REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 205 OF 2014

PATRICK NZIOKA DAVID.……………….…….APPELLANT

VERSUS

REPUBLIC…………………..……………..…....RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. M.A. O Opanga. Ag SRM delivered on 7th May 2014 in Sexual Offences Case No. 28 of 2011 in the Principal Magistrate's Court at Kithimani)

JUDGMENT

The Appellant was convicted of, and sentenced to serve twenty (20) years imprisonment for the offence of defilement of a child, contrary to section 8(1) (3) of the Sexual Offences Act. The particulars of the offence were that on 5th September 2011 in Yatta District within Machakos County, the Appellant intentionally and unlawfully did an act which caused penetration of his genital organ (penis) into the genital organ (vagina) of P M K, a child aged 14 years.

The Appellant pleaded not guilty to the charge on 4th October 2011. The hearing commenced before the trial magistrate who heard five prosecution witnesses, and put the Appellant on his defence.

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 submissions dated and filed in Court on 13th July 2016 by Andrew Makundi & Company Advocates, the Appellant's learned counsel.

The grounds of appeal are as follows:

1. THAT the Learned Trial Magistrate erred in law and in fact in failing to find and appreciate that the charge sheet before Court was defective.

2. THAT the Learned Trial Magistrate erred in law and in fact in pronouncing a judgement that did not confirm with the mandatory provisions of Section 169 (i) of the Criminal Procedure Code, Cap 75 Laws of Kenya.

3. THAT the Learned Trial Magistrate erred in law and in fact in admitting the opinion evidence of PW5 without subjecting it to scrutiny in view of other evidence before Court and as to whether or not evidence of a sexual nature can be confirmed 72 hours after alleged occurrence of the incident.

4. THAT the Learned Trial Magistrate erred in law and in fact in failing to enquire as to the basis of

the opinion of PW5 that defilement had taken place even in the absence of a high vaginal swab.

5. THAT the Learned Trial Magistrate erred in law and in fact in failing to analyse, evaluate and make a finding on material inconsistence in the evidence of the prosecution witnesses, and particular PWI, PW2 and PW4.

6. THAT the Learned Trial Magistrate erred in law and in fact in failing to critically analyse the testimony and evidence of PW3 as a popular age witness.

7. THAT the Learned Trial Magistrate erred in law and in fact in ignoring the testimony called by the appellant in support of his case by merely arresting "the two witnesses he called did not help his case either," without giving the reasons for so holding .

8. THAT the Learned Trial Magistrate erred in law in sentencing the appellant and the sentence imposed was excessive in the circumstances and a miscarriage of justice was occasioned.

The Appellant argued, as to the defective charge sheet, that the evidence adduced was that the Appellant defiled the complainant on 6th September 2011, which did not reflect the particulars in the charge sheet that the defilement took place on 5th September 2011. Further, that the trial magistrate dismissed the Appellant's defence without any explanation and reasons contrary to section 169 of the Criminal Procedure Code. The evidence of PW5 was also challenged on the ground that the examination of the complainant was done 4 days after the alleged defilement and without a high vaginal swab having been undertaken.

The material inconsistencies alleged in the evidence, was the inconsistency between the evidence of PW1 and PW3 as to whether the complainant was forcefully taken by the Appellant to his house, and that it was evident from their evidence that the complainant went voluntarily to the said house. Further, that PW2 testified that the complainant was 11 years old as at the time of the commission of the offence, and yet the child health clinic produced by the witness showed that the complainant was born on 1st May 1998 and was therefore 13 years of age.

Ms Rita Rono, the learned prosecution counsel, filed written submissions dated 22nd August 2016 in opposition to the appeal. It was urged therein that the complainant testified that she was defiled on both 5th and 6th September 2011, and that the omission of one of the dates in the particulars of the charge did not render it defective or occasion failure of justice, as it disclosed the offence the Appellant was charged with.

Further, that the trial magistrate complied with section 169 of the Criminal Procedure Code in her judgment, as she analysed the evidence by the prosecution and defence and was satisfied that it merited the conviction of the Appellant. Lastly, that the evidence of PW5 confirmed that the complainant was defiled, and the child health card produced as an exhibit showed that the complainant was born on 1st May 1998 and was a minor at the time of the time of the offence and not capable of giving consent or making her own decisions.

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 evidence adduced by the prosecution in summary was that the complainant, P M K who was PW1, met the Appellant who she knew on 5th September 2011 at about 7pm, on her way home after she had been sent by her mother to buy milk. The Appellant then led her to his house and that they slept in his bed that night, during which he removed his penis and inserted it into her vagina. She left the Appellant's house in the morning and he told her to go and visit him again. The complainant went to the Appellant's house again on 6th September 2011 and slept in his house, and left on 7th September 2011 when she went

to her auntie's house.

