



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. E022 OF 2024**

**CHARLES MUSA KUTSWA .....**

**APPELLANT**

**VERSUS**

**REPUBLIC .....**

**RESPONDENT**

**(Being an appeal against the Judgement by Hon. GLADYS OLLIMO  
(RM) in Butere PM's Court S.O No. 46 of 2020 delivered on 7<sup>th</sup> April  
2021)**

**JUDGEMENT**

**Background**

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 6/9/2020, at (particulars withheld) within Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of ABA, a child aged 11 years, a pupil. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to

Section 11 (1) (b) of the Sexual Offences Act. It was alleged that on 6/7/2020, at (particulars withheld) within Kakamega County, he intentionally and unlawfully touched the vagina of ABA, a child aged 11 years old with his penis.

2. After the Appellant pleaded not guilty, the case proceeded to hearing and four witnesses testified for the prosecution. When placed on his defence, the Appellant gave a sworn statement. He did not call any witnesses. In a Judgement delivered on 7/4/2021, the trial Magistrate found the Appellant guilty of the offence of defilement contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act and subsequently sentenced him to life imprisonment.
3. The Appellant was aggrieved by the conviction and sentence of the trial court, he lodged an appeal set down the following grounds of appeal:-
  1. *THAT, the trial magistrate erred in law and facts by basing my conviction and prosecution case marred discrepancies, inconsistencies and contradictions.*
  2. *THAT the prosecution case was not proved beyond reasonable doubt.*
  3. *THAT, the main ingredients for the offence of defilement i.e. penetration, age of the victim and identify of the perpetrator were doubtful.*
  4. *THAT, my mode of arrest was unconstitutional.*

5. *THAT, I did not benefit from the least severe punishment as enshrined in the Constitution.*
6. *THAT, my right to fair trial under Article 50 (2) of the Constitution was violated, as I was not supplied with documentary evidence the prosecution was to rely on before the case.*
7. *THAT, may the Hon. court be pleased to supply me with certified proceedings to enable me erect supplementary grounds.*

#### **The Evidence in Brief**

4. The victim testified as PW11. She was first taken through *voire dire* examination and the court concluded that she was possessed of sufficient intelligence and could distinguish between the truth and falsehoods but did not understand the meaning of an oath. She therefore gave unsworn evidence. She said that she was 11 years and in Class 4. She said that the Appellant was a watchman and worked with her mother at S. Hospital. She recalled that on 6/9/2020 the Appellant went to their residence in the evening when she was alone. He sat down and asked her to switch on the TV for him. He watched TV while she went to bathe S. After bathing S, she placed her on the couch. Her mother called and the Appellant warned her not to inform her mother that he was in the house lest he kill her. She then went to take a shower in a bathroom that was outside then entered her mother's room to dress. The Appellant followed her to the bedroom, took the lasso she had wrapped herself with and tied it around her mouth, then inserted his penis in

- her vagina. He was wearing blue underwear and had removed his trouser before defiling her. S entered the bedroom and the Appellant shooed her away. When he finished defiling her, the Appellant dressed up and left Kshs. 20/= on the table in the sitting room and told S. to give the victim the cash.
5. The victim said that her mother called shortly thereafter and found her crying. She told her mother that the Appellant had raped her. Her mother came and escorted her to hospital where she was treated. Later, the Appellant whom she identified in court, was arrested.
  6. In his defence, the Appellant denied committing the offence. He said that on the material date, he was at home and left to Khwisero market where he was going to meet someone at 2.00 p.m. At 4.00 p.m., he headed to his work place and while there, he saw police officers who arrested him and escorted him to the police station where he was accused of raping a minor. He said that he could not have committed the offence as he was already in police custody on 7/9/2020 yet the victim's mother told the court that the incident occurred on 7/9/2020. He also claimed that the victim's mother framed him because they never had a cordial relationship at the work place.
  7. The appeal was canvassed through written submissions but only the Appellant filed written submissions.

