

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 17 OF 2013

GEORGE MWAI MWANGI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeal against Judgemen conviction and sentence imposed in Criminal Case Number 16 of 2009, R vs George Mwai Mwangi at Karatina, delivered by L. Mbugua P.M. on 7.7.2009).

JUDGEMENT

George Mwai Mwangi (hereinafter referred to as the appellant) seeks to quash the conviction and sentence passed against him by the Learned Senior Resident Magistrate in criminal case number **16 of 2009, Karatina**, delivered on 7.7.2009. In the said case the appellant was charged with the offence of defilement of a child of 11 years contrary to Section **8 (1)** of the Sexual Offences Act.^[1]

The particulars of the offence were that on the **29th** day of December 2008 at 7.00PM in Nyeri District of the Central Province did an act of penetration of (sic) defilement to **J M M**, a child under the age of 11 years.

The appellant faced an alternative charge of indecent act with a child contrary to Section **11 (1)** of the Sexual Offences Act.^[2] It was alleged that on 29th December 2008 in Nyeri District of the Central Province, unlawfully and intentionally assaulted **J M M** a child under the age of 11 years by touching her private parts.

The prosecution called a total of four (**4**) witnesses whose evidence is summarized below. In determining this appeal, this court fully understands its duty as set out in the case of **Okeno v. R**^[3] which is to:-

“.....to a fresh and exhaustive examination^[4] and to the appellate court’s own decision on the evidence.....it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.^[5]”

I now turn to the evidence adduced before the trial court:-

PW1, J M M a minor aged 9 years at the time of giving evidence and as the law demands the learned magistrate conducted a *Voire Dire* and allowed her to give unsworn evidence. She testified that she was in class three, that on the material day at around 7.00pm she was sent by her mother with her younger sibling to get milk from her grandmother. She got the milk and took it home, then she went to the road where she met the appellant whom she described by his middle name, who carried her like a small child, took him to his bedroom, and removed her pant and defiled her sexually. After going home she told her mother. On cross-examination she reiterated how she was sexually assaulted.

PW2 M M M recalled that the complainant explained to her how she was defiled, that together with her husband they sat with the appellants mother, the appellant and his brother and the child repeated what had happened and the appellant admitted the same as the truth.

PW3 Corp Lucy Macharia, a police officer received the report and was the arresting officer.

PW4 Leonard Nyana, a clinical officer attended to the complainant, aged 9 years, confirmed that the injuries were one day old, degree of injury was harm, no spermatozoa was seen, but hymen was broken.

After evaluating the above evidence, the trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence and complied with the provisions of Section **211 C.P.C.**

The accused elected to give unsworn evidence. He stated on the material day he was at home, that a child came home and started perusing a photo album with his sister, he left to get fodder, later he went home and was told he had sex with the child. He was later arrested.

DW2 C W W testified that the child was in her house where she found her daughter in class two reading and they did studies in social ethics. Shortly, the child's mother came and called her, the next day she was shocked to hear the child had been defiled as she looked fine.

Appellant also called DW3 & DW4 as witnesses. However, their evidence is in my view of no value to the appellants case at all.

The learned magistrate in her judgement analysed the evidence of all the witnesses and the above defence and concluded that the appellant was guilty as charged and convicted him on the main count. There is no mention on whether or not there is a finding on the alternative count. The proper position would have been for the trial magistrate to spare a sentence and state something to the effect "*I make no finding on the alternative count*" but nevertheless, such an omission is not fatal.

After hearing the accused in mitigation the learned magistrate considered the seriousness of the offence and the maximum sentence provided under the law and sentenced the appellant to **20 years imprisonment.**

Aggrieved by the above verdict, the appellant appealed to this court seeking to quash the conviction and sentence. The appellant raised 3 grounds in his substituted grounds of appeal, namely:-

- i. Evidence was not credible,*
- ii. Charge sheet was defective,*
- iii. His defence was rejected.*

In his submissions, the appellant attacked the evidence adduced in the lower court and described it as insufficient. On the charge sheet, the appellant submitted that the words "*intentionally*" and "*unlawful*" were omitted and that his defence was not considered.

Learned counsel for the State agreed that no birth certificate was produced, but observed that the trial court had the benefit of seeing the child, and in any event this court has the discretion under Section **358 (1)** of the Criminal Procedure Code[6] to call for additional evidence if need be. She urged the court if necessary to invoke the said section to avoid injustice. Counsel further observed that the evidence of the mother and the child was not challenged and recalled the material evidence of the clinical officer. Finally counsel observed that the appellants defence was considered and found to be wanting. On sentence, counsel submitted that the offence attracts life imprisonment, yet the appellant was sentenced to 20 years jail. Counsel also submitted that the court has the power to alter the sentence if it deems it fit.

