REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL 192 OF 2011

ERICK MUTHENI MATIVO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. S. Gacheru

SRM arising out of a judgment delivered on 20th April 2011 in Sexual Offences

Case No. 21 of 20o8 in the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was convicted and sentenced to serve twenty (20) years imprisonment for the offence of defilement of a girl, contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The particulars of the offence were that on 4th November 2008 at Kosovo slums, Athi River Division, in Machakos District within Eastern Province, the Appellant intentionally and unlawfully had carnal knowledge of K K, a girl aged 13 years. The Appellant was also charged with the alternative offence of committing an indecent act with a juvenile contrary to section 11(1) of the Sexual Offences Act No 3 of 2016.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Petition and Mitigation of Appeal filed in Court on 8th June 2011, as well as the Amended Supplementary Grounds of Appeal and submissions dated 26th September 2016 that he availed to this Court.

In summary, the Appellant alleges that the trial magistrate erred in law and facts by failing to conduct a *voire dire* examination of PW1 who was the complainant and 13 years old, hence contravening the Oaths and Statutory Declarations Act; by relying on fabricated and contradictory evidence adduced by the prosecution; by failing to observe that section 36 of the Sexual Offences Act was not complied with and that proper investigations were not carried out by the prosecution to warrant his conviction; and by failing to consider the Appellant's defence.

Ms Mogoi Lillian, the learned prosecution counsel, also filed written submissions on 22nd November 2016 in opposition to the Appeal. It was argued therein that a *voire dire* examination was not necessary as PW1 was 13 years old, and not a child of tender years as stated in section 19 of the Oaths and Statutory Declarations Act and as defined in the Children Act is a child under the age of ten years. Reliance was

also placed on the decision in **Basil Okaroni vs Republic, (2013) e KLR.** It was urged therein that the prosecution through the testimony of its witnesses had proved the charges against the Appellant beyond reasonable doubt, and the learned counsel proceeded to analyse the evidence in light of the ingredients for the offence of defilement.

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**).

However, before proceeding to consider the grounds raised by the Appellant, after going through the trial Court record I noted that the Appellant was charged with the offence of defilement. However the particulars of the offence were that he intentionally and unlawfully had carnal knowledge of K K, a girl aged 13 years, to which he pleaded not guilty on 17th November 2008. He was convicted and sentenced for the offence of defilement after the trial magistrate found that the ingredients of the offence of defilement had been proved. At no stage during the proceedings was an application made to amend the charge and allowed, nor was the charge amended by the trial Court.

I raise this observation because of the legal requirements as regards framing of a charge and taking of plea to a charge. The procedure as to taking a plea set out in *section 207(1)* of the Criminal Procedure Code which provides as follows:

> **"1.The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement."**

In **Adan vs Republic, [1973] EA 445** the substance of the charge was held to mean the charge *and all the essential ingredients of the offence which should be explained to the accused in his language or in a language he understands.*

In addition, the requirements of the law as regards the framing of charges are stated Article 50(2)(b) of the Constitution which provides that one of the rights of a fair trial is the right of an accused person to be informed of the charge with sufficient detail to be able to answer it; and 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."**

It was further 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 while indeed the Appellant was charged with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act, which is a section that exists in the Sexual Offences Act, the particulars given in that charge do not reflect the nature of the said offence. The offence of defilement is defined in section 8(1) of the Sexual Offences Act as an act which causes penetration with a child, and there is no ingredient of the said offence known as carnal knowledge, or a definition of such a term in the Sexual Offences Act.

The particulars of the offence should not only contain the essential ingredients of the offence,, but should also in as much as possible be framed simply and in the ordinary language without the use of technical words and phrases. In my view an ordinary and reasonable person would not be able to explain what the

term carnal knowledge means, and I therefore find for this reason that the charge sheet was defective for reasons of not including the particulars of the offence or omitting essential ingredients of the offence. I am guided in this respect by the decisions in **Wandera Reuben Kubanisi vs Republic (1965) EA 572** and **Yozefu & Another vs Republic (1969) EA 236.**

Furthermore, after perusing the trial record I note that on 4th February 2009 before the trial was to commence the Appellant stated as follows**:**

> **"I am not ready, I was charged with different reason from why I was arrested."**

The trial magistrate then ruled as follows:

> **"No sufficient reason given, case to proceed."**

It is my view that the Appellant's statement should have alerted the trial magistrate to a possible defect in the charge sheet, and the trial Court ought to have then amended the charge sheet on its own motion.

I therefore find that the defect in the charge sheet is an not an irregularity that is curable at this stage, as the Appellant was prejudiced by not understanding the charge he was facing, and has undergone a full trial on the basis of the said defective charge and 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 accordingly quash the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (3) of the Sexual Offences Act, and set aside the sentence imposed upon the Appellant of a term of imprisonment of twenty years for the conviction. I also set the Appellant at liberty forthwith unless he is otherwise lawfully held

It is so ordered.

DATED AT MACHAKOS THIS 13TH DAY OF FEBRUARY 2017.

P. NYAMWEYA

JUDGE