REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 245A OF 2017

REPUBLIC.....APPELLANT

-VERSUS-

PAUL MUTUNGA DAVID.....RESPONDENT

(An Appeal from the judgment of Hon. Patrick Wambugu on 5th May 2015 in Kilungu SRM Criminal Case No. 22 of 2016)

JUDGMENT

1. This appeal arises out of an order acquitting the Respondent under section 210 Criminal Procedure Code for an offence of attempted incest. The order was made on 5th May, 2015.

2. The Appellant (the State) listed the following as grounds of appeal;

*i. **That,** the learned trial Magistrate erred in law in acquitting the Respondent under section 210 of the Criminal Procedure Code against the overwhelming evidence as was put across by the prosecution.*

*ii. **That,** the learned trial Magistrate erred in law and fact in making a finding that the charge sheet was fatally defective.*

*iii. **That,** the learned Magistrate erred in law and fact by failing to invoke the provisions of section 382 of the Criminal Procedure Code.*

3. The parties agreed to canvass the appeal by way of written submissions.

4. The Appellant though learned counsel Mrs. Owenga submits that the evidence adduced was overwhelming enough to warrant a conviction of the offence charged. Counsel set out the evidence adduced by R.M.M (Pw1) her brother (Pw3) who was an eye witness, her mother (Pw2), the arresting officer (Pw4) and the medical expert (Pw5).

5. It was counsel's contention that the evidence adduced satisfied all the key elements required for the offence of attempted incest as it sufficiently demonstrated that the Respondent is related to (Pw1) as father and daughter penetration took place and Pw1 was a minor at the time of the offence.

6. In respect to the defect in the law, she submitted that whereas the Respondent was charged under the wrong provision of the law, the same was not fatal to the case as the defect was curable in law by the invocation of section 382 of the Criminal Procedure Code.

7. In advancing this argument, the Appellant relied on the cases of:

i. R –vs- Mohammed Abdi Bille, High court of Kenya at Garissa Criminal Appeal No. 42 of 2013.

ii. Fappyton Mutuku Ngui –vs- R. Court of Appeal at Nairobi Criminal Appeal No. 32 of 2013.

Counsel submitted that in both cases the courts found that a defect such as the one in the instant case was curable under section 382 of the Criminal Procedure Code.

8. Mr. J.N Kimeu for the Respondent opposed the appeal. He submitted that the charge having been brought under a non- existent provision of the law rendered the charge sheet fatally defective. It was his submission that the evidence tendered by Pw1 – Pw3 was contradictory in material aspects. He points out that the evidence of Pw4 and Pw5 was wanting. That Pw5 produced a P3 form filled by someone else.

9. He pointed out shortfalls in the evidence adduced and what was in the charge sheet. It is his contention that the learned trial Magistrate evaluated the evidence tendered well, and arrived at a right and just decision. He referred to the case of **Timothy Katana Kazungu –vs- R Machakos HCCRA 44 OF 2011**.

10. On the application of section 382 Criminal Procedure Code, counsel submitted that the learned trial Magistrate rightly and properly addressed his mind on the same. He argued that any retrial would be prejudicial to the Respondent who is entitled to a fair trial under Article 50 of the Constitution of Kenya.

Analysis and determination

11. I have considered the grounds of appeal, the evidence on record, submissions by both parties and the cited authorities. I have equally carefully read the ruling by the learned trial Magistrate delivered on 5th May, 2015. The issue I find falling for determination is whether the defect in the charge sheet was curable under section 382 of the Criminal Procedure Code.

12. The Respondent was charged with the **offence of attempted incest contrary to section 20(1) (2) of the Sexual Offences Act No. 3 of 2006.**

The particulars were that the Respondent on diverse dates between 19th and 20th May, 2012 at Muusiini village, Watema location in Makueni county attempted to cause his penis to penetrate the vagina of **R.M.M** aged six years knowing that she is his daughter.

13. It is true that there is no section 20(1)(2) in the Sexual Offences Act. From the evidence on record the charge ought to have been framed thus:

> **"attempted defilement under section 20(1) as read with section 20(2) of the Sexual Offences Act".**

Having acknowledged that there was a defect the next issue would be to determine whether the defect was fatal or not to the charge.

14. The Respondent relied on the case of **Timothy Katana Kazungu (supra)** where the Appellant had been charged under the penal section instead of the section creating the offence. The appeal was conceded to by the State and Justice Makhandia (as he then was) allowed the appeal and the Appellant was released. This was on 29th February, 2012.

