REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 179 OF 2013

SHADRACK MOI ...…..... APPELLANT

VERSUS

REPUBLIC ….....….….... RESPONDENT

(B*eing an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Criminal Case No. 14 of 2013 by*

Hon. S.A. Ogot - RM on 2/8/2013)

J U D G M E NT

1. The appellant was charged with the offence of defilement contrary to **Section 8(1) as read with Section 8(4)** of the **Sexual Offences Act No. 3 of 2006.** Particulars thereof being that on diverse dates between O**ctober 2012** and **21st May 2013** at unknown time at **Ikutha market** of **Ikutha District** within **Kitui County**, intentionally caused his penis to penetrate the vagina of **M K K** a girl aged **16 years.**
2. In the alternative he was charged with the offence **of committing an indecent act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence being that on diverse dates between the month of **October 2012** and **21st May 2013** at unknown time, at **Ikutha market** in **Ikutha District** within **Kitui County**, intentionally touched the vagina of **M K K** a girl aged **16 years** with his penis.
3. He was tried and convicted on the main count. He was sentenced to serve **twenty-five (25) years** imprisonment.
4. Being dissatisfied with the conviction and sentence he now appeals on grounds that:

i. The trial was a nullity having proceeded on a defective charge.
ii. The appellant was prejudiced due to failure to amend the defective charge.
iii. The appellant was not accorded a fair trial.
iv. The sentence meted out was illegal since the age of the complainant was not proved.

5. The prosecution's case was that PW1, **K M K** met the appellant in the **year 2012**. They exchanged contacts. Thereafter they had a relationship. They engaged in consensual sexual intercourse. She conceived.

   On the **21st May 2013** while pregnant they met and engaged in sexual intercourse at his friend's house. A woman who turned out to be the appellant's wife caught them inside the house and beat her up. She was in pain. She left and informed her mother. They reported the matter to the police. She was treated and a P3 form filled. The appellant was arrested and charged.

6. In his defence the appellant admitted having known the complainant. It was his evidence that when they met the complainant was in class 8. They agreed to get married. She did not want to go to secondary school. Her wish was to go to a college for salonists. He promised to take her to college. She told him that she was 18 years old. She was big bodied therefore he believed her. They had sexual intercourse in October 2012 then lost contact until November 2012 when he was arrested. **M** could not be found. He was released. Thereafter, in **May 2013** they met at a friend's house. A woman went in search for him. The woman assaulted the complainant. These events led to his arrest.

7. The appellant relied upon written submissions. The state counsel, **Mr. Njogu,** submitted that the appellant wanted to marry the complainant thinking that she was above the age of **18 years** having told him that she was born in **1995**. The calculation of the years would still make the complainant a minor. Having been a child in primary school he would still ascertain her age. It was established that the complainant was aged **13 years** having been born in **1999** therefore the trial magistrate convicted the appellant under **Section 8(1)** as read with **Section 8(3**) of the **Sexual Offences Act,** where the minimum sentence prescribed is **20 years** imprisonment. The sentence imposed was therefore legal.
8. This being the first appeal, my duty as a court is to re-evaluate the evidence, draw my own inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial court. **(See Okeno versus Republic (1972) E.A. 32).**
9. It is the contention of the appellant that the charge was defective and having been convicted on such a charge, he was prejudiced. The charge can only be fatally defective if it does not allege essential ingredients of an offence. The case of **Sigilai versus Republic (2004) 2 KLR 480 –** it was stated thus:

> **"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence".**

10. It is apparent that the charge as drawn having been read to the accused disclosed ingredients of the offence of defilement. He pleaded to it, participated in the trial, cross-examined all witnesses and tendered his defence. In the premises he cannot be heard to allege that the charge was fatally defective.
11. What is apparent on record and not disputed is the fact that the court purported to exercise powers of amendment at any stage of proceedings as provided by the law. But at the point of writing judgment on the main charge, the appellant was charged with defilement contrary to **Section 8(1)** as read with **Section 8(4**) of the **Sexual Offences Act No. 3 of 2006.** In her analysis of evidence adduced in her judgment, the trial magistrate stated thus:

> **"I have also noted the discrepancies in the age of the minor. She indicates she was born in 1999 in her examination in chief. She also states she was 15 years old. Her mother indicates that she was born on 20th October 1999, and presented her immunization card as proof of said age, and which the accused person did not dispute. If we are to consider the age indicated therein, then her age at the time of the first incident in August 2012 would have been 13 years and not 16 years as indicated in the charge sheet, thereby rendering the sentencing section as Section 8(3) and not 8(4)…"**

On that basis, she reached a finding that the prosecution had proved its case contrary **to Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. She proceeded to convict the appellant.

