REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 69 OF 2018

BETWEEN

BONIFACE MUGODO KIVAGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court

at Makadara Sexual Offence Case No. 127 of 2016 delivered

by Hon. Kibosia, SRM on 16th February, 2018).

JUDGMENT.

Background.

1. Boniface Mugodo Kivagi, hereafter the Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between the month of August 2015 and 3rd September, 2016 at South B in Industrial Area within Nairobi County intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely anus of DM, a child aged twelve years. In the alternative, he was charged of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 in that he intentionally and unlawfully committed an indecent act with DM, a child aged twelve years by touching his private parts namely anus.

2. He was found guilty in the main count and sentenced to twenty years imprisonment. He set out his grounds of appeal in a memorandum annexed to his written submissions filed 8th October, 2018. I duplicate *them as under;*

> *(i) That the learned magistrate erred by failing to appreciate the fact that the charges preferred were incurably defective contrary to the Sexual offences Act and Sections 134, 135 and 214 of the Criminal Procedure Code.*
>
> *(ii) That the trial magistrate erred by failing to find that the prosecution did not prove the elements of the offence of defilement.*
>
> *(iii) That the honorable magistrate erred by failing to appreciate that the Appellant's constitutional rights as set out in Articles 25, 49 and 50 were infringed when he was kept in police custody for days and by the prosecution failing to disclose its evidence,*
>
> *(iv) That the trial magistrate erred by not considering his defence that there existed a serious grudge on the part of PW3 who originated the matter and had a pecuniary interest in the matter.*
>
> *(v) That the learned magistrate erred by failing to appreciate that there was no proof tendered beyond reasonable doubt occasioning a serious miscarriage of evidence.*
>
> *(vi) That the honorable magistrate erred by failing to consider his statement of defence contrary to Section 169(1) of the Criminal Procedure Code.*

Submissions.

3. The Appellant relied on his written submissions whilst learned State Counsel, Ms. Atina acted for the Respondent. She gave oral submissions. I shall consider the respective submissions in the determination.

Evidence.

4. The prosecution case can be summarized as follows; **PW1,** DM, was the complainant. He lived with his mother, brother and the Appellant who was his uncle. He used to share his room with the Appellant. He testified that starting in 2013 the Appellant begun inserting his penis into his anus and he did not tell anyone as the Appellant threatened to kill him. This happened for a period of three years. In September, 2016 the Appellant committed the act again but when one Aunt M enquired what was wrong owing to his walking style he informed her that he had soiled his pants through defilement by the Appellant. He was taken to Mater Hospital where he also informed his mother what had happened. He was later treated at Nairobi Women's Hospital and further examined by a government doctor, **PW5, Dr. Maundu** of police surgery. According to PW5, PW1 no physical injuries were observed even around the anal area. However, his anus was loose with the sphincter tissue reduced. He did the examination on 14th September, 2016.

5. **Dr. Mochoge** Edward of Mater Hospital testified as **PW7.** He attended to PW1 on 6th September, 2016. He reported that there was lubrication and dense deep penetration which had been ongoing for two years. He would soil his pants on a daily basis without him noticing. The physical examination did not find anal bruises or any physical injuries although he had a lot of stool around his anus. He noted decreased in sphincter tone and the child had an abnormal gait. Sexual assault was therefore confirmed.

6. **PW4,** Edward Mbugua Kinuthia, a Clinical Officer attached to Nairobi Women's Hospital examined PW1 on 10th June, 2016. He confirmed that the child had been seen at Mater Hospital on 6th September, 2016. An examination of the anal area revealed swelling and bruising of the anus. The child was in pain and the anal area was tender with weak sphincter muscles. An anal swab revealed pus cells and bacteria. He produced the Post Rape Care Form and discharge summary. The child was suffering incontinence, an indicator of continuous defilement. In cross examination, he stated that PW1 was seen by three doctors and was brought to the hospital by one A.

7. **PW2,** FAU was PW1's mother. She produced his birth certificate to confirm his age. She confirmed that she had employed the Appellant to take care of her children since in 2013. After a while she started noticing that her son was clingy and in September, 2016 she returned home from a journey at coast and was informed by a distant cousin who was living with them and working as a counselor that PW1 was not well. PW1 had revealed to this cousin that he had been sodomized. She produced a medical form from Mater Hospital and a test report. PW1 was also admitted at Nairobi Women's Hospital.

8. **PW3,** MKM, a social worker in Kisumu was in August, 2016 attending a course in Nairobi and she stayed with PW2's family. She testified that PW1 disclosed the matter to her after she noticed that he had difficulty walking or when he played or was sitting down. She noticed how he acted when the Appellant was around which gave her a hunch about him. She then informed PW2 and PW1 was taken to Mater Hospital.