15. On the other hand, in the case of **Mbithi Kiio Mutinda (supra)** the Appellant had been charged under section 8(2) Sexual Offences Act without the penalty section. Justice Makhandia (as he then was) allowed the appeal but with an order for retrial. This was on 15 th June 2012. It is clear that the two cases present two different scenarios.

16. In the instant case, the offence of attempted incest is anchored on section 20(1) Sexual Offences Act. The defect in the instant case was the additional (2) making it section 20(1) (2) which does not form part of section 20 (1) Sexual Offences Act and so is non-existent. Section 382 Criminal Procedure Code provides that:

> ***"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."***

17. In a later decision, Justice Mutuku in the case of **R –vs- Mohammed Abdi Bille (supra)** was of the view that despite the defect, the Appellant had gone through a fair trial. She stated thus:

> ***"I note that the Respondent was represented by an advocate and he participated in the trial in a manner suggesting that he understood the charge he was facing. There is no miscarriage of justice or prejudice on his part due to the manner the charge is drafted. I am therefore satisfied that the Respondent was accorded his rights to afair trial. Besides, the Respondent did not, through his advocate, raise any objections before the trial court in regard to the manner the charge was drafted."***

Further she states:

> ***"Had the trial Magistrate invoked the provisions of this section, he would have noted that the defects in the manner the charge was drawn were curable under it. I think I have said enough to demonstrate that the defects in the charge are curable under the above section."***

18. In the case of **Fappyton Mutuku Ngui (supra)** the Court of Appeal addressed a similar issue by stating thus:

> *"We now turn to the issue of the defective charge sheet. The Appellant argues that he was charged contrary to 'section 8(1)(2)' of the Sexual Offences Act when in fact there is no such section. We note that the Appellant did not raise this issue in his first appeal. Despite this, the High court addressed it in its judgment in light of any prejudice or miscarriage of justice that the Appellant may*

have faced as a result. The High court relied on section 382 of the Criminal Procedure Code which provides that:

*"**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."***

The first appellate court was of the opinion that this defect was curable under section 382 cited above; the Appellant had participated fully in his trial because he knew the charge that was facing him, and the trial process was fair. There was no prejudice that faced the Appellant. We concur with the High court and learned counsel for the Respondent that the Appellant was well aware of the charges he was facing, he had sufficient notice of the charges facing him and that he participated vigorously in the trial process. Furthermore, the charge sheet outlines the essential ingredients and particulars of the offence. We therefore find no merit in this ground of appeal and dismiss it."

19. As can be seen from the proceedings before the trial court, the Respondent was well aware of the charge facing him as being that of attempted incest. He was represented by Mr. Kimeu advocate. He was therefore well represented and fully participated in the trial. My finding is that the defect was not fatal as the learned trial Magistrate could have arrested it by invoking section 382 of the Criminal Procedure Code.

20. The next issue would then be what happens next. As I mentioned earlier, I have read the ruling by the learned trial Magistrate. Besides setting out the evidence by the witnesses, he did not evaluate it. He did not therefore acquit the Respondent on the basis of weak evidence. He only addressed the issue of the defect in the charge sheet and made his finding. I will therefore be hesitant in evaluating the evidence at this point.

21. I have taken note of the fact that the complainant is the Respondent's daughter. She was aged six years in 2012. She must be around 13 years now and may have undergone counselling and moved on. Returning her to the court for her to testify afresh would traumatize her for no good reason. It is clear that the trial Magistrate did not arrive at his decision upon evaluation of the evidence on record. He only dealt with the issue of the defective charge sheet, which I too have addressed and made a finding.

22. The upshot is that the appeal has merit and I allow it and make the following orders:

- **The order acquitting the Respondent under section 210 Criminal Procedure Code is hereby set aside.**
- **The prosecution case to be reopened to allow for amendment of the charge sheet only.**
- **The matter to thereafter proceed to writing of the ruling since the prosecution case had been closed.**
- **The matter to proceed before any other Magistrate besides Hon. Patrick Wambugu.**
- **Mention before Hon. Mayamba P.M Kilungu on 09/01/2020. The Respondent must be present.**
- **Lower court file to be returned to Kilungu court.**

Orders accordingly.

Delivered, signed & dated this 10th day of December 2019 in open court at Makueni.

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H. I. Ong'udi

Judge