REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 68 OF 2016

CHAKA MANGISI NGAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(*An appeal against the original conviction and sentence of Hon L.K Gatheru RM, delivered on 24th June 2016 in Criminal Case No. 158 of 2016 in the Senior Principal Magistrate's Court at Mariakani)**

JUDGMENT

The Appeal

1. The Appellant was convicted and sentenced to serve life imprisonment for 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 the 26th day of February, 2016 at [Particulars Withheld] village in Mariakani Location, Kaloleni sub–county in Kilifi County within Coast region, he intentionally caused his penis to penetrate the anus of A.K.M a child aged 7 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 29th February 2016, and he was tried, convicted of the offence of defilement, and sentenced to life imprisonment for the offence in a judgment delivered by the trial magistrate on 24th June 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 4th July 2016, and Amended Grounds of Appeal that he availed to the Court dated 20th July 2017 are as follows:

a) That the learned trial magistrate erred in law and fact in convicting him while relying on a defective charge that did not support the evidence adduced thus contravening sections 89, 134, 137, 214, 275 and 276 of the Criminal Procedure Code.

b) That the learned trial magistrate erred in law and fact in convicting the Appellant without considering that the burden of proof was not established beyond reasonable doubt, as the P3 form and the evidence of PW3 (the medical officer) had no substantial evidence to warrant the conviction of the Appellant thus contravening section 36 of the Sexual offences Act, Article 159 (2)(a)(a) of the Constitution, and section 107 as read with section 109 of the Evidence Act.

c) That the learned trial magistrate erred in law and fact in convicting the Appellant without considering that there was massive contradiction in the prosecution evidence, thus contravening section 153 as read together with section 154 of the Criminal Procedure Code.

d) That the learned trial magistrate erred in law and fact in convicting the Appellant without considering that credible witnesses who were mentioned were not compelled to appear in court thus contravening section 144 as read together with section 150 of the Criminal Procedure Code.

e) That the learned trial magistrate erred in law and fact in convicting the Appellant without giving due consideration to his alibi defence thus contravening section 212 as read together with section 235 of the Criminal Procedure Code.

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

6. The Appellant in his submissions stated that he was convicted and sentenced under a defective charge which is contrary to section 134 as read with section 137(a) (i) (ii) of the Criminal Procedure Code. He contended that he ought to have been charged with the offence of sodomy as captured in the evidence adduced in the P3 form, and not with defilement. Further, that if the offence was defilement, then the charge sheet ought to have read that it was defilement of a boy child.

7. However, that the prosecution did not seek to amend the charge sheet despite the defect. The Appellant thus prayed that the decision of the trial Magistrate be quashed as it was based on a void charge, while relying on the cases of **Yongo vs Republic (1983) KLR** and **Chemangong vs Republic (1984) KLR 611,** and section 214 and 276(1) of the Criminal Procedure Code.

8. The Appellant further submitted that the medical evidence adduced in the trial Court did not warrant his conviction, as it did not meet the requirements of section 36 of the Sexual Offences Act as regards administration of a DNA test on him, and as no spermatozoa was found to incriminate the Appellant in the offence. In addition, that the testimony of PW1 and PW4 was contradictory as regards the description of the complainant's underpant and/or boxer that was produced as an exhibit.

9. The Appellant went on to argue that key witnesses had not been called upon to testify, and particularly one Aboo and Ali that PW2 testified that he was playing football with, and the landlord who DW1 testified was present at the material time. He relied on the case of **Bukenya vs Uganda (1972),** where it was held that the prosecution is duty bound to make available all the witnesses necessary to establish the truth even if the evidence may be inconsistent to its case. Therefore that the evidence of PW2 and DW1 was of no value.

10. In conclusion, the Appellant stated that he had pleaded the defense of alibi which was not considered, in that he was threatened by the Complainant's parents who alleged that if he was not imprisoned, they would finish him off. He relied on the case of **Essantale vs Uganda (1968) EA 305** where it was noted that an accused person who puts forward an alibi defense as an answer to her charges does not assume any burden of proving the answer.

