REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL 47 OF 2015

ALEXANDER KAINGO KOMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. C Njagi RM delivered on 27th February 2015 in Criminal Case No. 645 of 2012 in the Principal Magistrate's Court at Kwale)

JUDGMENT

The Appeal

1. The Appellant was convicted of, and sentenced to serve fifteen years imprisonment for the offence of defilement of a child, contrary to section 8(1) as read with sub-section (4) of the Sexual Offences Act, after pleading not guilty to the offence and undergoing trial. The particulars were that during the month of August and 31st December 2011 at [Particulars Withheld] village Lunga Lunga Location in Kwale County within Coast Region, the Appellant intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of B M, a child aged 16 years.

2. The Appellant has filed an appeal against his conviction and sentence. His Advocates, Aboubakar, Mwanakitina & Company Advocates, in this respect filed an Amended Petition of Appeal on 26th October 2015 and 1st July 2015 and submissions dated 29th August 2019. Mr. Aboubakar highlighted the submissions during the hearing of the appeal on 3rd September 2018.

3. His grounds of appeal in summary as stated in the Amended Petition of Appeal are that the trial magistrate erred in law by convicting the Appellant on a charge that was defective; without noticing that section 36(1) of the Sexual Offences Act was not complied with; without a proper determination of the age of the complainant, on evidence that was contradictory and insufficient; on the basis of evidence of a distrustful witness of doubtful integrity and one with a grudge; without considering that key prosecution witnesses did not testify; and without considering the Appellants alibi defence.

4. It was submitted in this regard that the Sexual Offences Act uses the definition of a child provided under the Children's Act, which defines a child as a human being under the age of 18 years. That additional evidence being the complainant's clinical card admitted to Court, and the further testimony of the complainant showed that the complainant was born on 19th February 1994. Therefore, that using the method of calculating time provided under Article 259 (5) (c) of the Constitution, the complainant was 18 years at the time of the alleged commission of the offence in August 2011, and was not a child under the definition of a child under the Sexual Offences Act.

5. Further, that section 214 of the Criminal Procedure Code which provides for amendment of charges before the close of the Prosecution's case and section 89(5) of the Criminal Procedure Code could have been used to acquit the Appellant. However, that section 382 of the Criminal Procedure Code does not apply as the complainant was not a child, and therefore the offence cannot be substituted.

6. Furthermore, that the complainant's further testimony showed that she was coerced to lie before the Court and testify that she was born in 1996 instead of 1994, and she testified that the Appellant was her boyfriend. Therefore that the Appellant had no reasons to doubt that the complainant was an adult.

7. Lastly, that the investigating officer, the arresting officers and the doctor who prepared the age assessment report were not called to testify during the trial. In addition, that there was no medical evidence adduced linking the Appellant to the offence as no DNA test was conducted on the Appellant as required by section 36(1) of the Sexual Offences Act.

8. Ms. Mutua, the learned prosecution counsel, opposed the appeal in oral submissions made during the hearing of the appeal. It was the Prosecution's case that the charge was not defective as the complainant was a child and was subjected to an age assessment which placed her age at 16 years. Further, that the clinical card produced as additional evidence gave her date of birth as 19th February 1994 and therefore she

was still a minor of 17 years and 8 months at the time of the offence.

9. On the evidence adduced in the trial Court, Ms. Mutua submitted that there was no contradiction as the evidence of PW7 collaborated that of PW1, that the DNA test is not mandatory under section 36 of the Sexual Offences Act, that evidence adduced by the Prosecution as sufficient and no specific number of witnesses are required to be called under the Sexual Offences Act. Lastly, that the Appellant did introduce an alibi defence, and did not give the Prosecution any notice of the same. However, that the trial court did consider the alibi defence in its judgment.

The Evidence

10. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

11. The prosecution called seven witnesses to prove their case against the Appellant. The evidence of two of these witnesses namely B M who was the complainant and PW1, and Philip Kibet Chebii from Msambweni District Hospital who was PW7 was the relevant evidence as regards the offence and will be subjected to analysis later on in the judgment.

12. The evidence of the rest of the witnesses who were the family members (PW2, PW3, and PW5), a community policing member (PW4), and the investigating officer (PW6), was on the Appellant's arrest when he was found in the complainant's room, and that he was then taken to Lunga Lunga Police Station where a report of the offence was made. During the hearing of this appeal the Appellant applied for, and was granted leave to admit additional evidence, during which PW1 gave further testimony and produced her child health card as an exhibit.

13. The Appellant was found to have a case to answer and put on his defence. He gave sworn testimony and did not call any witnesses. He denied defiling the complainant, and stated that on the alleged date of the defilement he was at his work place.