I have carefully considered the submissions made by the appellant and the state counsel. I have also reviewed the evidence on record and the relevant law. I will first deal with the main count. Section **8(1) & (3)** of the Sexual Offences Act[7] provides that:-

8(1)A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

Section **8 (1)** cited above provides the key elements of the offence of defilement. These are “Penetration,” and “Child.” The act defines “penetration” as partial or complete insertion of the genital organs of a person into the genital organs of another person while “child” has the meaning assigned thereto in the children's Act. Before we exit the definitions it is extremely important that we bear in mind the category of persons defined in Section 2 of the act as ‘vulnerable person’ which means a child, a person with mental disabilities or an elderly person and ‘vulnerable witness’ shall be construed accordingly. I find no difficulty in concluding that the minor in this case was vulnerable persons.

Section **8 (1)** defines the offence of defilement and therefore before section **8 (2)** comes into play, the prosecution must prove the offence of defilement was committed. As stated above, an important element of defilement is *penetration*. From **PW1**'s evidence which was collaborated by **PW3** who testified that the hymen was broken, it is clear that there was penetration. Indeed **PW1** in cross examination stated that the appellant inserted his penis in her private parts. To me this evidence is cogent and was not rebutted and is sufficient to show that there was penetration, an essential element of an offence of this nature. In view of the foregoing I find that ground number one of the appeal fails.

Even without considering the presence or otherwise of medical evidence, it is my view that an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. My position in this regard is fortified by the holding of the court of appeal in *Martin Nyongesa Wanyonyi vs Republic*^[8] citing *Kassim Ali vs Republic*^[9] where the court stated:-

“The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence”

The evidence of **PW1** and in particular her assertion that the appellant inserted his penis in her private parts is in my view sufficient especially when we consider the rest of the evidence such as the medical evidence and **PW2'S** evidence who testified that they had a sitting with the appellant, her brother and mother and after the child narrated the story he said it was true. He never rebutted this version nor did he deem it fit to cross-examine **PW2** on this issue. He never denied the said sitting. He instead said he asked them to carry the child's pant to the police. In view of the said evidence ground number 1 must fail.

Regarding age, it is clear that she is a child within the definition in the Children's Act and secondly she was below 11 years within the provisions of section **8 (2)** and that the child was a vulnerable person within the above cited definition. Commenting on the age of a victim in cases of this nature the court of appeal in *Kaingu Elias Kasomo vs Republic*^[10] had this to say:-

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.

The birth certificate was not produced in court. In defilement cases, the age of the complainant is an important factor especially when sentence is being considered. In the case of *Dominic Kibet Mwareng – vs- Republic*^[11] it was held thus:-

“The critical ingredients forming the offence of defilement are:- the age of the complainant, proof of penetration and positive identification of the assailant.”

In the case of *Hilary Nyongesa Vs Republic*^[12] **Mwilu J** (as she then was) stated that:-

“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved... And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”

In certain circumstances, the court may rely on evidence other than an age assessment report or birth certificate and in this connection I find useful guidance in the case of *John Cardon Wagner –vs- Republic*,^[13] where **Warsame J** (as he then was) held that:-

“In defilement cases, the age of the complainant is proved by either medical evidence or through other evidence since the sexual offences act have different categories of ages and sentences of different ages...”

Mutende J in *Musyoki Mwakavi –vs- Republic*^[14] held that:-

“...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim’s parents or guardian and observation or common sense...”

In the case of *Francis Omuroni vs Uganda*,^[15] it was held thus:-

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

In the present case, the P3 form shows the age as 9 years. The Hospital treatment card also shows age as 9 years. The learned magistrate had the benefit of seeing the child testify and also observed the child in court. In my view the aspect of common sense described in the above cited case now comes into play. The appellant never cross-examined any of the witnesses on the issue of age. The child was in class three at the time of giving evidence. I find nothing to doubt the age of the child hence I concluded that age of the child was sufficiently proved.

The appellant insists the charge sheet was defective because the words "unlawfully" and "intentionally" were omitted. I now proceed to determine whether such an omission is fatal or curable. In this connection, it’s paramount to bear in mind the provisions of Section 382 of the Criminal Procedure Code^[16] which provides:-

“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, judgement 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, or 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”

Also relevant to the issue at hand are the clear provisions of Section 134 of the Criminal Procedure Code^[17] which provides that:-

“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 information as to the nature of the offence charged.”

I have diligently searched the entire record and I find that no objection to the charge sheet was raised at all through-out the proceedings. Discussing the above proviso, **Rudd J** in the case of *Mwasya vs Republic*^[18] stated that “as regards the proviso to this section, no objection to the charge has been raised

at all to this very moment by the appellant. On the other hand if the appellant in the said case had objected to the charge at any proper time in the lower court the charge could have been amended to fall within the proper provisions.”

I find nothing to show that the charge sheet as drawn with regard to count one was in incurably defective or prejudicial to the appellant. In my view count one as drawn discloses an offence under section **8(1)** of the Act. I strongly hold the view that failure to use the said words is an error that can be cured by an amendment. Thus, even if the said omission constituted a defect, such an omission is not in the opinion of this court fatal nor can it be said to have occasioned injustice. My position in this regard is fortified by the holding in the case of *Seidi vs Republic*^[19] where the state counsel conceded in court that the charge sheet as framed was defective. The court held that the defects in the charge sheet had occasioned no failure of justice and were curable.

