



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 6 OF 2017

ROBERT MWANGI MUNYIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of Hon V.J. Yator RM, delivered on 22nd September 2014 in Criminal Case No. 2124 of 2013 in the Chief Magistrate's Court at Mombasa)

JUDGMENT

The Appeal

1. The Appellant was charged in the trial Court with the offence of defilement, contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars of the offence were that on 6th September 2013 at [Particulars Withheld] village in Changamwe District within Mombasa County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of J A, a girl aged 10 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.
3. The Appellant pleaded not guilty to the charge in the trial court on 9th September 2016, and he was tried, convicted of the offence of defilement under section 8(1) as read together with section 8(3) of the Sexual Offences Act, and sentenced to 20 years imprisonment in a judgment delivered by the trial magistrate on 22nd September 2014 .
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 and in the Amended Grounds of Appeal dated 31st July 2018 that he availed to the Court are as follows:
 - a) That the learned trial magistrate erred in law and fact by finding for his conviction in reliance on a fatally defective charge sheet.
 - b) That the learned trial magistrate erred in law and fact by convicting him without properly finding that his arresters were not called to testify in the trial to clear doubt on his arrest.
 - c) That the learned trial magistrate erred in law and fact by failing to consider the discrepancies and uncorroborated testimony of the complainant.
 - d) That the learned trial magistrate erred in law and fact by failing to consider the Appellant's defence, which was reasonable enough to cast doubt on the prosecution's case.
5. The appeal proceeded for hearing on 27th August 2018, and the Appellant submitted that he would rely on his written submissions dated 31st July 2018 that he availed to the Court. Ms Mutua, the learned Prosecution counsel, made oral submissions at the hearing on behalf of the Respondent.
6. The Appellant in his submissions stated that he was charged under section 8 (1) as read with section 8(2) of the Sexual Offences Act, which provides for the penalty for an act of defilement with a child under the age of 12 years, however that the age assessment showed that the complainant was 15 ½ years old when the incident took place, and that he therefore ought to have been charged under section 8(1) as read with section 8(3) of the Sexual Offences Act.
7. Further, that the complainant testified of many defilement incidents yet that the date of the first incident was not clear, and the

complainant never complained to anyone neither did she testify of being threatened not to tell. The Appellant contended that the complainant only reported the defilement with her mother after the second incident. In addition, that the CID officers who were alleged to have arrested the Appellant did not testify, and weakened the thread of the Prosecution's case. Reliance was placed on the decision in Bukenya & Others vs Uganda (1972) EA 549 in this respect.

8. The Appellant further submitted that the medical evidence adduced in the trial Court had discrepancies, and particularly that it was stated that the complainant was able to go for a medical examination on 8th September 2013, yet her mother in her testimony alleged that the complainant had difficulty walking. Further, that the P3 form produced as an exhibit showed that the complainant's injuries were weeks old, and that she had no other injuries on her body.

9. Ms. Mutua on her part submitted that the defect in the charge sheet was curable under section 382 of the Criminal Procedure Code, and that the Appellant did not object to the charge participated fully in the trial including cross-examining witnesses. On the Appellant's arresters not having been called as witnesses, the counsel submitted that all the ingredients of the charge of defilement that the Appellant faced were proved by the witnesses that were called to testify, and that the issue of his arrest was not required to be proved. Further, that section 143 of the Evidence Act does not require any specific number of witnesses to be called, and what matters is the cogency of the evidence that is adduced.

10. It was further submitted that the evidence of PW1, who was the victim, was corroborated by that of PW2 who was a medical doctor, and who confirmed the injuries suffered by the complainant. Further, that all the ingredients of defilement were proved beyond reasonable doubt. Lastly, on the Appellant's defence not having been considered, the prosecution submitted that the Appellant did not give any account of the events of the material date, and only gave evidence on the day of his arrest. In addition that he only alleged that the doctor did not find any sperms on the victim, which did not cast any doubt on the prosecution's case.

11. Having heard the arguments made by the Appellant and Respondent, 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.

12. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called four witnesses. PW1 was J A O, who was the complainant, and who testified after a *voire dire* examination. The complainant's mother, M O O, testified as PW3. Both PW1 and PW3 testified as to the events of 6th September 2013, when the alleged offence was committed, and the subsequent actions that were taken.

13. Dr. Lawrence Njue, a doctor based at Coast General Provincial Hospital testified as PW2, and he stated that he examined the complainant and produced a P3 form dated 16th September 2016 as the Prosecutions' Exhibit 1 and a PRC form as the Prosecutions Exhibit 3. The last prosecution witness (PW4) was PC Anne Chemutai, who was at the material time based at Changamwe Police Station, and who testified as to the report she received of the defilement of the complainant on 8th September 2013.

14. 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. In his defence, the Appellant gave sworn testimony and stated that he was beaten until he lost consciousness, and was then taken to Changamwe Police Station and charged with an offence he did not know. Further, that the doctor confirmed that he did not get any sperms on the complainant.

