IAE v Republic (Criminal Appeal 159 of 2018)
[2023] KECA 127 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KECA 127 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 159 OF 2018

F SICHALE, FA OCHIENG & WK KORIR, JJA

FEBRUARY 10, 2023

BETWEEN

IAE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kitale, (Chemitei, J), dated 12th April 2018 in HC. CRA No. 112 of 2016)

Exclusion of the words 'unlawfully and intentionally' in a charge sheet in an offence of defilement does not render a charge sheet incurably defective.

The court addressed whether the omission of the words "unlawfully" and "intentionally" in the charge sheet prejudiced the appellant, concluding it did not as those terms were not legally required and the error was curable. The court also examined the appropriateness of the appellant's conviction under section 8(3) of the Sexual Offences Act, finding no prejudice as the offence remained defilement. The court confirmed that the offence remained defilement despite the initial charge under section 8(1) and (2). The court further clarified that partial penetration sufficed for defilement and that the medical evidence, even with an intact hymen, supported the conviction. The appellant's constitutional claim of unlawful detention was unsupported.

Reported by Moses Rotich

Criminal Law *– sexual offences – defilement – ingredients of defilement – age as an ingredient of defilement – where the appellant had been charged and convicted of defilement – where the age of the victim had been captured as 11 years on the charge sheet – where the doctor later determined victim to be 15 years – whether an error on the charge sheet on age discrepancy of the victim could affect the charge of defilement, conviction, and sentencing – Sexual Offences Act, cap 63A, section 8(1) & (2).*

Criminal Procedure *– charge sheet – contents of – where the appellant was charged with the offence of defilement - claim that the charge sheet did not include the words "unlawfully and intentionally' – claim that the charge sheet was defective - whether failure to include the words 'unlawfully and intentionally' in a charge sheet for the*

offence of defilement rendered the charge sheet defective - Criminal Procedure Code, cap 75, section 382; Sexual Offences Act, cap 63A, section 8.

***Criminal Law** – sexual offences – defilement – claim by appellant that hymen was not broken – penetration without going past hymen - whether or not a complainant's hymen was broken was a fact that needed to be proved by the prosecution in an offence of defilement - Sexual Offences Act, cap 63A, section 8.*

Brief facts

The appeal originated from the Chief Magistrates Court at Kitale where the appellant had been charged with the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act, cap 63A. He was accused of intentionally causing his penis to penetrate the vagina of CN, a child aged 11 years, on March 23, 2015. The appellant also faced an alternative charge of committing an indecent act with a child contrary to the provisions of section 11(1) of the same Act, for intentionally touching the vagina of CN.

The appellant denied the charge, leading to a trial. On December 1, 2016, the trial court convicted him of the main charge and sentenced him to 20 years' imprisonment. Aggrieved by both the conviction and sentence, the appellant appealed to the High Court. However, the High Court dismissed the appeal in its entirety, upholding the conviction and sentence. Undeterred, the appellant filed the instant appeal.

Issues

i. Whether an error on the charge sheet on age discrepancy of the victim could affect the charge of defilement's conviction and sentencing.
ii. Whether failure to include the words 'unlawfully and intentionally' in a charge sheet for the offence of defilement rendered the charge sheet defective.
iii. Whether or not a complainant's hymen was broken was a fact that needed to be proved by the prosecution in an offence of defilement.

Relevant provisions of the Law

Sexual Offences Act, cap 63A

Section 8 - Defilement

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

(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.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. ...

Held

1. The appeal before the court was a second appeal. By dint of section 361(1) (a) of the Criminal Procedure Code, cap 75, (CPC), only matters of law fell for consideration. The court would not normally interfere with concurrent findings of fact by the two courts below unless such findings were based on no evidence, or were based on a misapprehension of the evidence, or the courts below were shown demonstrably to have acted on wrong principles in making the findings.
2. From section 8 (1) and (2) of the Sexual Offences Act, it was evident that there was no requirement in law for the words 'unlawfully' and 'intentionally' to be used in a charge sheet for the offence of defilement. That notwithstanding, looking at the evidence holistically, it was apparent that the appellant clearly understood the charges he was facing and he even ably cross examined the prosecution witnesses and had not demonstrated any prejudice he would have suffered by the omission of these two words.
3. There was no reason whatsoever to fault the trial court for invoking the provisions of section 179 of the CPC and convicting the appellant with the offence of defilement contrary to section 8(1) as read with section 8(3) and not section 8(2) of the Act that the appellant had been initially charged with when it subsequently became apparent that PW1 was 15 years old. The fact that that the appellant had been initially charged under section 8(1) and (2) of the Act did not change the fact that the appellant

