REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO 90 OF 2016

J S K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of Hon N. S. Lutta SPM

delivered on 2nd August 2016 in Criminal Case No. 506 of 2015

in the Senior Principal Magistrate's Court at Mombasa)

JUDGMENT

The Appeal

1. The Appellant was convicted and sentenced to serve fifteen (15) years imprisonment for the offence of defilement , contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act. The particulars of the offence were that on 11th July 2015 at [particulars withheld] Village, Ribe Location in Rabai Sub-County of Kilifi county within Coast Region, he unlawfully and intentionally committed an act which caused penetration of a male genital organ namely penis into a female genital organ namely vagina of F U S, a child aged 16 years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, based on the same particulars.

3. The Appellant pleaded not guilty to the charge in the trial court on 28th September 2015. He was tried, convicted of the offence of defilement, and sentenced to serve 15 years in prison for the offence, in a judgment delivered by the trial magistrate on 2nd August 2016.

4. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in his Petition of Appeal filed in Court on 10th August 2016 and Amended Grounds of Appeal that he filed are as follows:

a) That, the learned trial magistrate erred in law and fact by finding for his conviction and sentence without considering the fact that the charge as preferred against him by the prosecution was fatal and incurable defective.

b) That, the learned trial magistrate erred in law and fact by finding for his conviction and sentence without considering that section 8(7) of the Sexual offences Act No.3 of 2006 was not put into consideration hence the sentence of 15 years imposed upon him was unsafe.

c) That, the learned trial magistrate erred in law and fact by finding for his conviction and sentence without considering that the Prosecution's case was not proved beyond any reasonable doubt for section 36(1) of Sexual Offences Act was not put into considerations.

d) That, the learned trial magistrate erred in law and fact by finding for his conviction and sentence without considering that section 189 of the Children's Act was not considered hence the conviction and sentence imposed upon him was unsafe.

e) That, the learned trial magistrate erred in law and fact by finding for his conviction and sentence without considering that the

prosecution case was due to fabrications.

f) That, the learned trial magistrate erred in law and fact by finding for his conviction and sentence without considering his reasonable defense statement.

5. The appeal proceeded for hearing on 20th July, 2017, and the Appellant submitted that he would wholly rely on written submissions dated 20th July, 2017 that he had availed to the Court. The Prosecution counsel made oral submissions.

6. With regard to his first ground of appeal, the Appellant alleged that the provisions of section 8(1) as read together with section 8(4) of the Sexual Offences Act No 3.0f 2006 referred to the act of defilement being committed by a single person, yet the complainant testified to having been defiled by two people in turns; hence this would amount to gang raping.

7. Therefore, that he ought to have been charged under section 10 of the Sexual Offences Act which provides for the offence of gang rape. He also relied on the decision in **Nyongo. vs. Republic C.A No.1 of 1993** and section 214(1) of the Criminal Procedure Code for the position that a charge should accord with the evidence, otherwise it is defective. The Appellant therefore submitted that his conviction and sentence having been made as a result of the defective charge sheet cannot stand .

8. On the second ground of appeal, the Appellant indicated that his conviction ought to have considered under the Borstal Institutions Act and the Children's Act. He indicated that he was only 17 years at the time of arrest and therefore a minor. He intimated that the trial court judgment is vitiated by section 189 of the Children's Act (Cap 75) which provided that;

"The words "conviction'' and "sentence'' shall not be used in relation to Children"

9. The Appellant in his submissions combined grounds (c), (d), (e) and (f) of his appeal on burden of proof. He alleged that the prosecution had not proven the case beyond reasonable doubt. He stated that for the offence of defilement to be proved, the age of the complainant and penetration must be proved, and he indicated that penetration had not been proved since the complainant in her evidence had only indicated that she was defiled.

10. Lastly, the Appellant submitted that the fact that the complainant was pregnant is not enough proof that it is he who was responsible, as no DNA test had been conducted by the prosecution to that effect. He relied on **Section 36 (1)** of the Sexual Offences Act which states that:

> **" Where a person is charged with an offence under the Act, court may direct that appropriate samples be taken from the accused person and such court may direct for purposes of forensic and other scientific testing including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence''**

11. Mr. Fundi, the learned prosecution counsel, submitted that the ingredients of defilement as to age, penetration and identification were all proved. In this regard, he submitted that PW1 who was the minor had indicated that she was 16 years when the offence was committed, which was corroborated by the complainant's mother, and an age assessment report produced as exhibit 1 in court also proved that she was 16 years.

12. On the issue of penetration, Mr. Fundi submitted that PW1 had stated that she had been defiled by the Appellant for almost half an hour. Further, that she did not tell anyone until she missed her periods, and her mother took her to hospital where it was confirmed she was two and a half months expectant. Lastly, that PW4, a clinical officer, conducted an examination on the complainant and produced a P3 form and treatment records indicating that the complainant's hymen had been ruptured, and she was 8 weeks pregnant.

13. Mr. Fundi in conclusion noted that the Appellant in his defense had not given any explanation as to the incident and he had not explained what had happened, neither had he given an alibi evidence to show he was not at the scene of crime.

