REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 102 OF 2017

BETWEEN

SOSPETER MWAMACHI MWANJAHI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.D. Mochache, SPM

dated 4th July 2017 at the Senior Principal Magistrate's Court

at Shanzu in Criminal Case No. 1234 of 2015)

JUDGMENT

1. The appellant, **SOSPETER MWAMACHI MWANJAHI,** was charged and convicted of the offence of defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars were that on diverse dates in the month of August 2015 at [particulars withheld] area in Kisauni Sub-county within Mombasa County, the appellant caused his penis to penetrate the vagina of MW, a child aged 9 years. He was sentenced to life imprisonment and now appeals against the conviction and sentence.

2. Before I consider the substantive case against the appellant, I am aware that it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**).

3. The evidence before the trial court was as follows. The complainant (PW 1), testified that she was 10 years old. She recalled that in August 2015 while she was playing at the door of the gate, the appellant told her to stop playing with the gate otherwise he would do bad things to her. On another day, she met the appellant and he told her he would assist her with tuition. He took her to his house, undressed her, lay her on his bed and proceeded to sexually assault her. She described the appellant did to her as, *"tabia mbaya."* She explained what happened as follows:

> *Alinishika kwa nguvu. Alitoa dud yate akaweka hapa katikati yangi. Nilisikia uchungu sikuweza kususu na kupupu. ….. I used to feel pain when passing urine. I did not scream because I was scared of his father who is Mzee wa Mtaa. He gave me 5/- and told me not to tell anyone. I used the 5/- but I don't remember what I bought.*

4. PW 1 further testified that she recalled that the appellant defiled her on three other occasions. It is only on one night when her mother noticed that she was not walking properly and after she suffered a bout of diarrhea, that PW 1 told her that the appellant had sexually assaulted her three times. Thereafter she was taken to hospital where she was examined and treated.

5. The complainant's mother, PW 2, told the court that PW 1 had come to live with her during August 2015. She recalled that in October 2015, PW 1 had come back to Mombasa because the schools were on strike. On 22nd October 2015, she noticed that the kikoy PW 1 was wearing was wet. Although she beat her, PW 1 did not say anything to her. Later that night, she found PW 1 had diarrhea on herself and when she asked what was the problem, PW 1 told her that the appellant had defiled her and that he had threatened to kill her if she told anyone. She reported the matter to the police station and was referred to the hospital where the child was examined and treated.

6. PW 3, a doctor, gave evidence on behalf of the doctor who examined and treated PW 1. She testified that PW 1 went to the hospital on 30th October 2015 under police escort having reported the incident on 22nd October 2015. The physical examination revealed that the genitalia had a healing abrasion on the outer part of the genitalia. The hymen, which was not completely broken, was partly open with an old scar. He approximated the injuries to be about 9 days. The laboratory analysis showed that the child had a urinary tract infection. She produced the P3 medical report. PW 3 also produced the Post Rape Care (PRC) form which was filled on 22nd October 2015. According to the form, the incident took place on 21st October 2015 at about 5.30pm. Examination revealed that the hymen was partly broken with an old scar and there was a healing abrasion on the openings of the genitalia. She also testified that PW 1 age was assessed to be 9 years.

7. The investigating officer, PW 4, recalled that she received the PRC forms and started investigations. She interviewed PW 1 alone who told her that the appellant is the one who sexually assaulted her. She also identified him as the son of a village elder. She recorded the statements and caused the appellant to be charged.

8. In his sworn testimony, the appellant denied the offence. He admitted that PW 2's landlord was his uncle and that he lived a kilometer away. He told the court that he was arrested and taken to Nyali police station where he remained for a week before his parents were informed of the charges. When he was charged, he testified that his father was asked to pay Kshs. 300,000/- for the charges to be dropped but his father did not have the money so the case proceeded.

9. The appellant's father, DW 2, testified that he was a village elder in the locality where PW 2 was staying. He knew PW 2 and the child. DW 2 testified that PW 1 was naughty and used to play with boys. He even stopped her from playing with boys but he never told her mother. He recalled that at one time his grandchild disagreed with PW 2's children and PW 2 told him that someone should stop joking with her children or else they would end up in prison. He told the court that the appellant was arrested by policemen who were with PW 1 who pointed him out. He later learnt that the appellant had been arrested for defilement. He further testified that he was asked to pay Kshs. 300,000/- before the appellant could be released but he did not give the money.

10. In the petition of appeal dated 10th July 2017, the appellant challenged the conviction and sentence on several grounds. He contended that the charge was defective and at variance with the evidence led by the prosecution. That the prosecution failed to prove the case beyond reasonable doubt and in particular, the testimony of the witnesses was conflicting and contradictory and that the conviction was against the weight of evidence. He also complained that the trial magistrate did not consider his defence and that he was framed as a result of a grudge between himself and PW 2.