was facing a charge of defilement. The offence still remained defilement and the appellant was properly convicted and sentenced to 20 years' imprisonment under section 8(3) of the Act. Had the appellant been convicted under section 8(1) and (2), he would have been liable to a sentence of life imprisonment.

4. The error in the charge sheet was not material as the appellant was not prejudiced in any way by the said error and the same was not fatal to the prosecution's case. Further, the error was curable pursuant to the provisions of section 382 of the CPC.
5. The appellant first alleged that his constitutional rights had been infringed, when he, in his defence stated that he was detained beyond the 24 hours' period. There was however no evidence on record to support that allegation.
6. Further, the appellant seemed to be taking issue with the fact that PW1's hymen was intact. The court had on several occasions pronounced itself with regard to penetration and medical evidence and more so the fact that that hymen need not be broken for the offence of defilement to be proved.
7. For the offence of defilement to be proved, the prosecution evidence had to show that the appellant inserted his penis into the vagina of the child. It was not sufficient that the said organs came into contact. However, partial insertion succeeded for the purposes of penetration as the said insertion needed not be complete.
8. Taking into account PW1's evidence which remained uncontroverted and which evidence was corroborated by the evidence of PW3 and PW4 who produced the P3 Form that showed *inter alia* that PW1's genitals were swollen and painful, the court could not agree with the contention by the appellant that the medical evidence on record did not prove the offence of defilement and that the prosecution's case was not proved beyond reasonable doubt notwithstanding the fact that hymen was not broken.
9. The instant court was in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of defilement against the appellant beyond any reasonable doubt and that there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement and that it was the appellant who defiled PW1 and no one else.

Appeal dismissed.

Orders

Conviction and sentence upheld.

Citations

Cases

Kenya

1. *Chemagong, Richard Kaitany v Republic* Criminal Appeal 150 of 1983; [1984] KECA 64 (KLR) - (Mentioned)
2. *Kados v Republic* Criminal Appeal No 149 of 2006 - (Explained)
3. *Macharia, David Njoroge v Republic* Criminal Appeal 497 of 2007; [2011] KECA 406 (KLR) - (Applied)
4. *Nyamwea, Mutali alias Mogaka v Republic* Criminal Appeal 17 of 2016; [2019] KECA 319 (KLR) - (Explained)

Statutes

Kenya

1. Criminal Procedure Code (cap 75) sections 169; 179; 361(1)(a); 382 — (Interpreted)
2. Sexual Offences Act (63A) sections 8(1)(2)(3); 11(1) — (Interpreted)

Advocates

Ms Kipyego for the respondent

JUDGMENT

1. IAE (the appellant herein), has preferred this second appeal against the judgment of Chemitei J dated April 12, 2018, in which he had initially been charged at the Chief Magistrate's Court in Kitale with the offence of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the offence were that on March 23, 2015, at (particulars withheld), he intentionally caused his penis to penetrate the vagina of CN a child aged 11 years.

3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to the provisions of section 11(1) of the same Act. The particulars of the offence were that at the same time and place, he intentionally touched the vagina of CN a child aged 11years.

4. The appellant denied the charge after which a trial ensued. In a judgment delivered on December 1, 2016, Hon MIG Moranga (the then Principal Magistrate Kitale Law Courts), convicted him of the main charge and sentenced him to 20 years' imprisonment.

5. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on April 12, 2018, Chemitei J, found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

6. Unrelenting, the appellant has now filed this appeal and probably the last appeal vide an undated homemade memorandum of appeal raising the following grounds of appeal:

    1. That the charge sheet was defective,

    2. That the evidence against him was uncorroborated,

    3. That there was no documentary proof on the age of the complainant and finally,

    4. That the medical report indicated that there was no penetration and/or injury on the complainant.

7. Briefly, the background to this appeal is that on March 23, 2015, CN was at home with her uncle (the appellant), and her two brothers. It was her evidence that they slept at 8pm and that she slept in the sitting room of her grand parents' house with her two younger brothers whereupon the appellant came at night. As he had lit a tin kerosene lamp, she recognized him.

