REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL 200 OF 2014

B M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. M.A.O.Opanga

Ag. SRM delivered on 19th August 2014 in Sexual Offences Case No. 26 of 2014

in the Principal Magistrate's Court at Kithimani)

JUDGMENT

The Appellant was convicted and sentenced to serve fifteen (15) years' imprisonment for the offence of defilement of a child, contrary to section 8(1) (4) of the Sexual Offences Act, after pleading guilty to the charge. The particulars of the offence were that on 17th August 2014 at [particulars withheld] village in Masinga sub-County within Machakos County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of a child namely DS who was aged 17 years. The Appellant had also been charged with the alternative offence of committing an indecent act with a child 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 Amended Grounds of Appeal dated 13th July 2016 availed to the Court as well as in submissions of the same date. The grounds of appeal are that the trial Court failed to establish whether the Appellant understood the magnanimity and grave consequences of pleading guilty considering the seriousness of the charges he was facing, and that the Appellant ought to have been accorded legal representation in line with Article 50(2)(h) of the Constitution. Further, that the Appellant is now in possession of incontrovertible new and compelling evidence proving that the purported victim was over 18 years of age.

The Appellant subsequently filed a Notice of Motion dated 12th September 2016 seeking orders that the Court receives various documents as proof that the purported victim was over 18 years of age, namely a child immunization card showing the victims date of birth as 20th October 1995; Catholic Church Certificate of Sacraments corroborating the said date of birth; an affidavit sworn on 12th September 2016 by MWK, the mother of the purported victim confirming the said death of birth and that the Appellant is the lawful husband of her daughter DS; and an affidavit sworn on12th September 2016 by the purported victim, DS, to the effect that she was an adult of over 18 years and married to the Appellant, and was not

a complainant in the criminal case in the lower court.

This Court allowed the said application on 14th February 2017 and the Prosecution thereupon sought to cross examine MW on the documents attached to the Notice of Motion. A hearing was set for 28th February 2017, and the said MW produced the original child immunization card and Catholic Church Certificate of Sacraments showing the victims date of birth as 20th October 1995. Upon cross-examination as to why the birth certificate produced in the trial Court showed the date of birth of the victim to be 20th October 1996, the deponent stated that the victim applied for the birth certificate without her knowledge and made a mistake as to the date of birth.

Ms Mogoi, the learned prosecution counsel, thereupon conceded the appeal as the documents produced showed the victim was 18 years at the time of the alleged offence.

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, the arguments made and new evidence, I note that the main issue raised by the Appellant is whether the victim was a minor at the time of commission of the alleged offence. The ingredients of the offence 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."**

The Court of Appeal in addition stated in the case of ***Kaingu Elias Kasomo vs Republic, Malindi CRA No. 504 of 2014*** that age is a key ingredient to the offence of defilement, and failure to prove it beyond reasonable doubt amounts to failing to prove the offence.

The said Court in ***Moses Nato Raphael vs Republic*** **[2015] eKLR** further clarified the difference between proof of age for purposes of establishing the offence of defilement and for purposes of sentencing as follows:

> ***On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.***

The issue whether the victim is below 18 years old, and therefore a minor for the offence of defilement to be found to have been committed, must be proved beyond reasonable doubt as emphasised in the above-cited decisions. In the present appeal, the evidence provided during trial as to the age of the victim was a birth certificate that showed that the alleged victim was born on 20th October 1996. The offence the Appellant was charged with was alleged to have been committed on 17th August 2014, and it therefore would put the age of the complainant at 17 years and 10 months at the time of the offence according to her the birth certificate.

The Appellant has produced new evidence being a child health immunization card of the victim, showing that the victim was born on 20th October 1995, which evidence was corroborated by the victim's mother. It is my finding that there was inconsistency in the evidence as to the victim's age, and particularly as to

whether or not the victim was 17 years old as stated in the charge sheet and facts read out in the trial Court after the Appellant pleaded guilty to the offence.

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) (4) 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 as there is evidence that the alleged victim may have been over 18 years old.

As this evidence was crucial for the purposes of establishing whether the offence of defilement was committed or not, the doubt created as to whether the victim was 17 or 18 years old at the time of the alleged offence can only be resolved in favour of the Appellant, as the fact that she was below 18 years was one that was required to be proved beyond reasonable doubt.

I accordingly allow the Appellant's appeal and quash his conviction for the offence of defilement contrary to section 8(1) (4) 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 6TH DAY OF MARCH 2017.

P. NYAMWEYA

JUDGE