11. The learned Prosecution counsel, Mr. Fundi, stated the brief facts of the case leading to the instant appeal and proceeded to submit that all the ingredients of the offence of defilement as regards penetration, the age of the complainant and identification of the Appellant had been proved by the witnesses called to testify.

12. Mr. Fundi in this regard submitted that the complainant testified that the Appellant penetrated his anus with an unknown object, and that the penetration was corroborated by PW4 who produced the boxers worn at the time by the complainant as an exhibit, and testified that the same had spermatozoa. In addition, that the medical doctor (PW3) testified that upon examination, the complainant's anus was tender, swollen and painful, and had an attempted penetration.

13. On the issue of the complainant's age, the said Prosecution counsel submitted that it was proved that the complainant was born on 7th December, 2008, through the health card produced by PW1. The counsel also indicated to court that the complainant who was PW2 identified the Appellant, and was able to describe him and take his mother who was PW1 to the Appellant's home after which he was arrested.

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. S K K, the complainant's mother was PW1, while PW2 was A K, who was the complainant and testified after a *voire dire* examination. Both PW1 and PW2 testified as to the events of 26th February 2016, when the alleged offence was committed.

16. Mwangolo Chigulu, a senior clinical officer at Mariakani District Hospital who examined the complainant on 26th February 2016, was PW3. He produced the P3 form, the treatment notes and laboratory test results as exhibits. The last prosecution witness (PW4) was PC Eunice Wambui who was based at Mariakani Police Station Gender and Children's Desk and the investigation officer, and she produced the underwear worn by the complainant on the material date and a Kenya shillings 10/= coin given to the complainant by the Appellant as exhibits.

17. 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 an unsworn testimony without calling any witnesses. He narrated the events that occurred on 26th February 2016, and that he was arrested on allegations of having committed a theft.

The Determination

18. 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 three issues for determination raised in this appeal. These are whether the Appellant was convicted for 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 and whether his alibi defence was considered

19. On the first issue, the Appellant alleges that the charge sheet was defective as the P3 form showed that he had sodomised the

complainant, and that he therefore ought to have been charged with sodomy instead of defilement.

20. 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."**

21. 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."***

22. 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.

23. Section 8(1) of the Sexual Offences Act in this respect provides that a person who commits an act which caused penetration with a child is guilty of an offence termed defilement. Penetration is defined under section 2 of the Act as the partial or complete insertion of the genital organs of a person into a genital organs of another person, while genital organs are defined in the same section to the whole or part of male or female genital organs and for purposes of this Act includes the anus.

24. Therefore, to the extent that the particulars of the charge sheet did indicate the Appellant did cause his penis to penetrate the anus of a child aged 7 years, there was no defect in the said charge sheet. It is also notable in this regard that there is no offence known as sodomy in the Sexual Offences Act or Penal Code that could have been substituted for defilement, irrespective of the term having being used in the P3 form that was produced by PW3. Lastly, the evidence adduced by the prosecution, and particularly by PW2 and PW3, did support the particulars in the charge sheet, and there was thus no need for amendment of the same.

25. On the second issue as to whether the prosecution proved that the Appellant committed the offence of defilement beyond reasonable doubt, the ingredients of defilement were 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."**

26. PW1 in this respect produced as Exhibit 5 a health card showing that the complainant was born on 7th December 2008 and was therefore 7 years at the time of the alleged offence. In addition, PW2 testified that he did see and identify the Appellant who had been staying in their neighborhood for two days by name, and PW2 led PW1 to the scene of the alleged offence where the Appellant was found and arrested shortly after the incident.

