REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 97 OF 2017

PETER MUMBE KIOKO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

*(*Appeal arising from the original conviction and sentence in Machakos Chief Magistrate's Court (Hon. C. K Kisiangani, RM), in Criminal Case SOA No. 8 of 2016 and judgement delivered on 27.7.2017)

JUDGEMENT

1. This is an appeal from the judgment, conviction and sentence of Hon. C.K. Kisiangani, Resident Magistrate in Criminal Case S.O.A No. 8 of 2016 on 27.7.2017. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant "on the 20th day of March, 2016 in Kathiani Sub county within Machakos county intentionally caused his penis to penetrate the vagina of AKM, a child aged 13 years. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. When the matter came up for trial, the appellant pleaded not guilty thereby warranting a trial. The prosecution presented five witnesses in support of its case. Pw1 was NM who told the court that she sent the victim to a neighbor to get salt on 20.3.2016 and she did not return and at 3.00 am the following morning a search party that included Pw2 discovered that she was in the appellant's house deep asleep. The complainant and the appellant were escorted to Kathiani police station and later to Kathiani Hospital where the child was examined.

3. Pw2 was Johana Mwenga Kasoka who testified that he received a call that the victim had been found in the appellant's house and he went to the scene and confirmed that fact whereupon the victim stated that the appellant was her boyfriend. The appellant at the time claimed that he wanted to marry the victim. Later the victim was taken to the doctor and then to the police station.

4. Pw3 was AKM. A voir dire was conducted upon her and when the court was satisfied that she was competent to testify on oath, she was put on the witness stand. She testified that she was a class 7 pupil and that the appellant is her neighbour. It was her testimony that on 20.3.2016 she had been sent to buy vegetables and found the appellant who directed her to go to his house where he removed her clothes as well as his and then inserted his penis into her vagina. She later put on her clothes. She told the court that she felt pain and was bleeding. Her mother came and found her at the appellant's house whereupon they went to Machakos level 5 hospital where she was examined; she also went to Kathiani Police Station. She identified the P3 form that was given to her. The appellant refused to cross examine her and claimed that she was telling lies.

5. Pw4 was Agatha Dulu Kasina, a clinical officer at Kathiani Hospital who testified of an examination that was carried out on the appellant and the victim. No injuries were found on the appellant. She found that the appellant had syphilis for which he was treated and she presented the P3 form that was filled on 21.3.2016. On examination of the victim, it was found that she had a broken hymen and a whitish substance in her vagina; she had pus cells in the urine and trachonomona vaginalis which showed that she was ill. The victim was treated and the P3 form that was filled on 21.3.2016 was tendered in evidence. On cross examination, she testified that she examined the appellant and Pw3 separately.

6. Pw5 was No. 101506 Pc Margaret Wambui who was the investigating officer. She testified about a report that she received whilst at Kathiani Police Station on 21.3.2016 regarding defilement. She was told that the victim was found in the appellant's house and that the doctor confirmed that there was sexual activity and that the parents of the victim brought a birth notification that indicated that the appellant was born in 2003 which she tendered in court. She told the court that she issued a P3 form for the appellant and the victim. On cross examination, she testified that the appellant was brought to the police station by members of the public. The learned trial magistrate found that a prima facie case had been established and put the appellant on his defence.

7. The appellant opted to keep silent and did not call witnesses. The trial court found that the main count was established and after considering mitigations sentenced the appellant to 20 years imprisonment.

8. The appeal was canvassed vide written submissions. It is the appellant's case that the prosecution did not prove its case beyond reasonable doubt. It is also his case that the trial court went into error in failing to find that the charge sheet was defective for the time factor is not indicated in the charge sheet and the word unlawful is omitted. On the issue of violation of article 50(2)(c) of the Constitution, the appellant submitted that he was not supplied with a defence counsel and he requested for witness statements which were not supplied and therefore there was a breach his right to a fair trial. Further he submitted that the judgement did not indicate what offence and under which section the appellant was convicted of and in addition there were contradictions in the evidence of Pw1 and Pw3 and as such his appeal be allowed, the conviction quashed and the sentence set aside.

9. The state submitted that the age of the victim, penetration as per Section 2 of the Sexual Offences Act and identification of the appellant were established by evidence that the appellant had not controverted therefore it was proved that the victim was defiled and hence this ground of appeal has no merit. On the issue of the defective charge sheet, learned Counsel submitted that Section 134 of the Criminal Procedure Code spells out the contents of a good charge sheet. Similarly section 382 of the Criminal Procedure Code states that the test to be met is whether injustice has been occasioned. The offence the appellant was charged with are known in law and the appellant was aware of the charge facing him. Hence there was no prejudice occasioned to him by omission of time and the word unlawful from the charge sheet could be cured under Section 382 of the Criminal Procedure Code. On the issue of contradictions, in relying on the case of **Philip Nzaka Watu v R (2016) eKLR** counsel submitted that discrepancies on the exact time that the offence was committed is not material to the conviction. On the issue of failure to comply with Section 169(2) of the Criminal procedure code, it was submitted that the failure to specify the counts in the judgement are irrelevant because the appellant was facing only one count and one alternative charge, Hence there is no confusion in what he was convicted on. Learned counsel for the respondent invited the court to apply section 382 of the Criminal Procedure Code. The state submitted that the appellant has not raised sufficient reason to warrant interference with the decision of the trial court and therefore the appeal be dismissed and the court should uphold the conviction and sentence of the trial court.

10. This being a first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyse the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses.