9. **PW6,** No. 53519 PC Fredrick Oramisi investigated the case. He recorded relevant statements on 8th September, 2016. He thereafter arrested the Appellant alongside his colleague and preferred the instant charges. He issued a P3 Form to PW1.

10. After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly out on his defence. He gave a sworn statement of defence. He called no other witness. He confirmed that he had been engaged by PW2 to take care of her child whom she wanted circumcised. He testified that PW2 informed him that her son was disturbing her as he had not learnt to use the toilet at the age of nine. He decided to assist in training the boy to use the toilet. After the training, he wanted to leave the house but PW2 declined. It was thereafter that she framed him for the offence.

11. The Appellant went on to state that PW3 was employed as a house help after he recommended her but after two weeks she quit. He added that there was friction between him and PW2 fueled by PW3 due to sleeping arrangements in the house as she did not want to sleep in the sitting room anymore. He stated that he was arrested on trumped up charges. He was of the view that the grudge was also based on his refusal to have a relationship with PW2.

Determination.

12. After considering the evidence on record and the submissions by the parties this court finds that the following issues arise for determination:

i. Whether the Appellant's right to a fair trial was infringed.

ii. Whether the charge sheet was fatally defective

iii. Whether the Appellant's defence was taken into account.

iv. Whether the offence was proved beyond reasonable doubt.

13. The first issue relates to the Appellant's submission that his right to a fair trial under Articles 49 and 50 of the Constitution was violated. Under Article 49(1)(f) he cited that he was not arraigned in court within twenty four hours are provided but after eight days. He was arrested on 8th September, 2016 and was kept in custody until his production to court on 16th September, 2016 when he pleaded not guilty to the

offences. This, was of course, was in contravention of Article 49(1)(f) of the Constitution. However the same does not render the trial a nullity. Instead, the Appellant is at liberty to seek redress in compensatory suit against the individual or body that violated his right. Such a suit would also serve the purpose not only of vindicating the position that constitutional rights were violated but serve as deterrence for future infringement.

14. This position was taken by the Privy Council in **Subiah *v.* The Attorney General of Trinidad and Tobago[2008] UKPC 47,** where it was held that;

> ***"Those who suffer violations of their constitutional rights may apply to the court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state and its agents. Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation. But ordinarily, …, constitutional redress will include an award of damages to compensate the victim."***

15. The prerogative to file such a suit falls with the party aggrieved to seek the redress. The discretion thereafter of the relief to award lies with the court in which the suit is filed. Certainly that is not within the jurisdiction of this court.

16. The next limb of argument under this head was that the Appellant was not supplied with witness statements. He was arraigned in court on16th September, 2016 and an order was made that he be supplied with statements and other documentary exhibits. It appears that the order was not complied with as on 14th October, 2016 the Appellant once again applied to have supply of the exhibits whereupon the trial court ordered a special mention on 18th October, 2016. The purpose of that special mention is not indicated on the file although logic dictates that it was based on the application for the statements. This is buttressed by the fact that when the matter was mentioned on 18th October, 2016 it was set for hearing. The court notes that on the 18th the Appellant did not renew his application to have the statements supplied and the fact that the matter was set for hearing is an indicator that the Appellant was supplied with the statements on this date. This ground of appeal is thus unmeritorious.

17. On the submission that the charge sheet was fatally defective, the Appellant premises the argument under the provisions of Section 134, 135 and 214 of the Criminal Procedure Code. He submitted that the evidence adduced was at variance with the charge and pointed out various parts of the prosecution's case that were at odds with the charge. He questioned the failure to amend the charge sheet given the glaring disparities. He pointed to the complainant's evidence about the period of defilement that was not clear varying from three to four years. That PW7 further complicated the matter when he testified that the same had occurred over a period of two years. He also pointed to the medical evidence adduced by PW5 and PW7 stating that it did not support the allegation of defilement contrary to the evidence adduced by PW4. Further that the age of the complainant when the offence allegedly begun was nine years, which did not accord with the age stated in the charge sheet.

18. What constitutes a defective charge was enunciated by Kimaru J. in **Sigilai *v.* Republic[2004] 2 KLR 480,** thus:

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

19. In the present case, the Appellant contrasted parts of the evidence to the particulars of the charge. The first involves the period during which the offence was committed. The charge set out the period as diverse dates between August, 2015 and 3rd September, 2016 which the Appellant contrasted with the evidence on record relating to the initial offence which ranged between the year 2013 and 2015. The court is aware that the diverse nature of a period during which an offence is alleged to occur may lead to ambiguity. However, while the complainant's evidence is that the offence was perpetrated over a longer period of time than that set out in the charge his evidence was specific with regards to the recent occurrences. Further, his evidence of the long term perpetration was corroborated by the evidence of the doctor from Mater Hospital, PW7, who testified that his examinations indicated that the offence occurred over a period of time. That said, the little discrepancy on the exact dates that the offence was perpetrated did not lessen the fact that the same was committed. It neither rendered the charge sheet defective for want of ambiguity.