### **Appellant's Submissions**

8. The Appellant submits that the charges against him were defective as he was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act yet the particulars of the offence did not support the charges as they did not fit in the definition of Section 8 (4) of the Sexual Offences Act. He submits that he was prejudiced as he faced difficulty not knowing exactly what charges he was facing. He also submits that the charge sheet does not indicate where and when the incident was first reported and this made the charges defective.
9. The Appellant also submits that his plea was equivocal and so the conviction and sentence must be quashed. The Appellant further submits that the trial was defective in that the parties were not given a chance to tender final submissions before the judgement was rendered. He relies on **Section 213 of the Criminal Procedure Code** and **Akhunga v. Republic [2003] eKLR**.
10. The Appellant further submits that the prosecution's case was full of contradictions, discrepancies and doubtful evidence and so it failed to prove its case beyond reasonable doubt. He contends that the age of the victim was not proven as the prosecution relied on a photocopy of a birth certificate which had variation in serial numbers. He relied on the case of **Eliud Waweru Wambui v. Republic [2019] eKLR**. He also submits that the prosecution relied on documents which were only marked for identification and not produced and which had not been served upon him.

11. The Appellant further submits that penetration was not proved and that absence of a hymen is not prove of penetration. He further posits that the medical evidence relied on was produced by an unqualified person and should not be relied on. Finally, he submits that the trial court shifted the burden of proof to the defence.

### **Analysis and Determination**

12. The duty of the court in a first appeal is spelt out in **Okeno v. Republic [1972] EA 32** which is to review and re-evaluate the entire evidence on record so as to arrive at its own independent conclusion bearing in mind the fact that unlike the trial court, it did not have the privilege of observing the witness firsthand as they gave evidence.
13. From the memorandum of appeal and the submissions, the court deduces the following issues for determination:-
- (a) Whether the Appellant's right to a fair trial under Article 50 (2) of the Constitution was violated.*
  - (b) Whether the charge sheet was fatally defective.*
  - (c) Whether the prosecution 's case was marred with discrepancies, inconsistencies and contradictions.*
  - (d) Whether the ingredients of the offence of defilement were proved beyond reasonable doubt.*
14. Under Article 50 (2) of the Constitution, an accused person has a right to a fair trial. This entails inter alia, the right to be informed of the charge, with sufficient detail to answer and adequate time and

facilities to prepare a defence. Pursuant to Article 25 (c) of the Constitution, the right to a fair trial is non-derogable fundamental right. A vital component of this right is the right to be furnished at the earliest time before the hearing with witness statements and documentary evidence to enable the accused prepare for his defence as provided in Article 50 (2) (j) of the Constitution which states:-

**“(2)Every accused person has the right to a fair trial, which includes the right—**

**(j)to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”**

15. From the trial record, on 9<sup>th</sup> August 2020 immediately after the Appellant took his plea, the Appellant was informed of his right to legal representation after which the prosecution furnished him with copies of the witness statements, investigation diary, P3 form, treatment notes and copy of the charge sheet, receipt of which documents the Appellant acknowledged in court. It is therefore clear that the prosecution and the trial court fully complied with the constitutional imperative for a fair trial and there is no basis for the Appellant’s claim that he was not supplied with the documentary evidence as the checklist dated 8/9/2020 confirms that Appellant was supplied with the said documents.