The Determination

15. 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, which are whether the Appellant was convicted for the offence of defilement on the basis of a defective charge, and if not, whether he was convicted on the basis of sufficient and satisfactory evidence.

16. On the first issue, 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."

17. 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."

18. The charge sheet in the trial Court in this regard stated the sections creating the offence of defilement and penalty which were sections 8(1) and (2) of the Sexual Offences Act, and 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. The charge sheet in this respect indicated that the victim was 10 years old, however upon the Prosecution's evidence being adduced, and in particular from the testimony of PW1 and PW2, and an age assessment report produced as an exhibit, it was established that the victim who was PW1, was 15½ years old.

19. One of the ways a charge may be defective is when it is not supported by the evidence that is adduced in support thereof, and to this

extent there was thus an error in the charge sheet pursuant to which the Appellant was charged. The Court of Appeal in Yongo vs Republic [1983] KLR, 319 stated as follows in this regard:

“In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:

(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

(b) it does not, for such reasons, accord with the evidence given at the trial; or

(c) it gives a misdescription of the alleged offence in its particulars.”

20. Section 214 of the Criminal Procedure provides for the amendment of a charge sheet in such circumstances as follows:

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case”.

21. The trial Magistrate however did not amend or alter the charge sheet before the close of the prosecution case, and instead invoked the provisions of section 179 of the Criminal Procedure Code at the time of writing of judgment to convict the Appellant under section 8(1) as read together with section 8(3) of the Sexual Offences Act.

22. Section 179 of the Criminal Procedure Code in this respect provides as follows:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

23. It was explained by Asike-Makhandia J. (as he then was) in Kyalo Mwendwa v Republic [2012] eKLR that the *jurisdiction of the Court is to impose a substituted conviction for a minor cognate offence only*. In the same vein, the Court of Appeal stated as follows in Robert Mutungi Muumbi v. Republic, Cr App. No. 5 of 2013:

“An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted.

24. The Court of Appeal sitting in Nyeri also observed as follows in James Maina Njogu v. Republic, Cr App No. 38 of 2004 regarding section 179 of the Criminal Procedure Code:

“It is clear from this section that the power of the court to convict an accused person of an offence lesser than the offence with which the person is charged is only available when the “remaining particulars are not proved”, the “remaining particulars” being the particulars necessary to prove the major offence and which particulars are not required to be proved in respect of the minor offence.”

25. The offence of committing a defilement contrary to section 8(1) as read together with section 8(3) of the Sexual Offences Act cannot be argued to be a lesser cognate offence merely because it imposes a lesser sentence, as it is basically the same offence as that provided for under section 8(1) as read together with section 8(2) with the particulars necessary to prove the two offences being the same, and there was thus an error made by the trial magistrate to this extent that he relied on section 179 to substitute the charge against the Appellant.

26. However, the error on the charge sheet can still be cured on appeal pursuant to section 382 of the Criminal Procedure Code, where it is shown that no prejudice has been occasioned to the accused person. In the present appeal no such prejudice was demonstrated as the Appellant was fully involved in the trial and informed of the age of the complainant, and cross-examined all the witnesses. In addition, the mistake in the sections of law cited in the charge sheet was as regards the penalty section, which is applicable once defilement is proved to have been committed, and can therefore be corrected without any prejudice being caused.

27. On the second issue as to whether the ingredients of the offence were sufficiently proved, section 8 of the Sexual Offences Act provides as follows as regards the offence of defilement:

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to

imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

The ingredients of defilement were in addition highlighted 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.”

28. In the present appeal, an age assessment report was produced as the Prosecution’s Exhibit 2, which showed that the complainant was 15½ years old, the Appellant was identified by PW1 and PW3 who knew him from before as their neighbor, and they testified that saw and identified him on the day of the alleged offence. Further, PW3 stated that the Appellant was arrested on the 8th September 2013 after she saw him and informed CID officers who lived nearby.

29. On the ingredient of penetration, PW1 testified that the Appellant called her to his house and she went there at to cook for him ugali and eggs on the material day. That after eating, the Appellant then removed her clothes and raped her, and that they had had intercourse for a long time. PW2 testified that after examination of PW1 on 8th September 2013, it was found that her hymen had been perforated and that she had lacerations at her vaginal opening.

30. I therefore find that PW1’S evidence was specific enough as to penetration, and the same was corroborated by the medical evidence of PW2 . The evidence of the arrest of the Appellant was also not material to the offence he was facing, and failure to call the persons who arrested him was not fatal to the Prosecution’s case.

31. I accordingly uphold the conviction of the Appellant by the trial Court for the for the offence of defilement, contrary to section 8 (1) and (3) of the Sexual Offences Act for the foregoing reasons. I also affirm the sentence imposed upon him of 20 years imprisonment for this conviction.

32. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 5th DAY OF SEPTEMBER 2018.

P. NYAMWEYA

JUDGE