8. That, the appellant then told her not to be afraid and said that he would buy her uniforms, *ka ngumu*, shoes and anything she would require and removed her pant, laid on top of her and inserted his dudu (penis) into her *dudu* (vagina) and that it was very painful but she could not scream. The following day, she didn't go to school and she went to Mama Nekesa's (a neighbour), and reported to her what the appellant had done to her. They then went to the chief's office and reported the incident. She was later taken to Kitale District hospital where she was examined and treated.

9. PW2 was CNWK, in charge [particulars withheld] children's home. It was her evidence that on March 24, 2015, she was at the children's home and at around 1pm, the assistant chief (PW3) called her and informed her of the incident. The child had been taken to his office at Aruba.

10. She then went to the chief's office and took the child to the police and later to Kitale District hospital where she was examined and given medication. It was her further evidence that she was aware that the appellant was later arrested and taken to Kipsaina police post.

11. PW3 was PWS, the assistant chief, [particulars withheld] sub- location. It was his evidence that on March 23, 2015, he was in the office when a student of about 8 years who had difficulty in walking came and said that her uncle (the appellant) had slept with her the previous night when the grandmother was away. He later called PW2, a children's officer who took PW1 to hospital. Later, the appellant was arrested over a suspected offence of defilement.

12. PW4 was Kirwa Labatt a clinical officer at Kitale District hospital examined PW1 who had difficulty in walking and who was in pain and upon examination of her private parts, he found that it was swollen and painful

    Her hymen was intact.

13. PW5 was PC Timothy Kinja attached to Kipsaina police station. On March 3, 2015, he was at the police station when the appellant was brought by PW2 and 3 who said that the appellant had defiled PW1. He later issued PW1 with a P3 form and later arrested the appellant.

14. PW6 was Dr. Mercy Oyieke a dentist at Kitale county hospital. She produced an age assessment report in respect of PW1. It was her evidence that from the clinical examination, she estimated that she was15 years old.

15. The appellant in his defence gave an unsworn statement and called no witness and denied having committed the offence.

16. When the matter came up for plenary hearing on October 18, 2022, the appellant who was in person sought to rely on his undated written submissions which he briefly orally highlighted in court. Ms Kipyego on the other hand, for the respondent sought to rely on her written submissions dated October 11, 2022, which she also orally highlighted in court.

17. We have considered the record, the rival oral and written submissions, the authorities cited and the law.

18. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of section 361(1)(a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. In *Kados v Republic* Nyeri Cr Appeal No 149 of 2006 (UR) this court rendered itself thus on this issue:

    > " ...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

19. In *David Njoroge Macharia v Republic* [2011] eKLR it was stated that under section 361 of the *Criminal Procedure Code* :

    > " Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* [1984] KLR 213)."

20. With regard to the first ground of appeal, it was submitted by the appellant that the charge sheet was defective for the reasons inter alia the words "intentionally" and "unlawfully" were missing and that further PW1 contradicted the doctor since she said she was 11 years whereas the doctor (PW6) stated that she was 15 years.

21. In opposing the appeal, it was submitted for the respondent that the charge was not defective as it disclosed the offence in which the appellant was charged with and that he understood the charges facing him very well to understand the ingredients of the offence.

22. It was further submitted that the error on the charge sheet was not material as to affect the substance of the proceedings before the trial court or as to make the appellant not understand the charges facing him and that the error was curable by section 382 of the *Criminal Procedure Code*.

23. We have carefully perused the impugned charge sheet and indeed the words "unlawfully" and "intentionally" are missing from the charge sheet. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with sub-section (2) of the *Sexual Offences Act* No 3 of 2006. Section 8(1) thereof defines the offence while sub-section (2) thereof prescribes the punishment.

24. Section 8(1) of the *Sexual Offences Act* provides as follows;

> " 8. Defilement
>
> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

Sub-section (2) further provides that:

> " (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."