27. Therefore, this was not merely a case of identification but also of recognition of the Appellant by the complainant. It was in this regard held by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

28. The above findings notwithstanding, it is nevertheless my view that the evidence adduced by the prosecution was insufficient to prove the ingredient of penetration. In this respect, PW2's evidence was that the Appellant called him into a house, laid him on a mattress facing down, and that he felt pain in the anus and did not know what the Appellant used to penetrate him. PW3 on examination of the complainant, noted in the P3 from he produced as Exhibit 4 that the complainant's underwear was wet with spermatozoa, and that he had a painful external anal area. He also noted that there was an attempted sodomy. Therefore there was no proof beyond reasonable doubt of penetration of the complainant's anus by the Appellant's genital organ to sustain a conviction of defilement.

29. The evidence adduced however proves that there was attempted defilement of the complainant by the Appellant. It is in this regard noted that the contradictions as to the description of the colours of the complainant's underwear given by the complainant and PW4 were not fatal, for the reasons that the said underwear was produced as an exhibit in Court by PW4 who confirmed to have received it from the complainant, which evidence was also corroborated by the complainant's and PW1'S testimony.

30. I am guided by the provisions of **section 179** of the *Criminal Procedure Code empower a* court to convict an accused person for an offence which he was not charged but which is proved and was a lesser offence than that charged. The said section 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."**

31. 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. The* offence of attempted defilement contrary to section 9(1) and 9(2) of the Sexual Offences Act, is a lesser cognate offence as it is revealed by the particulars of the charge and evidence adduced, but also carries a lesser sentence than offence of defilement which the Appellant was charged with.

32. Section 9(1) of the Sexual Offences Act refers to an attempted defilement as an act which would cause penetration. It states as follows:

> **"A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement. "**

The punishment provided for the offence of attempted defilement with a child under section 9(2) of the sexual offences Act is with a child is imprisonment for a term of not less than ten years.

33. Section 388 of the Penal Code in addition defines an attempt as follows;

> **" (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.**
>
> **(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.**
>
> **(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."**

34. In **Francis Mutuku Nzangi v Republic [2013] eKLR**, the Court of Appeal explained these provisions as follows;

> **"Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible."**

35. The offence under section 9(1) of the Sexual Offences Act is therefore committed when a person attempts to causes penetration with his genital organs, manifested by facts that point to an act of penetration. However, in an offence of attempted defilement, no penetration takes place, and this is what distinguishes the offence from that of defilement. As shown in the foregoing, the evidence adduced by the Prosecution did establish without doubt that the Appellant did undertake acts with the objective of defiling the complainant, but fell short of establishing that there was penetration of the complainant's anus by the Appellant's genital organ.

36. Lastly, as regards the ground raised by the Appellant of his alibi defence, this Court has considered his evidence in the trial Court and notes that he did not give any evidence to show that he was at another place other than his place of arrest as testified to by PW1 and PW2. The defence of alibi is raised by an accused person when he alleges that he or she was not at the scene of the crime at the time the crime was alleged to have been committed, which was not the case in the present appeal.

37. On the contrary, the Appellant confirmed in his testimony that he was found by PW1 at the house where he was staying and where PW1 had been taken by PW2. Further, that he was subsequently rescued by his landlord from members of the public who had gathered, and who directed that he be taken to the police station. There was thus no defence of alibi raised or established by the Appellant.

38. I hereby accordingly quash the conviction of the Appellant for the offence of defilement of a child contrary to section 8(1) and (2) of the Sexual Offences Act, and substitute it with the conviction of the Appellant for the offence of attempted defilement of a child contrary to section 9 (1) and (2) of the Sexual Offences Act. I also substitute the sentence of life imprisonment imposed upon the Appellant with a sentence of ten (10) years imprisonment for the offence of attempted defilement, which sentence is to run from the date of conviction by the trial Court.

39. It is so ordered.

DATED AND SIGNED THIS 16TH DAY OF AUGUST 2018

P. NYAMWEYA

DELIVERED AT MOMBASA THIS THIS 3RD DAY OF OCTOBER 2018

D. O. CHEPKWONY

JUDGE