examine witnesses. There is no record that he complained. He also does not allege on appeal that he raised the issue and the court ignored it. The appellant also gave a clear sworn defence and he was cross examined and answered the questions. That in my view in totality shows that the appellant understood the proceedings and the language used in court."

29. From the overall record, there is every indication that the appellant understood the language, followed the proceedings and gave a defence to the evidence tendered. He even cross-examined all the prosecution witnesses. How and in which language did he cross examine the five prosecution witnesses if he did not understand the proceedings and the language in which they were conducted? He never complained before the trial court that he could not follow the proceedings. For that reason it is my opinion that the appeal fails on this ground.

30. It appears to me that this complaint is an afterthought, and I am unable to find that the appellant did not understand the language of the proceedings.

Proof of the case beyond reasonable doubt

31. The submissions of the appellant that properly fall for determination under this heading concern the following aspects: Shoddy investigations; Delay in medically examining the complainant; failure to examine the appellant; and reliance of the trial court on circumstantial evidence. I will deal with these together.

32. On shoddy investigations, the applicant submitted that the investigating officer work never visited scene of crime to draw a sketch plan of the house, or to interrogate neighbors and witnesses. That he did not even investigate whether the accused was the biological father or step father nor examine the sheets and cloths that the complainant wore. On delay, the appellant argued that there was unwarranted and unexplained delay in examination of the complainant in hospital. The incident allegedly occurred on 19th October 2015 but the hospital examination was done on 22nd October 2015. The appellant states that this contravenes the requirement that the police should order an examination of a subject within 72 hours after a report of a defilement case. He also says he was not examined, and submits that such examination would verify whether he was transgender or male and that the prosecution should not have assumed that he was male without proving the fact.

33. I have considered these allegations. They must be viewed against the totality of the evidence availed by both the prosecution and defence. It is trite that the burden of proving any offence lies squarely on the prosecution. No specific type investigations or particular number of witnesses or are specified in law as necessary. Each case must be viewed against the facts or evidence presented. .

34. On non-application of the principles of circumstantial evidence, the appellant stated that the principles were not properly applied. The charge against the appellant is a sexual offence. It is not unreasonable to surmise that most sexual acts are normally conducted in private. As such, in most cases there will be no few or no corroborating eye witnesses with regards to these offences. It is for this reason that in respect of sexual offences against children, **Section 124** of the **Evidence Act** makes special provision for a court to admit the sole evidence of a child victim of a sexual offence without corroboration if the court is satisfied that the child is telling the truth. Here, there is evidence of the child and four other witnesses. The evidence includes medical evidence.

35. The appellant argues that the trial court relied on circumstantial evidence, which, as I understand it, is indirect evidence that depends on making an inference to connect it to a conclusion of fact. In **R. v. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in the Court of Appeal for Eastern Africa stated on circumstantial evidence as follows:

> ***"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."***

36. In this case, the trial court had the direct evidence of the complainant, PW1. It was not contested that the appellant was well known to her. There was no complaint concerning identification which is thus not in dispute. It is also not in dispute that the appellant was the one staying with PW1 whilst her mother was in hospital. This fact was mentioned by both PW1 and the accused. PW1 gave a convincing and believable narration of the events as they happened and he evidence was supported by medical evidence which showed that her hymen had been broken and there was a fresh scar and inflamed vulva. All these were indicative signs of fresh and forceful penetration.

37. The trial magistrate found that the testimonies of PW2, 3 4 and 5 corroborated the evidence of the complainant. She found that both PW2 and PW3 checked the complainant soon after she reported the incident to PW2. The trial magistrate stated that the women who checked confirmed the defilement, although no details of the evidence they were checking was given.

38. There was no other evidence presented before the trial court, throughout, that could shift blame onto a different person nor did the medical evidence discount that there was sexual activity on PW1. The prosecution's case was strong. Whilst it is true that the investigation officer did not visit the scene and that the investigations could have been shoddy, nevertheless this is a clear-cut case in which the direct evidence led to conviction of the accused.

Disposition

39. Having considered all the appellant's grounds of appeal, and also having carefully reviewed all the evidence on record, I find that on the basis of the available evidence, the learned magistrate correctly convicted the appellant.

40. Accordingly, the appeal is dismissed.

41. Orders accordingly.

Dated and Delivered at Naivasha this 13th Day of May, 2019.

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Joseph Kamau Regina - Appellant - present in person

2. Mr. Koima for the State

3. Court Clerk - Quinter Ogutu