16. The charge sheet indicates that the Appellant was charged with defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. The particulars of the charge are that the Appellant defiled a child aged 11 years old. Section 8 (1) and 8 (4) of the Sexual Offences Act provide:-

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

**“8 (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”**

17. From the Judgement, the Appellant was convicted of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. Section 8 (2) stipulates:-

**“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.”**

18. Section 134 of the Criminal Procedure Code 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 reasonable information as to the nature of the offence charged.”**

19. In **Peter Ngure Mwangi v. Republic [2014] KECA 405 (KLR)**, the Court of Appeal stated:-

**“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40<sup>th</sup> Edn), page 52 paragraph 53, this Court stated in YONGO V R, (1983) eKLR that:**

***“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:***

***(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,***

***(ii) when for such reason it does not accord with the evidence given at the trial.”***

20. The Court of Appeal considered the effect of a defective charge sheet in **Ombuna v. Republic [2019] KECA 994 (KLR)** and held that:-

**“15. In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet**

**prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him, and as a result, he was not able to put up an appropriate defence.”**

21. From the record, there was no amendment of the charge sheet so whereas the Appellant faced charges of defilement of a child between the age of sixteen and eighteen years, the evidence led by the prosecution sought to prove that the Appellant defiled a child aged eleven years or less which attract a maximum sentence of life imprisonment. The mis-citation of the penalty section rendered the charge defective but the question is whether the defect was fatal.
22. The trial court did not address the issue of the defect in the charge sheet but proceeded to convict under the appropriate section, notwithstanding the defective charge sheet.
23. Section 382 of the Criminal Procedure Code provides a remedy for a defective charge sheet that is not fatally defective. It states that:-  
**“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.”**

24. The Sexual Offences Act is a unique statute in that whereas the essential ingredients of the offence of defilement under Section 8 (1) remain the same, the penalty Clauses comprising Section 8 (2), (3) and (4) are distinct and varied with the resultant punishment upon conviction graduating from the least severe punishment where the offence involves older victims to the most severe of the penalty where the victim is younger.
25. The particulars laid out in the charge sheet were unambiguous and explained clearly that the Appellant was charged for defiling an 11 year old child. Contrary to the Appellant’s contention, it contained sufficient particulars to enable him know when and where he allegedly committed the offence. The evidence adduced by the prosecution aligned with the particulars in the charge sheet. There was no doubt in the mind of the Appellant who cross-examined all the witnesses, regarding the nature of the charges facing him. However, the manner in which the charge itself was drafted led to

ambiguity as the penalty Section cited was at variance with the penalty Section that was eventually applied.

26. It is now settled that the test as to whether a charge sheet is fatally defective is whether the defect was such that it prejudiced the accused. In **BNT v. Republic [2025] KECA 643 (KLR)**, the Court of Appeal held that:-

**“...As this Court held in Nyamai Musyoki vs. Republic [2014] eKLR, an appellant would only be entitled to an acquittal or retrial where a defective charge sheet prejudiced them. The test for whether a defective charge sheet caused prejudice to an accused person is substantive not technical: the question to ask is whether the accused person was charged with an offence known to law and whether the charge sheet, as framed, gave him, in clear and unmistakable terms, sufficient notice and information about the allegations he was facing in order to mount a defence.”**

27. Having carefully considered the charge sheet, the proceedings and the Judgement, I am of the considered view that the defect in the charge sheet was fatal as it related to an offence whose punishment was less severe than the one the Appellant was subsequently convicted for and the variance between the charge and the evidence prejudiced the Appellant who was under the impression that he faced a charge that would attract a maximum of 15 years imprisonment but was ultimately sentenced to life imprisonment

- instead. The variation in sentence was a substantive defect that resulted in a miscarriage of justice and violated the Appellant's right to a fair trial.
28. Having said that, I find that it is not necessary to address the other issues raised by the Appellant. The appeal succeeds as the court finds the conviction unsafe. The conviction and sentence is therefore set aside.
  29. Taking into account the nature of the charges that faced the Appellant, and having reviewed the evidence, I am of the opinion that this is an appropriate case for retrial. The case is remitted to the Chief Magistrate's court for hearing afresh.
  30. Right of appeal explained.

Dated, signed, and delivered at Kakamega this 21<sup>st</sup> day of April 2026.

**A. C. BETT  
JUDGE**

**In the presence of:**

The Appellant virtually

Ms. Chala for the Respondent/State

Court Assistant: Polycap

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