IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 23 OF 2013

BETWEEN

STANLEY OMAE OKEYO ……..…..…….…… APPELLANT

AND

REPUBLIC……..…….RESPONDENT

(Being an appeal from the original conviction and sentence in Homa Bay CM's Court Criminal Case No. of 774 of 2012 by Hon. N. Kariuki, RM on 2nd August 2013)

JUDGMENT

1. The appellant, **STANLEY OMAE OKEYO**, was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the ***Sexual Offences Act***. The particulars of the offence were that on 9th May 2012, at [particulars withheld] in Gembe West Location within Homa Bay County, he intentionally caused his penis to penetrate the vagina of P A J a child aged 7 years.

2. The prosecution called five witnesses to prove its case. PW1, the complainant, stated that at the material time she was 9 years in Standard 2. After a *voir dire* conducted by the magistrate, she testified on oath that on 9th May 2012, her mother and father had gone to Sindo to buy Omena for sale leaving her and her siblings at home. The appellant came to their home at about 1 pm and told her that he had an item to deliver. He also requested her to take a sack and go with him to collect some grains outside. The two left the house together. When they reached the river, the appellant told her to spread the sack on the ground. He removed her clothes and his trouser and he proceeded to have intercourse with her. Afterwards, she wore her clothes and returned home. She informed her mother, PW 2, that if she saw the man she would identify him. PW3, her brother, recalled that on 5th June 2012, the appellant came home while he was with his siblings. He knew him physically but not by name. The appellant left with PW1. He stated that PW1 came back crying. Although he asked PW 1 what had happened she did not tell him immediately but told her later.

3. PW2 confirmed that PW1 was 9 years old by producing the baptismal card. She testified that she left home on 5th May 2012 with her husband and returned on 8th May 2012. She noticed that her daughter could not walk properly. When she asked what happened, PW 1 narrated her ordeal to her. She also checked PW 1's vagina and found something like blood. She reported the matter to the Mbita Police Station and was issued with a P3 form on 9th May 2012. She thereafter took her to Mbita Hospital. PW 2 stated that PW 1 identified the appellant to her. She reported this to the Chief who arrested the appellant.

4. PW4, the Clinical Officer at Mbita District Hospital confirmed that he filled the P3 form issued on

9th May 2012 at Mbita Police Station after examining PW1 on 20th June 2012. PW4 found that the labia minora and majora were normal though the hymen was broken. He concluded that there had been a sexual encounter before. He did not notice any physical injury nor review the initial treatment notes.

5. PW5, a police officer, at Mbita Police Station recalled that on 9th May 2012, he was at the station when a defilement report was made by PW2 and the P3 form issued. He recorded the statements from PW1 and PW 2. He stated that the accused was arrested by an officer at Sindo.

6. When called upon to make his defence, the appellant gave sworn testimony. He stated that on 7th May 2012 at about 10 am he saw some four goats in a garden and a young girl. He slapped the girl until she bled from the nose. Officers from Luanda Chief's Camp came to take him at 2.00 pm. They questioned him and later took him to Mbita Police Station. He was later taken to Mbita District Hospital and examined. He stayed in the cell until he was released on 11th May 2013. He states that he was arrested on 19th June 2012 while at a beach seminar and arraigned in court on 21st June 2012.

7. After hearing, the appellant was convicted of the offence and sentenced to life imprisonment. He now appeals against the conviction and sentence. In the amended petition of appeal dated 24th March 2014, the appellant challenges the conviction and sentence on the following grounds;

1. *The Learned trial Magistrate misdirected herself on several matters of law and fact in that:-*

    a. *She amended the charge as to the date when the offence was committed without following the laid down procedure and during the delivery and writing of the judgment,*
    b. *She gave the benefit of the doubt raised by the evidence as to the date of the offence to the complainant instead of giving the benefit of doubt to the accused as by law provided.*
    c. *She placed herself in an adversarial arena by unprocedurally correcting a purported mistake made by the prosecution without any cause or evidence justifying the same.*
    d. *She engaged herself on the issue of identification which, going by the evidence of the prosecution and the evidence of the accused, was not a triable issue.*
    e. *She failed to appreciate the fact that the appellant did not have a lawyer to defend his case during trial and that the court had a responsibility to guide the parties in the circumstances.*

2. *The Learned trial magistrate erred in law of evidence in relying on and accepting medical evidence of an examination done more than forty five (45) days after the alleged commission of the offence whereas the appellant was arrested on the same day of the alleged offence and was released due to lack of evidence.*
3. *The Learned Magistrate erred in law of evidence relating to corroboration of evidence adduced by a child of tender years in relying on the repealed version of section 124 of the Evidence Act (Cap 80) thereby resulting in a miscarriage of justice.*
4. *The Learned Trial magistrate erred in law of evidence in deciding the case against the weight of evidence in that:-*

    a. *The court having acknowledged the contradictions in the prosecution case evidence downplayed the same so as to support a conviction.*
    b. *She failed to consider and appreciate the defence of the appellant which was probable in the circumstances considering the fact that the medical evidence was not credible at all.*

5. *The Learned trial magistrate erred in law in failing to appreciate that the ingredients of the offence charged were not fully proved by the prosecution beyond any reasonable doubt.*
6. *That Learned Trial magistrate erred in law in passing a maximum sentence available under the law without weighing the facts of the case and the surrounding circumstances.*

8. As this is the first appeal, this Court is obliged to independently re-evaluate the evidence and come

to its own conclusion noting that it neither heard nor saw the witnesses (see ***Okeno v Republic* [1972] EA 32)**.

