REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 148 OF 2012

MUSEMBI JOHN MUTUA……..……...……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. J. Omange, SPM delivered on 27th April 2012 in Criminal Case No. 138 of 2011 in the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was convicted of, and sentenced to serve ten (10) years imprisonment for the offence of attempted defilement, contrary to section 9(1) (2) of the Sexual Offences Act. The particulars of the offence were that on 10th January 2011 in [particulars withheld] sub-location in Yatta District within Eastern Province, he unlawfully attempted to cause his penis to penetrate the anus of M W, a boy aged 15 years. The Appellant had also been charged with an alternative offence of an indecent act with a child contrary to section 1(1) of the Sexual Offences Act.

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 of Appeal dated and filed in Court on 5th November 2014, as well as in his Amended Supplementary Grounds of Appeal and submissions dated 13th July 2016. The grounds of appeal are that the learned trial magistrate erred in law and fact by convicting him on a defective charge; in failing to appreciate that the Appellant was not informed of all his rights as enshrined in the Constitution; by convicting him on contradictory uncorroborated and unreliable evidence and on the basis of a case that was not proved beyond reasonable doubt; and by shifting the burden of proof to the Appellant.

The Appellant urged that according to the evidence of the witnesses there was no attempted defilement and their testimony was that of touching, and that the charge was therefore defective in accordance with the provisions of section 214 (1) of the Criminal Procedure Code and the decision in **Yongo vs Republic (1983) KLR 1**.

It was also submitted that the Appellant's rights under Article 49 and 50 were violated as he was not informed of his right of legal representation as he was facing serious charges, and witness statements were not given to him at the appropriate time. It was the Appellant's contention that the right to a fair trial is not derogable under the constitution and he cited various judicial authorities in this regard. As regards the contradictory evidence, it was submitted that PW4 and PW5 testified that they saw the complainant with dusty clothes, while PW6 and PW7 testified that the heard that the complainant's clothes were dusty but did not see him. Further, that the boys who were with PW3 when he alleged he met the Appellant on the road were not called to give evidence as they were key witnesses .

Ms Mogoi Lillian, the learned prosecution counsel, relied on the record of the trial Court, while noting that the said record was not clear.

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**).

The issues raised in this regard by the grounds of appeal and arguments made by the Appellant are firstly, whether he was convicted on the basis of a defective charge; secondly whether his rights to a fair trial were violated, and thirdly, whether he was convicted for the offence of defilement on the basis of sufficient and consistent evidence.

On the first issue, the Appellant argued that the charge was defective as the offence was not supported by the evidence that was presented by the Prosecution. Section 214(1) of the Criminal Procedure Code in this regard provides as follows:

> **"(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**
>
> **Provided that—**
>
> **(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;**
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> **(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."**

The Court of Appeal in **Yongo vs Republic** ***[1983] KLR, 319*** did hold that a charge that is not disclosed by evidence is defective and stated as follows in this regard:

> **"In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:**
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> **(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or**
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> **(b) it does not, for such reasons, accord with the evidence given at the trial; or**
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> **(c) it gives a misdescription of the alleged offence in its particulars."**

This holding was explaining the circumstances when a charge is considered to be defective in substance, so as to guide a court when it is altering the said charge. In order to find out if there was an error made in this respect in this appeal, one must interrogate the elements of the offence of attempted defilement. 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. "

Section 2 of the Act defines penetration as "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

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.**
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> **(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.**
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> **(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."**

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."**

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. The complainant's (PW3) evidence in this regard was as follows:

> **"I am M W. I am from [particulars withheld], Yatta District. I am in class 6. On 10/1/11 at 8.00am I was going to school with other children I met the accused Musembi Makumi. I know his name he was standing. He caught my left hand I was carrying bag which fell and my lunch also fell. He wanted to remove my pant he had knife in his pocket, he caught my hand and removed my pant. Then a parent came from behind and he let me go. I fell on my stomach when he saw parent he ran. I went home"**

The complainant then proceeded to testify about other occasions on different dates when the Appellant is alleged to have also removed his pants. I have also perused the record of the testimony of the other witnesses, and note that PW1 and PW2 testified as to how the Appellant was touching them, and gave no testimony as regards any incident between the Appellant and the complainant herein. PW4 on her part gave evidence that she met an unidentified boy who was dusty along the road. According to PW5, the Appellant called the complainant from PW5's posho mill on 20th January and they left together, and the complainant returned later on at 6pm crying and he was dusty. PW6 who was the complainant's mother, and PW7 the investigating officer, testified as to the report they got from the complainant about the alleged attempted defilement.

There was therefore no evidence adduced of an attempted defilement of the complainant by the Appellant, and particularly on the material date indicated in the charge sheet which was 10th January

2011. In particular no evidence was given as to any attempt by the Appellant to insert his genital organ in any part of the complainant's body. I therefore find for the above reasons that the charge sheet was defective and the conviction of the Appellant for attempted defilement on the basis of the charge sheet before the trial Court was not safe.

While this finding is enough to dispose of the appeal, I will also comment on other grounds raised by the Appellant. As shown in the foregoing, the evidence adduced in the trial was inconsistent and insufficient, as it is only the evidence of PW3 that was relevant to the charge, and even his own evidence was also touching on facts that happened on other dates. The evidence of PW1, PW2, PW4 and PW5 was completely unrelated to the charge the Appellant was facing, while PW6 and PW7 were not present at the scene of the alleged offence.

More importantly, the record shows that the Appellant severally requested for statements before and during the trial. In particular, just before the complainant testified on 14th July 2011, the Appellant asked for his statement and the P3 form. The court directed that the hearing proceeds and there is no record of the said statement being availed to the Appellant. After re-examination the record shows that the Appellant stated that he only got the statement that day and asked for an adjournment. On 24th January 2012, again the Appellant stated that he was only given half the statements and that he was not given the P3 form.

Article 50(2)(j) of the Constitution provides that the right to a fair trial includes the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. This right was explained in ***Dennis Edmond Apaa and Others v Ethics and Anti-Corruption Commission*,** **Nairobi Petition No. 317 of 2012 [2012] eKLR** as follows:

> ***"The words of Article 50(2)(j) that guarantee the right "to be informed in advance" cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c)guarantees the accused the right, "to have adequate facilities to prepare a defence.***
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> ***This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence ….. The obligation to disclose was a continuing one and was to be updated when additional information was received."***

In the present appeal, I note that the Appellant had been consistent and persistent in requesting for the witness statements and P3 form before and after the trial commenced, and as there are indications that some of the statements were availed to him after the trial commenced, I find that his right to a fair trial was infringed on this account.

I accordingly quash the conviction of the Appellant for the offence of attempted defilement, contrary to section 9 (1) (2) of the Sexual Offences Act. I also set aside the sentence of ten 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.

It is so ordered.

DATED AT MACHAKOS THIS 1ST DAY OF FEBRUARY 2017.

P. NYAMWEYA

JUDGE