25. From the said statutory provision, it is evident that there is no requirement in law for the words unlawfully and intentionally to be used in a charge sheet for the offence of defilement. That notwithstanding, looking at the evidence holistically, it is apparent that the appellant clearly understood the charges he was facing and he even ably cross examined the prosecution witnesses and he has not demonstrated any prejudice he may have suffered by the omission of these two words.

26. It was further contended by the appellant that there were contradictions between the evidence of PW1 and PW6 (the doctor) as regards the age of the complainant (PW1), in that PW1 stated that she was 11 years whereas PW6 stated that she was 15 years.

27. In the instant case, PW1 stated in her evidence in chief that she was 11 years old and that she was an orphan and that she used to stay with her grandparents. The trial court took PW1's word that she was 11 years old since PW1's grandparents did not testify until later, when PW6 Dr. Mercy Oyieke produced an age assessment report which showed that PW1 was 15 years old. The doctor's evidence remained firm and unconverted since the appellant did not even cross examine PW6 on the same. The trial court ultimately found the appellant guilty of "the offence of defilement (pursuant to section 179 of the *CPC*) contrary to section 8(1) as read with section 8(3) and not 8(2) of the *Sexual Offences Act* No 3 of 2006 as stated in the charge sheet" and subsequently sentenced him to 20 years' imprisonment.

28. Section 179 of the *Criminal Procedure Code* cap 75 of the Laws of Kenya which the learned trial magistrate used to convict the appellant with offence of defilement contrary to section 8(1) as read with section 8(3) and not 8(2) of the *Sexual Offences Act* No 3 of 2006 provides thus:

> " 179. When offence proved is included in offence charged
>
> 1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the

remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

29. In the instant case we have no reason whatsoever to fault the learned trial magistrate for invoking the provisions of section 179 of the *Criminal Procedure Code* and convicting the appellant with the offence of defilement contrary to section 8(1) as read with section 8(3) and not section 8(2) that the appellant had been initially charged with when it subsequently became apparent that PW1 was 15 years old.

30. The mere fact that that the appellant had been initially charged under section 8(1)(2) did not change the fact that the appellant was facing a charge of defilement. The offence still remained defilement and the appellant was properly convicted and sentenced to 20 years' imprisonment under section 8(3) of the *Sexual Offences Act*. Had the appellant been convicted under section 8(1)(2), he would have been liable to a sentence of life imprisonment.

31. From the circumstances of this case, we are of the considered opinion that the error in charge sheet was not material as the appellant was not prejudiced in anyway by the said error and the same was not fatal to the prosecution's case. Further, the error was curable pursuant to the provisions of section 382 of the *Criminal Procedure Code*. Consequently, this ground of appeal is without merit and the same must fail.

32. The appellant further contended that his rights to liberty/freedom were infringed in the course of the trial. The respondent on the other hand contended that this issue was not raised during the trial and further, that no evidence was adduced by the appellant to prove the same.

33. We have carefully gone through the record and indeed the appellant first alleged that his Constitutional rights had been infringed, when he, in his defence stated that he was detained beyond the 24 hours' period. There is however no evidence on record to support this allegation.

34. Regarding ground 3 and 4 of appeal, the appellant submitted inter alia that the evidence of PW1 and the medical examination did not prove the offence of defilement and that further the hymen was intact.

35. On the other hand, it was submitted for the respondent that the evidence of the medical doctor corroborated the evidence of the victim which confirmed that the victim was defiled and that the doctor observed that the victim had difficulty in walking and her genitals were swollen and painful during examination.

36. We have re-evaluated and analyzed the evidence of record. PW1 who was the complainant in this case gave a detailed vivid account of the events of that day of how she was defiled by the appellant who was well known to her as she was her uncle when she testified inter alia thus:

> " The accused came at night I looked up, startled from sleep I recognized him. He had lit a tobe light a tin kerosene lamp. It was on my bedding. He told me not to be afraid. I will buy you uniforms, kaa ngumu, shoes and anything I would require. I realized he had removed my underpants. He had worn a trouser which he removed to his knees and lay on me. He inserted his 'dudu' into my 'dudu'. His 'dudu' is the one he uses to urinate and my 'dudu' is the one I use to urinate. It was very painful. He lay so heavily on me. I could not even scream. He did so for 5 minutes the got up (sic) and left to his bedroom where he sleeps in a house outside the house where we sleep." (Sic) Emphasis ours.