9. The first issue the learned magistrate dealt with, which is the first ground of appeal, was the exact date on which the offence was committed. The learned magistrate stated as follows;

> *The exact date on which the offence before the court took place is uncertain as different witnesses have attested to difference dates with regards to the material date on which the offence took place.*
>
> *The prosecution stated in their charge sheet dated 21st June 2012 that the offence before the court took place on 9th May 2012. PW 1, the complainant stated that the offence took place on 5th May 2012. PW 2, the complainant's mother stated that the offence took place on 5th May 2012 but she personally learnt of the same on 8th May 2012. PW 3 on the other hand stated that the offence took place on 5th June 2012. PW 4 stated that the incident took place on 5th May 2012. I have examined the P3 form and PCR form produced by PW 4 and they state that the offence took place on 5th May 2012. I am of the view that the offence probably took place on 5th May 2012 as evidenced by PW 1, PW 2 and PW 3. PW 5 stated that the offence was reported on 9th May 2012. The same date of 9th May 2012 was indicated on the P3 form (exhibit 1) as the date when the offence was reported to the police. The accused did not bring up the issue of the differences in the dates on which the offence allegedly took place. It is on that premise that I (sic) find that (sic) the date of the offence was 5th May 2012 and the date of 9th May 2012 as indicated in the charge sheet by the prosecution as mistake on their part.*

10. Mr Okoth, counsel for the appellant, attacked the reasoning on the basis set out in ground 1 of the amended petition of the appeal. He submitted that the conclusion of the learned magistrate amounted to an amendment of the charge without giving the appellant the opportunity to plead to it contrary to **section 214** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** which occasioned a grave injustice to the appellant. In response to this argument, Ms Ongeti, learned counsel for the State, submitted that the variation between the charge and the evidence was not fatal in the circumstances and was curable by **section 318** of the ***Criminal Procedure Code***.

11. **Section 214** of the ***Criminal Procedure Code*** allows the amendment of a charge where there is such variance between the evidence and the charge. It provides as follows;

> *214(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.*

> *(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.*

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

12. **Section 382** of the ***Criminal Procedure Code*** provides as follows;

> *382. 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, judgment 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, 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.*

13. The conflict between the positions taken by learned counsel for the appellant and State is answered by the decision of the Court of Appeal in ***Kimeu v Republic*** **[2002] 1 KAR 757** the Court held that; *"The position in law is that not every conflict between the particulars of the charge and the evidence which will vitiate a conviction especially with conflicts are minor or of such a nature that no discernable prejudice is cause to the accused."*

14. In dealing with the issue when the offence was committed, the learned magistrate recognized that the evidence pointed to different dates. The learned magistrate fell into error by holding that the accused did not bring the differences in dates in contention as the accused does not bear the burden of proving the particulars of the charge which includes the particular date on which the offence was committed. The duty lies squarely on the prosecution to prove the case it has set out in the charge sheet beyond reasonable doubt (see ***Leonard Aniseth v Republic*** **[1963] EA 206**, ***Okethi Okale v Republic*** **[1965] EA 555**).

15. The question to consider is whether the variation between the date in the charge and the evidence presented was prejudicial to the accused or whether, in the words of **section 382** of the ***Criminal Procedure Code***, such variation occasioned a failure of justice? The charge sheet, in essence gives notice to the accused the case that the prosecution must prove. The date of the offence is material particularly since the appellant is entitled to counter the prosecution case establishing or pointing to facts undermining it. Had the provisions of **section 214** of the ***Criminal Procedure Code*** been followed, the appellant would have had an opportunity to defend himself based on the charge before the court. I therefore find that the appellant was prejudiced in the circumstances by failure to state the actual date of the offence in the charge and presenting, as part of the evidence, different dates on which the offence could have been committed and finally determining such a date in the judgment without giving the appellant the opportunity to answer to it.

16. In light of my findings above it is unnecessary to consider the other grounds of appeal preferred against the conviction and sentence. The question that remains for determination is whether a re-trial should be ordered.

17. The principles governing whether or not a retrial should be ordered were enunciated in ***Fatehali Manji v Republic*** **[1966] E.A. 343** East Africa Court of Appeal stated, *"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should*

not be ordered where it is likely to cause injustice to the accused person." In ***Mwangi v Republic*** **[1983] KLR 522** the Court of Appeal held that, *"We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result: Braganza v R (1957) EA 152 (CA) 469 Pyarala Bassan v R [1960] EA 854. In our view, there was evidence on record which might support the conviction of the appellant."*

18. There is ample evidence in support of the charge. The complaint and other witness, I believe would be readily available to give evidence and given the nature of the offence, I think it is in the interests of justice that he appellant be retried.

19. I therefore allow the appeal and quash the conviction and order that the appellant be retried before any other magistrate other than Hon. N. Kariuki, SRM.

20. The appellant shall remain in custody until such time as he taken to court to plead to the fresh charges on 4th July 2014 before the Chief Magistrates Court, Homabay.

DATED and DELIVERED at HOMABAY this 3rd day of July 2014.

D.S. MAJANJA

JUDGE

Appellant in person

Ms Ongeti, Prosecution Counsel, instructed by Office of the Director of Public Prosecutions for the respondent.