PW2, L W N, who was the complainant's mother confirmed that PW1 did not come home on the night of 5th September 2011 and 6th September 2011, and that on the evening of 6th September 2011 they went to the Appellant's house but did not find the complainant there. PW3 was Jacinta Muthoni a neighbor of the complainant, who saw the complainant on 5th September 2011 at 7pm walking on the road with the Appellant behind her. PC Boniface Owuor (PW4) testified as to receiving the report of the complainant's defilement on 9th September 2011 from the complainant who was in the company of her mother, and that the Appellant then went missing and was arrested one month later.

The last prosecution witness was Benjamin Maingi (PW5), a senior clinical officer at Matuu District hospital, who stated that he examined the complainant and the physical examination showed that her hymen was freshly torn with fresh edges. He also did an age assessment which showed that the complainant was 13 years old.

The Appellant gave unsworn testimony in his defence and called two witnesses. He stated that the case had been fabricated by the complainant so that she could take his land. DW2 was Paul David Kavoi, the Appellant's father, and DW3 was Alice Katuo the Appellant's mother, and they both testified that the parents of the complainant came looking for her at their son's house and did not find her. Further, that the Appellant was arrested two weeks later.

After going through the grounds of appeal, the arguments made, and evidence of the prosecution witnesses and that of the Defence, 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 he was convicted for the offence of defilement on the basis of sufficient and consistent evidence; and thirdly whether section 169 of the Criminal Procedure Code was complied with by the trial magistrate.

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."***

In this appeal I am in agreement that there was a defect in the charge but not for the reasons advanced by the Appellant. For the avoidance of doubt, the reasons given by the Appellant were that the charge sheet was defective as the particulars indicated that the defilement occurred on 5th September 2011, yet the complainant testified that she was defiled on 6th September 2011. This particular argument is adequately addressed by section 214(2) of the Criminal Procedure Code which provides as follows:

> **"(2) Variance between the charge and the evidence adduced in support of it with respect to**

the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."

The said defect is therefore not material and it is not necessary to amend the charge on account of a contestation by the Appellant as to the dates when the offence was committed.

However, after perusal of the record of the trial Court, I noted in this respect that on 18th June 2013, while PW5 was giving his evidence-in-chief, the prosecution applied to amend the charge sheet for the age of the complainant to read 11 years instead of 13 years.

The proceedings in this regard are recorded as follows:

"Prosecutor

I wish to amend the charge sheet to have the age of the minor read 11 years and not 13 years

Accused

No Objection.

Court

Age amended on the charge to read 11 years.

M.A.O.OPANGA

AG. SENIOR RESIDENT MAGISTRATE

18.6.2013

PW5 Continues

I also took samples to the lab. I wish to present lab result and P3 form as exhibits.

Cross examined by Accused

It is not my work to bring you to hospital. I did not say you defiled her. I said the minor was defiled.

Prosecutor

I wish to close the prosecution case at this stage."

The trial magistrate then ruled that from the evidence adduced, a *prima facie* case had been established against the Accused person to warrant him to be put on his defence.

Section 214(1) of the Criminal Procedure Code in this regard provides for the rights of an accused person upon the amendment of a charge 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;

(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 Appellant did not plead to the amended charge or recall witnesses, and no directions or explanations were given to this effect by the trial magistrate. The witnesses who had testified as to the age of the complainant, particularly PW1 and PW2, needed to be recalled to be cross-examined on the amended charge, and the proceedings that followed after the amendment of the charge in the trial court were to this extent irregular. As the age of a victim of a sexual offence is a material factor in the kind of charge preferred and sentence that will be imposed in the event of a guilty finding, this irregularity is one which prejudiced the Appellant and cannot therefore be cured by section 382 of the Criminal Procedure Code.

More fundamentally it is not clear from the trial record what charge the Appellant was facing, as the charge sheet on record states that the offence the Appellant was charged with was defilement contrary to section 8(1)(3) of the Sexual Offences Act and that the complainant was aged 13 years old at the time of the offence, and this is the charge that is the basis of the judgment and conviction by the trial magistrate delivered on 7th May 2014. However, in light of the amendment that was allowed to the charge sheet during the proceedings, the applicable penalty section when a complainant is 11 years old is section 8(2)of the Sexual Offences Act which provides as follows:

" 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."

No amended charge sheet is on the record of the trial Court, and the proceedings in the trial Court therefore in addition violated the constitutional right of the Appellant to be informed of the charge, with sufficient detail to answer it as is provided in Article 50 (2) (b) of the Constitution.

I therefore find for the above reasons that the conviction of the Appellant on the basis of the charge sheet before the trial Court and irregularity in the proceedings was not safe, and allow the appeal.

I accordingly quash the conviction of the Appellant for the offence of defilement, contrary to section 8(1)(3) of the Sexual Offences Act. I also set aside the sentence of twenty 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 DECEMBER 2016.

P. NYAMWEYA

JUDGE