14. My duty as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

The Evidence

15. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called four witnesses. F S U was PW1 and the complainant, and she testified that on 11/7/2015 she was fetching water from the river when she was accosted by two people who pushed her into a thicket, removed her clothes and defiled her in turns.

16. PW2 was G W M, the complainant's mother, who testified that upon noticing that her daughter had missed her periods, she took her to hospital and found that she was pregnant. Upon inquiry, the complainant indicated that the Appellant and his co-accused in the trial had defiled her.

17. Sergeant Patrick Mutinda who was PW3 narrated to court how he received the report from PW2, conducted investigations and later charged the Appellant with the offence of defilement.

18. The last witness (PW4) was Barrington Edward Charo, a clinical officer based at Mariakani District Hospital, who testified that he examined the complainant on 17th September 2015, and he found that her hymen was broken and she was 8 weeks pregnant. Further, that an age assessment was done and the complainant was found to be 16 years old. He produced the P3 form and age assessment report as exhibits

in Court.

19. The trial court found that the Appellant had a case to answer and complied with section 211 of the Criminal Procedure Code in this respect. The Appellant gave unsworn testimony without calling any witnesses. He denied committing the offence.

The Determination

20. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I find that there are two issues for determination raised in this appeal. These are whether the Appellant was convicted of the offence of defilement on the basis of a defective charge, and if not, whether his conviction for the offence of defilement was on the basis of sufficient and satisfactory evidence.

21. On the first issue, the Appellant alleges that the charge sheet was defective as the evidence showed that two people defiled the complainant, and that he therefore ought to have been charged with gang rape instead of defilement.

22. The issue of when a charge is defective is to be examined in light of the requirements of the law as regards the framing of charges, as stated in section 134 of the Criminal Procedure Code which 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."

23. In addition it was held in **Sigilani vs Republic, (2004) 2 KLR, 480** that:

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."***

24. The charge sheet in the trial Court in this regard stated the correct sections creating the offence of defilement and its penalty which were sections 8(1) and (4) of the Sexual Offences Act, and the particulars of the offence, which included the date of the offence, the place of the offence, the act constituting the offence and the name and age of the victim. In addition, the charge sheet only applied to the Appellant alone, and there were no particulars that he committed the offence with any other person for the charge of gang rape to be applicable.

25. The Court of Appeal in this respect held in **Murunga vs Republic (2008) KLR 333,** that this is the correct approach and charge to be made when a person is raped or defiled by more than one person, as each person commits the act of rape or defilement individually and is then followed by another person. I therefore find that there was no defect in the charges brought against the Appellant for these reasons.

26. On the second issue as to whether the prosecution proved that the Appellant committed the offence of defilement beyond reasonable doubt, the said offence is defined in section 8(1) of the Sexual Offences Act as follows:

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

Section 2 of the Sexual Offences Act provides that penetration entails the partial or complete insertion of the genital organs of a person into the genital organs of another person. The ingredients of defilement were further highlighted in in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

> **"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

27. The relevant evidence adduced in the trial Court as to defilement was that of the complainant, who was PW1, and whose testimony was as follows:

> **"I do recall on 11th July 2015 at around 2.00pm I was fetching water in the river when two people held me and pushed me into a thicket. They removed my clothes and defiled me. It is Hassan Kombo Shaban who started followed by J S K. They are in Court. 1st and 2nd accused identified by the witness. We stayed there for about ½ hour and I was released to go home. I did not tell my mother on the same day. Afterwards I failed to get my monthly period and my mother took me to hospital. It was found that I was 2 ½ months pregnant. The matter was then reported to the police. I have known the Accused persons, we hail from the same village"**

28. It is my view that the evidence by PW1 was insufficient to sustain a conviction of the Appellant. In particular no evidence was given as to any penetration by the Appellant of his genital organ in any part of the complainant's body, which is key to a determination as to whether defilement occurred or not. I also find that PW1's decision not to report the defilement until after it was found by her mother that she was pregnant affected her credibility as a witness, and her evidence as to the defilement therefore required to be corroborated under section 124 of the Evidence Act.

29. Section 124 of the Evidence Act in this regard provides as follows:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

30. In this respect the evidence by PW4 that PW1's hymen was broken and that she was two months pregnant at the time of her medical examination was corroboration of penetration, however it did not identify the person responsible for the pregnancy and was therefore not corroboration as to penetration by the Appellant, particularly as PW2 testified that she was defiled by another person during the ordeal. None of the other four prosecution witnesses put the Appellant at the alleged scene of the offence, and there was therefore no corroboration of the identity of the person who committed the defilement.

31. I therefore find that there were gaps in the evidence adduced by the prosecution and it was not sufficient to establish the offence of defilement as against the Appellant beyond reasonable doubt.

32.. I accordingly quash the conviction of the Appellant for the offence of defilement, contrary to section 8 (1) as read together with section 8 (4) of the Sexual Offences Act. I also set aside the sentence of fifteen years imprisonment imposed upon the Appellant for this conviction, and order that he is set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND SIGNED THIS 16TH DAY OF APRIL 2018

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS 5TH DAY OF JUNE 2018

D. O. CHEPKWONY

JUDGE