REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 213A OF 2014

DANIEL UVYU KITHUKU……...……APPELLANT

VERSUS

REPUBLIC…….…….….RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. D.G Karani. PM delivered on 27th November 2014 in Sexual. Offences Case No. 21 of 2013 in the Senior Principal Magistrate's Court at Kithimani)

JUDGMENT

The Appellant was convicted of, and sentenced to serve fifteen (15) years imprisonment for the offence of defilement of a child, contrary to section 8(1) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between the 2nd day of September 2013 and 18th day of September 2013 in Mwala District within Machakos County, he intentionally and unlawfully caused his penis to penetrate the vagina of I M M a child of (16) sixteen years.

He was also charged with the alternative of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, with the particulars being that on diverse dates between the 2nd day of September 2013 and the 18th day of September 2013 in Mwala District within Machakos County, he intentionally and unlawfully touched the vagina of I M M a child aged 16 years with his penis.

The Appellant has filed an appeal against his conviction and sentence, and filed a memorandum of appeal dated 1st December 2014, and availed amended grounds of appeal dated 25th July 2016. The Appellant urged two main grounds of appeal as follows. Firstly, that the trial court erred in law and substance in failing to factor into the final assessment that the purported victim (PW1) was already a mother of two children before cohabiting with the Appellant.

It was contended in this respect that PW1 met the Appellant in September 2013, and was already delivered of a baby by the date of her testimony before court in May 2014, which was seven months after meeting the Appellant , then the Appellant is not the biological parent of said second child. Moreover, that by the time PW1 met Appellant, she was probably already two months pregnant and he was mislead as to the victim's age arising from the special circumstance of her appearance owing to maternity.

Secondly, that due and owing to the gravity of the case before the lower court, the Appellant should have been accorded legal representation and/or counsel pursuant to Article 50(2)(h)of the Constitution, and that his conviction was largely due to his legal ignorance and illiteracy which resulted in substantial injustice.

Ms Mogoi Lillian, the learned prosecution counsel, filed written submissions in response dated 8th

December 2016, wherein she conceded the appeal on two grounds. The first was that it is evident from the charge sheet that the Appellant was charged under Section 8(1) (4) 9(2) of the Sexual Offences Act which does not exist. Further, that even if section 8(1)(4) was to be read on its own and section 9(2) on its own, this still makes the charge duplex, in the sense that the Appellant was charged with the offence of defilement and attempted defilement as one or same charge.

It was thus submitted that the charge was defective and/or duplex which ought to have been amended by the prosecution before close of the prosecution 's case, since the error is not curable by Section 382 of the Criminal Procedure Code. Secondly, that from the evidence and conduct of PW1 before and after she met the Appellant, the Appellant would have been led to reasonably believe that she was over eighteen considering the fact that she was already a mother of one.

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**).

In this regard after going through the grounds of appeal and the arguments made thereon, I note that the three issues raised by the Appellant are firstly, whether he was convicted on the basis of a defective charge; secondly, whether his right to a fair trial was violated, and thirdly, whether the defence of in section 8(5) of the Sexual Offences Act is available to him.

On the first issue, the Court of Appeal sitting at Nairobi held in **Peter Ngure Mwangi v Republic, [2014] eKLR** 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.

The first question as to whether 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."**

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."***

I have perused the charge sheet and find that the section of law creating the offence the Appellant was charged with was indicated therein as Section 8(1) (4) 9(2) of the Sexual Offences Act . No such section exists in the Sexual Offences Act, and this is not an irregularity that is curable at this stage as the Appellant has undergone a full trial on the basis of the said charge and has been convicted. Section 382 of the Criminal Procedure Code provides as follows in this regard:

> **"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."

I will also briefly address the other issues raised. On the second issue as to whether the Appellant's right to a fair trial was infringed, Article 50 (2) (h) of the Constitution provides for the right to legal representation, which is the right the Appellant alleged to have been violated. This right was the subject of the Court of Appeal's decision in the case of **David Macharia Njoroge vs Republic [2011] Eklr,** *which Court* after reviewing the past and current law stated that as follows:-

*"**Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."***

In the present appeal, the charge the Appellant was facing did not carry a penalty of loss of life, and the Appellant did not suffer from any of disability that prevented him from understanding the proceedings. His allegation that his right to a fair trial was infringed on account of lack of legal representation is theefore found not to have merit.

The last issue is whether the defence under section 8(5) of the Sexual Offences Act is available to the Appellant. The said section as read together with sub-section 6 provides as follows:

"(5) It is a defence to a charge under this section if—

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertainthe age of the complainant."

Notwithstanding that the prosecution conceded this ground of appeal, it is for the court to examine the evidence adduced and satisfy itself that the accused reasonably believed that the victim was over 18 years old. In the present appeal, both the complainant and Appellant testified that they had prior conversations, and that the complainant subsequently willingly went to meet the Appellant and had sexual intercourse with him. The complainant in addition testified that she was living with the Appellant as husband and wife. I therefore find that the evidence adduced raised the possibility that the Appellant had reason believe that the victim was of age and had capacity to consent.

I accordingly allow the Appellant's appeal and quash his conviction for the offence of defilement contrary to section 8(1) of the Sexual Offences Act. I also set aside the sentence of fifteen years' imprisonment imposed on the Appellant for this conviction, and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 1st DAY OF FEBRUARY 2017.

P. NYAMWEYA

JUDGE