11. The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal and the amended grounds may be collapsed into 3 grounds:

> **1. That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;**
>
> **2. That the trial magistrate erred in convicting the Appellant yet the charge sheet was defective;**
>
> **3. That the trial magistrate erred in failing to comply with Section 169(2) of the Criminal Procedure Code with regard to the contents of her judgement**

12. In cases of defilement the following are to be proven:

1. **The age of the child.**
2. **The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and**
3. **That the perpetrator is the Appellant.**

16. Having considered this appeal and the rival submissions, it is undisputed that the complainant was a person below 18 years as she was aged 13 years. It is also undisputed that there was penetration because the evidence on record points towards penetration and this was indicated on the P3 form and the account of the victim that was uncontroverted by the appellant who did not testify or give evidence to counter the evidence. There is no contention on the issue of identification of the appellant as the perpetrator as he and the victim were found inside his house. The complainant was found soundly asleep on the appellant's bed and that both of them were promptly arrested. The complainant stated that on 20.3.2016 she was sent to buy vegetables and found the appellant who told her to go to his house where he removed her clothes as well as his and inserted his penis into her vagina. Thereafter she put on her clothes. She told the court that she felt pain and was bleeding. Her mother came and found her at the appellant's house whereupon they went to Machakos level 5 hospital and examined; she also went to Kathiani Police Station. She identified the P3 form that was given to her. The appellant has not controverted this evidence and he was hence properly identified by Pw1 and Pw3 who found him at the scene as well as the account of Pw1.

14. The account of events as narrated by the complainant left no doubt that the appellant was involved in the crime. He was placed at the scene of crime while in company of the complainant on his bed inside his house. The evidence of the complainant was credible and was corroborated by the witnesses.

15. From the foregoing, I did not have the benefit of seeing the witnesses testify. However from the proceedings and the court record, the trial court was satisfied of the evidence against the appellant. The learned trial magistrate rightly relied on Section 124 of the Evidence Act and the case of **Mohamed v R (2006) 2 KLR 138** in believing the evidence of the complainant and I see no reason to disturb the finding. I have also considered the surrounding circumstances that earlier in the day the appellant was at the scene of crime, was seen there coupled by the fact that he is well known to the victim. The appellant was called out from his house and as he came out the girl was found asleep on the appellant's bed.

16. The appellant has raised the issue of a defective charge sheet. Section 134 of the Criminal Procedure Code provides as follows:-

> **"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."**

17. From the above section, I am satisfied that though the charge sheet was defective to the extent that one word was omitted, however I am unable to see the prejudice that he has suffered because of the same for he was aware of the charges he was facing. He fully participated in trial and thus I find that he did not suffer any prejudice. In any event such a minor discrepancy is curable under section 382 of the Criminal Procedure Code.

18. The appellant has raised the issue of contradictions. I shall analyze the same with regard to the elements of the offence to, *wit*; the age of the complainant, the fact of penetration and the identification of the appellant. From the evidence on record, there is only one birth notification that was produced in respect of the victim; and the appellant had not disputed the element of age so I find no contradiction. On the element of penetration, there is a P3 form that was filled on 21.3.2016 and the same was signed and stamped. The same presents evidence of penetration. Finally, the element of identity of the appellant is consistent. I am unable to see inconsistency in the prosecution evidence. Therefore this ground raised by the appellant fails.

19. The appellant has assailed the trial magistrate for failing to comply with the requirements of **section 169 of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** which provides as follows:

> 169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
>
> **(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced**.
>
> (3) In the case of an acquittal, the judgment shall state the offence which the accused person is acquitted, and shall direct that he be set at liberty.

20. In the above section, there is an imputation of a constitutional duty for the appellant has a right to know which offence he was convicted and in this regard the trial magistrate failed to comply with **section 169(2)** of the ***Criminal Procedure Code*** as she did not state or specify the counts on which the appellant was found guilty and convicted though he faced one principal count and an alternative charge. I am of the view that the appellant was not prejudiced. I am guided by the view expressed by the Court of Appeal in ***James Nyanamba v Republic*** **[1982 – 88] 1 KAR 1165 [1983]eKLR** as follows;

> Again the magistrate transgressed subsection (2) of section 169 of the Criminal Procedure Code which requires that in the case of a conviction, the judgment must specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted. Since in his opening statement of the judgment, the magistrate did not state which accused was charged alone in which count of the counts 3 and 4 it cannot be said that the omission to comply with section 169(2) (ibid) did not occasion the appellant injustice. In the circumstances of this case that omission is not cured by section 382 of the Criminal Procedure Code.

21. From the evidence on record, I am satisfied that the same is sufficient to sustain a conviction against the appellant who due to the evidence on record has been placed at the scene of the crime on the material date. That evidence was credible and unshaken at all by the appellant. The conviction of the appellant by the trial court was safe and I see no reason to disturb the same.

22. Section 8 (3)of the Sexual Offences provides that :

> **"(2) A person who commits an offence of defilement with a child aged between 12 and 15 years shall be liable on conviction to a term of imprisonment of not less than 20 years."**

23. From the evidence on record, and the analysis of the appellant, the victim was 13 years at the time of commission of the offence and therefore the mandatory sentence was within the law.

24. In the result, I find that the prosecution did prove its case beyond all reasonable doubt. The appeal has no merit and is dismissed. The appellant's conviction and sentence is upheld.

It is so ordered.

Dated and delivered at Machakos this 15th day of October, 2019.

D.K. Kemei

Judge