12. The court's discretion in allowing amendment of charges is derived from **Section 214** of the **Criminal Procedure Code** which stipulates thus:

"(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 court acted in an endeavor to make evidence adduced meet circumstances of the case. The conviction following the amendment failed to take into consideration the rights of the appellant as envisaged by the law. Looking at the kind of defence he came up was a result of the age of the complainant having been given as 16 years in the charge sheet. He least expected that the court would find that the child would be **13 years** old and that he would be convicted under a section of the statute that attracts not less **than 20 years imprisonment.** The charge having been amended in substance without the expectation of the appellant was indeed prejudicial to him **(See Yongo versus Republic 1983 KLR, JNMV Republic 2013 KLR).**

13. The age of the child in this case was contentious. In the case of **Francis Omuroni versus Uganda**, **Criminal Appeal No. 2 of 2000** it was held interalia, that:

> **"In defilement case, medical evidence is paramount in determining the age of the victim and that 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."**

14. In this case a **child health card** (immunization) was produced. The trial magistrate stated that the appellant did not dispute it. What the learned magistrate failed to do was to scrutinize the card and also the book (treatment notes) made in respect of the appellant on the **11th April** at the **Anti Natal Clinic (ANC).** Both documents have alterations in respect of the age of the complainant. The Medical Practitioner who filled the P3 form examined the complainant and found her to be aged **16 years.**
15. On the Immunization Child Health Card, the date when the child was first seen is altered. There is a **'9'** overwritten on **'8'** as to the birth order. Child number 1/99 is overwritten on another number. The date **'4/2/99'** is overwritten on another date, the last digit seems to be **'5'.** The mother of the child claimed that the complainant was born on the **20th October 1999**. This evidence contradicts the information inserted on the card following the alteration which purports to indicate that the child was first seen on the **4/2/99.** There is no way a child could be seen at the hospital prior to her date of birth. The card also bears an outpatient **No. 188/98.** It is indicated on **4/2/98** – the **'8'** is also written on a digit hence altering it – that was the date the child was taken to hospital to be weighed. The book issued to the complainant at an anti natal clinic on the **11th April 2013** has her age indicated as **'16 years.'** It is then altered to read '**13' years**.
16. In court the complainant said she was aged **15 years.** The discrepancies in respect of the age of the complainant as established should have required the trial court to make an observation of the complainant. Having failed to do so, the court should have relied on the evidence of the Medical Practitioner that established that at the time of examination the complainant was aged **16 years** old.
17. It is not in dispute that the appellant engaged in sexual intercourse with the complainant. The

appellant claimed that he believed the complainant was of age having allegedly been told that she was born in 1995.

18. The question to be answered is whether there was a strong probability that would make him believe that the complainant was over **eighteen (18) years.** Their first encounter was in **June 2012.** He said they had sex for the first time in **August 2012.** Having been told that she was born in 1995 and the fact that she was a standard 8 pupil having been within his knowledge, he was fully aware that she was below the age of **18 years.** Therefore, she had not capacity in law to consent to any sexual intercourse.
19. It was, therefore, a misdirection on the part of the trial magistrate to purport to amend the charge. She should have convicted the appellant as charged.

20. In the premises, the charge having been proved beyond any reasonable doubt, I do quash the conviction erroneously entered by the trial court and convict the appellant as charged. The minimum prescribed sentence for the offence is not less than **15 years imprisonment.** The appellant having been a first offender, the sentence imposed is substituted with that of **15 years imprisonment.**
21. It is so ordered.

DATED, SIGNED and **DELIVERED** at **KITUI** this **17TH** day of **JULY, 2014.**

L.N. MUTENDE

JUDGE