11. The respondent supported the conviction and sentence on the basis that the prosecution proved all the elements of the offence. Counsel for the respondent urged the court to dismiss the appeal.

12. The main issue for determination in this appeal is whether the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant. In order to prove its case under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must show that the appellant did an act that amounted to penetration of a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

13. As regards the issue of penetration, the child clearly testified how the appellant sexually assaulted her in graphic terms as I have set out elsewhere in this judgment. She was firm in cross-examination, that the appellant had in fact sexually assaulted her three times. The appellant was a person known to her, a fact admitted by the appellant himself and DW 2.

14. PW 1 gave sworn testimony which was sufficient to support a conviction under the provision to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. The Court of Appeal in ***Geoffrey Kioji v Republic*** **NYR CA Criminal Appeal No. 270 of 2010 (UR)** summarized the import of this provision as follows:

> *[T]he court can convict if it satisfied that there is evidence beyond reasonable doubt, that the defilement was perpetrated and orchestrated by the accused person, indeed under the proviso to section 124 of the Evidence Act (Cap 80), a court can convict an accused person in a prosecution involving a sexual offence, in the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.*

15. The trial magistrate held that having conducted a voire dire, PW 1 was intelligent and her evidence was consistent, as such I am also satisfied that the testimony of PW 1 was sufficient to support a conviction. However, there is additional corroborative evidence. First, PW 2 saw PW 1 in a state of distress before she told her what the appellant had done to her. Secondly, the medical examination revealed injuries to PW 1's private parts that were consistent with penetration.

16. The issue raised by the appellant in this respect is the variance between the evidence and the charge. Counsel for the appellant pointed out that according to the charge sheet, the appellant was charged with defiling PW 1, *"on diverse dates in August 2015"* yet the evidence and in particular the medical evidence was in respect of the incident that took place in October 2015. Counsel for the appellant submitted that the proper course for the court was to amend the charge to reflect the evidence before proceeding to convict the appellant. The respondent submitted that the charge sheet was not defective and if there was an error it was curable under **section 382** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***.

17. The purpose of a charge sheet is to accord every accused the right to know the offence he is facing which should be disclosed in clear terms that he or she can understand to enable him prepare his defence (see ***Sigilani v Republic*** **[2004] 2 KLR 480**). **Section 134** of the ***Criminal Procedure Code*** which provides that:

> *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.*

18. In this case the charge sheet referred to acts of defilement that took place on diverse dates in August 2015 but the evidence led showed the PW 1 was not only defiled in August 2015 but also in October 2015. Was the failure to include the later incident in the charge fatal to the prosecution case as urged by the appellant? Section 214 of the Criminal Procedure Code contemplates that this situation may indeed occur and it allows the court to amend the charge to meet the circumstances of the case is in the following terms:

> ***214.*** *(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:*
>
> *Provided that -*
>
> *(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;*
>
> *(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.*
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> *(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.*
>
> *(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.*

19. The situation in this case is covered by **section 214(2)** of the ***Criminal Procedure Code*** which relates to the time the offence was committed as such I find that the variance is not material to the charge in light of the totality of the evidence I have outlined. Further, I find that the error of failing to properly frame the charge to be one that is curable under **section 382** of the ***Criminal Procedure Code***, which 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."* (Emphasis added)

20. I find that no prejudice was occasioned to the appellant in the circumstances. PW 1, PW 2 and PW 3 all led evidence to the incident that took place in October 2015. It is worth noting that the testimony of PW 1, which the trial magistrate held was credible, was that she had been defiled before in the month of August 2015 and the only reason she did not tell her parents was because she had been threatened. The appellant's counsel cross-examined the witnesses on these matters and ultimately the appellant and his witness gave evidence. I therefore conclude that there was no prejudice as the evidence clearly pointed to the incident that took place in October 2015. I therefore reject the argument that the evidence was at variance with the charge therefore vitiating the trial.

21. The same argument was also raised concerning the age of the child and the variance between the age stated in the charge and the evidence. At this stage, I wish to point out the place of age in the offence of defilement and in doing so I would do no better than quote the Court of Appeal in ***Moses Nato Raphael vs Republic*** **[2015] eKLR** where it clarified the difference between proof of age for purposes of establishing the offence of defilement and for purposes of sentencing as follows:

> ***On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.***

22. In this case there was no contention that PW 1 was not below the age of 18 years hence the offence of defilement was proved. The real or apparent age of the child is a question of fact to be proved by oral testimony of the parents, the child, the medical age assessment by doctors or public documents evidencing the child's birth. At the end of the day, the child was aged below the age of 11 years which under **section 8(2)** of the ***Act*** provides for a mandatory death sentence.

23. For the reasons I have set out, I affirm the conviction and sentence. I dismiss the appeal

DATED and DELIVERED at MOMBASA this 7th day of September 2018.

D.S. MAJANJA

JUDGE

Mr Odera, Advocate for the Appellant.

Mr Masila, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.