The Determination

14. I have considered the grounds of appeal and the arguments made thereon, and I note that the two issues for determination are whether the Appellant was convicted for the offence of defilement on the basis of a defective charge; and if not, whether his conviction was on the basis of sufficient and satisfactory evidence. I have noted in this regard that the Appellant in his defence did not raise any alibi defence, as he admitted being at the complainant's home on the day of his arrest. He also confirmed that he knew the complainant, but denied that they had a sexual relationship.

15. On the first issue, the Appellant alleges that the charge sheet was defective as he was charged with defilement contrary to section 8(1) as read with sub section(4) of the Sexual Offences Act which provides for defilement of a child between sixteen and eighteen years, and a minimum penalty of fifteen years imprisonment. However, that the complainant was aged 18 years and was therefore not a child.

16. Section 8(1), (2) (3) and (4) of the Sexual Offences Act provides as follows in this regard:

> "(**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."**

17. In **Peter Ngure Mwangi v Republic, [2014] eKLR** the Court of Appeal sitting at Nairobi held that there are two limbs to the issue of a defective charge sheet. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not.

18. 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."**

19. 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."**

20. The Appellant's arguments emanate from the additional evidence given by PW1 where she produced a child health card showing that she was born on 19th February 1994. The Appellant also relied on the provisions on calculation of time in Article 259(5)(c) of the Constitution, which provides as follows:

> **(5) In calculating time between two events for any purpose under this Constitution, if the time is expressed—**
>
> **(*a*) as days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included;**
>
> **(*b*) as months, the time period ends at the beginning of the day in the relevant month—**
>
> > **(i) that has the same number as the date on which the period began, if that month has a corresponding date; or**
> >
> > **(ii) that is the last day of that month, in any other case; or**
>
> **(*c*) as years, the period of time ends at the beginning of the date of the relevant year that corresponds to the date on which the period began.**

21. The date when the relevant period began in this case is 19th February 1994, which is the date of birth of the complainant, and therefore, 18 years from 19th February 1994 would be 19th February 2012, which is the date when time ends for purposes of Article 259(5)(c). The alleged offence was committed in August and December 2011, and therefore the complainant was still aged under 18 years.

22. The charge sheet was therefore not defective, as it clearly spelt out the correct section creating the offence of defilement which is section 8(1) of the Sexual Offences Act, and also provided for the correct penalty section of the law which is subsection 4 of the said section. Section 214 and 382 of the Criminal Procedure Code were likewise also not applicable.

23. However, and this finding notwithstanding, this Court finds that there were inconsistences in that the evidence of the complainant (PW1) that required her evidence to be collaborated. In the trial Court PW1 testified that she had sex with the complainant on various occasions in August and December 2011. When she gave additional evidence, she claimed that the Appellant was her lover, that she lied in the trial Court and was told what to say by her relatives in, and that she was 18 years at the time of the alleged offence. PW1 was therefore not a reliable witness.

24. There was also contradictory evidence adduced on the complainant's age. In the trial Court an age assessment was produced as the Prosecutions Exhibit 3 by PW5 which showed the complainant to be 16 years old. The complainant during her additional evidence produced her health card as an exhibit, showing that she was born on 19th February 1994, and therefore 17 years and 8 months at the time of the alleged offence.

25. In terms of corroborative evidence, PW2, PW3, PW4 and PW5 testified that the Appellant was arrested while at the complainant's home and room on 11th May 2012. However, from the testimony of the witnesses, the Appellant was fully clothed and was not found having any sexual intercourse with the complainant on that date.

26. PW7 on his part testified that on examination of the complainant on 13th May 2012, found that her hymen was absent and that there had been a penetrative act, and he produced the P3 form as the Prosecutions Exhibit 2. He did not testify as to who committed the penetrative act. There was thus no collaborative evidence placing the Appellant with the complainant during the commission of the offences in August and December 2011.

27. It is my view that the contradictory evidence and gaps in the evidence adduced by the prosecution, should be construed in favour of the Appellant, and also resulted in the offence of defilement as against the Appellant not being proved beyond reasonable doubt .

28. I accordingly quash the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (4) of the Sexual Offences Act for the foregoing reasons. I also set aside the sentence of fifteen years imprisonment imposed upon the Appellant for this conviction, and order that he be and is hereby set at liberty forthwith unless otherwise lawfully held.

29. It is so ordered.

DATED AND SIGNED THIS 2ND DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS THIS 16TH DAY OF OCTOBER 2018

D. O. CHEPKWONY

JUDGE