A similar position was held in the case of *Mwasya vs Republic*^[20] where the court authoritatively held that the charge was defective, but not of such an irregularity or error as had occasioned a failure of justice under section 382 Criminal Procedure Code.

In *Avone vs Uganda*, the court held that where the mis-descriptions in the charge sheet had not prejudiced the appellant, the convictions ought to be allowed to stand.

I am fully alive to the fact that it is an established position that where a charge sheet does not allege an essential ingredient of ^[21]the offence, then it is defective. In the case of *Sigilani vs Republic*^[22] it was held that the principle of the law governing charge sheets is that an accused person 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.

This court takes the view that from the onset, the appellant knew the charge facing him. The particulars were carefully spelt out and the appellant has not demonstrated that he suffered any prejudice as a result of the charge sheet. He fully participated in the trial and the trial process was fair.^[23] The charge sheet outlines the essential ingredients and particulars of the offence and the evidence adduced was geared to establishing the said offence and the defence offered was clearly a direct response of the allegations made against the appellant, thus he fully understood the nature of the offence and the evidence against him. Thus where no prejudice is alleged to have been suffered or demonstrated, or the charge sheet is out rightly defective or ambiguous the court will be reluctant to pronounce the same as defective. Accordingly, I find no merit in ground number **two** of appeal and I hereby dismiss it.

On ground number 3, I have reviewed and analysed the defence offered by the appellant. I am fully aware that the legal burden of proof in criminal cases never leaves the prosecution's backyard. This ground calls for close scrutiny of the evidence on record and also an examination of the defence advanced by the accused. In *Uganda vs. Sebyala & Others*,^[24] the learned Judge citing relevant precedents had this to say:-

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts”

A close examination of the defence offered clearly shows that it does not create doubts on the strength of the prosecution case. In my view, the defence did not rebut the serious allegations made in support of the charges against the appellant. Thus I find no merit in ground number 3 of the appeal.

After evaluating the evidence adduced, the law and authorities, I am satisfied that the prosecution proved the offence of defilement under section **8 (1)** as read with section **8 (2)** and that the necessary ingredients of the offence as enumerated above were proved beyond doubt. The upshot is that the learned magistrate correctly analysed the evidence and properly convicted the appellant. I hereby uphold the conviction.

Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.^[25] In *Shadrack Kipchoge Kogovs Republic*,^[26] the court of appeal stated:-

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

The Supreme Court of India in *State of M.P. vs Bablu Natt*^[27] stated that:-

"the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with."

In *Alister Anthony Pareira vs State of Maharashtra*,^[28] the court held that:-

“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances”

Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.^[29]

Section 8 (2) of the Sexual Offences Act^[30] provides that a person guilty of an offence under this section is liable upon conviction to imprisonment for life. I have considered the seriousness on the said offence, the age of the victim at the material time and the principles of sentencing, and I find no reason to interfere with the sentence of 20 years imposed by the trial court.

The upshot is that this appeal on both conviction and sentence fails and the same is hereby dismissed.

Dated at Nyeri this 1st day of March 2016

John M. Mativo

Judge

^[1] No. 3 of 2006

^[2] Ibid

[3] {1972} E.A, 32at page 36

[4] See Pandya vs Republic {1957}EA 336

[5] See Peter vs Sunday Post {1958}EA 424

[6] Cp 75, Laws of Kenya

[7] Supra

[8] Criminal Appeal no. 661 of 2010,(Eldoret), D. K. Maranga, D. Musinga& A. K. Murgor JJA

[9] Criminal Appeal No. 84 of 2005 (Mombasa)

[10]Criminal Appeal no. 504 of 2010 cited in Martin NyongesaWanyonyi vs Republic, Criminal Appeal no. 661 of 2010

[11] {2013}eKLR

[12] High Court Cr Appeal No. 123 of 2009, Eldoret

[13] High Court Criminal Appeal No. 404 of 2009 (Nairobi)

[14] High Court Criminal Appeal No. 172 of 2012

[15] Criminal Appeal no 2 of 2000- Court of Appeal

[16] Supra

[17] Ibid

[18] Infra note 8

[19] {1969} EA 280

[20] {1967} EA 345

[21] See Yosefu and Another vs Uganda {1960} EA 236

[22] {2004}2KLR 480

[23] See Fappyton Mutuku Ngui vs Republic CA Cr app no. 32 of 2013-Kiahar Kariuki, Maraga & J. Mohammed

[24]{1969} EA 204

[25]See Makhandia J (as he then was in Simon NdunguMurage vs Republic, Criminal appeal no. 275 of 2007, Nyeri.

[26]Criminal Appeal No. 253 of 2003(Eldoret), Omolo, O'kubasu&Onyango JJA)

[27] {2009}2S.C.C 272 Para 13

[28] {2012}2 S.C.C 648 Para 69

[29] See Soman vs Kerala {2013} 11 SC.C 382 Para 13, Supreme Court of India

[\[30\]](#) Supra