20. The Appellant contended that the evidence was also at odds with regards to the offence that was committed with PW4's evidence being that the offence committed was sodomy. He pointed to the Gender Violence Recovery Centre Form which also diagnosed the offence as sodomy which was not a crime under the Sexual Offences Act. While the court admits that the offence of "sodomy" is not provided under the Sexual Offences Act it is clear that the witnesses and the documentary evidence referred to sex through the anus. The Act under Section 8(1) only refers to defilement in which the operative word is penetration. Penetration is defined under Section 2 as;

> ***"means the partial or complete insertion of the genital organs of a person into the genital of another person."***

21. Penetration must occur to a genital organ and genital organ is also defined under Section 2 as

> ***"includes the whole or part of male or female genital organs and for purposes of this Act includes anus."***

22. Sodomy on the other hand is defined under the **Black's Law Dictionary, 10th Edition** as "***'Oral or anal copulation between humans esp. those of the same sex").*** No doubt then the use of the word sodomy by the witnesses did not imply that they referred to a different offence as the phrase is already catered for in the Sexual Offences Act which defines the genital organs to include the anus. This ground of appeal too is overruled.

23. The next issue that the Appellant raised was that his defence was not considered contrary to Section 169 of the Criminal Procedure Code. His submission was that his defence was that the case was predicated by a grudge between him and PW3. He attributed his woes to several persons including PW2 and PW3. He submitted that PW2 decided to frame him after he potty trained her child, PW1, as she did not want him to leave. He further submitted that he introduced PW3 to PW1 and she was supposed to act as a house help. This was contrary to the evidence of PW3 that she was PW1's cousin and she was staying with her pending the conclusion of a course. He did not challenge this fact in cross examination. He testified that PW1 wanted to initiate a relationship with him contrary to his wishes and objection and that this led to her framing him. He also testified to a third source of his woes, one Reinee, whose malice was predicated by the fact he had refused his advances. On the part of Miss Atina, she submitted that the Appellant's defence was found unmerited.

24. It is clear from the judgment that the trial court considered the defence but when it came to determining the case it did not delve into the defence only relying on it to corroborate the identification of the Appellant by way of recognition. My evaluation of the evidence as I shall state did rebut the cogency of the prosecution case. It drivees me to conclude that the Appellant's defence was a mere afterthought that could not bail him out.

25. On proof of the case, the prosecution was enjoined to establish three elements, namely; penetration, identification and age of the victim child. Learned State Counsel, Miss Atina submitted that the prosecution ably discharged its burden by proving the three elements beyond a reasonable doubt. With regards to the identification of the Appellant, it was an accepted fact that the complainant recognized him as they had lived in the same house since 2013 although what role the Appellant's played in the household was not quite clear.

26. The age of the minor was proved through the production of a Birth Certificate which proved she was born in April, 2004. The Appellant contended that the offence was charged under Section 8(3) instead of 8(2) given the complainant's evidence that the Appellant begun attacking him in 2013 when he was nine years old. It is true that the complainant testified that the Appellant first attacked him in 2013 but the scope of the offence charged was the period between August, 2015 and September, 2016 during which time the complainant was aged between 11-12 age bracket and therefore charging the Appellant under Section 8(3) of the Sexual Offences Act was proper.

27. As to proof of penetration, the complainant's evidence was that the Appellant had attacked him over a period of several years. He however singled out an incident that occurred in September, 2016. He testified how the Appellant had accosted him in the kitchen before leading him to the bedroom where he defiled him. That after the incident he had problems walking which aroused his aunt's, PW3, suspicions and led to him revealing what the Appellant had been doing to him. Medical evidence adduced by PW4, PW5 and PW7 clearly established that defilement had been committed and not once but over a period of a long time. The documentary evidence adduced in support thereof attested to this fact.

28. In sum therefore, I find that the prosecution proved that the offence of defilement contrary to Section 8(1) as read with Section 8(3) beyond a reasonable doubt and the Appellant was properly convicted.

29. On sentence, Section 8(3) provides for a minimum of twenty years imprisonment. The Appellant does not deserve a lesser sentence. He messed the life of an innocent soul who will live with the trauma for rest of his life. The Appellant acted a beast by preying into the innocence of a young child through intimidation so that the offence went unnoticed for a long time. He deserves isolation from the bigger society in the hope that by the time he completes the sentence he shall have learned his lesson, to refrain from crime. I do accordingly uphold the sentence save that the period of one year four months and 15 days spent in remand custody shall be deducted from the jail term.

Dated and delivered at Nairobi This 14th Day of November, 2018.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant present in person.*

2. *Mr. Miiri for the Respondent*.