37. Her evidence towards this respect remained firm and consistent and was corroborated by the evidence of PW3 and 4 who testified *inter alia* that PW1 had difficulty in walking and that her clothes were dirty and smelly and that she had pain. Further, the P3 form that was produced in evidence by PW4 showed that her genitals were swollen and painful though her hymen was intact. In cross examination she stated that he concluded that PW1 had been defiled from the pain she had on examination and that there was every sign of penetration.

38. The appellant seems to be taking issue with the fact that PW1's hymen was intact. This court has on several occasions pronounced itself with regard to penetration and medical evidence and more so the fact that that hymen need not be broken for the offence of defilement to be proved.

39. In in the case of *Mutali Nyamwea v Republic* [2019] eKLR this court differently constituted stated as follows as regards penetration

> " We have carefully considered the issue of law raised in the appeal.
>
> Section 8 of *SOA* upon which the main charge was laid against the appellant provides as follows:
>
> A"8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."
>
> Clearly under the section, 'penetration' is a major element of the offence. Under section 2 of the SOA, it is defined to mean:
>
> "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
>
> It follows that, for the offence of defilement to be proved, the prosecution evidence must show that the appellant inserted his penis into the vagina of the child. It is not sufficient that the said organs came into contact. However, partial insertion suffices for the purposes of penetration as the said insertion need not be complete."

40. The court further went on to state as follows:

> " Secondly, the finding of injuries in the child's genitalia as well as a foul smell suggested that there was partial penetration. As the court stated in the case of *George Owiti Raya v Republic* [2013] eKLR:-
>
> "There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane...It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration." (Emphasis added).

41. In the instant case taking into account PW1's evidence which remained uncontroverted and which evidence was corroborated by the evidence of PW3 and PW4 who produced the P3 Form that showed inter alia that PW1's genitals were swollen and painful, we are unable to agree with the contention by the appellant that the medical evidence on record did not prove the offence of defilement and that the prosecution's case was not proved beyond reasonable doubt notwithstanding the fact that hymen was not broken.

42. From the circumstances of this case and having re-evaluated the evidence on record, we have no doubt whatsoever in our minds that it is the appellant who defiled PW1 and there was overwhelming evidence to support a charge of defilement. Accordingly, this ground of appeal is without merit and the same must fail.

43. Finally, the learned judge was faulted for rejecting the appellant's defence in violation of section 169 of the *Criminal Procedure Code* cap 75 of the Laws of Kenya. The learned trial magistrate who had the opportunity of seeing the witnesses testifying stated inter alia as follows in his/her judgment:

> " .... I did watch her demeanor and I find her honest. She answered questions concisely and without hesitation I have no reason (sic) doubt the fact that after he lit the lamp she was able to identify him positively and she was awake at 10pm when he defiled her. I don't believe it when the accused says he had canned her and that it was a lie when she reported the incident. Caning on its own could not be the reason for her to make wild allegations like those of defilement that were untrue. The fact that the minor was walking normally that morning when she left for school is therefore doubtful...."
>
> "...Having so observed I note the accused defence was untenable. He created no doubt in the case that could work to his favour. The ingredients of the offence as observed earlier have been proved beyond all reasonable doubt and I find that the prosecution has provided to this court overwhelming evidence that has not in any way been rebutted." (Emphasis ours).

44. Again the learned judge at paragraph 23 of his judgment gave reasons as to why the appellant's defence was untenable. Consequently, nothing turns on this point and this ground of appeal must as well fail.

45. From the circumstances of this case, we are in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of defilement against the appellant beyond any reasonable doubt and that there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement and that it was the appellant who defiled PW1 and no one else.

46. Accordingly, we find and hold that the appellants' conviction for the offence of defilement was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant's appeal on conviction.

47. Regarding sentence, the appellant was sentenced to 20 years' imprisonment which is the minimum sentence provided under section 8(1)(3) of the *Sexual Offences Act* No 3 of 2006. The appellant in this case defiled his own niece and more particularly, an orphan. We have looked at the mitigation that he tendered in the lower court. He did not appear remorseful and in our view, he does not deserve any mercy and we are therefore not inclined to disturb the sentence.

48. Accordingly, the appellant's appeal is without merit and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR