



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO, & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 20 OF 2016

BETWEEN

JOHN IRUNGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa

(Nzioka, J.) dated 25th September 2012

in

H.C.C.R.A. No. 371 of 2010)

JUDGMENT OF THE COURT

In this second appeal, **John Irungu** (the appellant), is challenging his conviction and sentence by the Senior Resident Magistrate, Mombasa. He was convicted for the offence of defilement contrary to **section 8(2)** of the **Sexual Offences Act (the Act)** on 9th April 2010 and sentenced to 15 years imprisonment. After he lodged a first appeal in the High Court, **Nzioka, J.**, by a judgment dated 25th September 2012, found that the age of the victim was not proved. Accordingly the learned judge quashed the appellant's conviction for defilement and invoking **Article 159** of the **Constitution** and **Section 179** of the **Criminal Procedure Code**, convicted him of the offence of indecent act with a child contrary to **section 11(1)** of the Act and sentenced him to 15 years imprisonment.

Further aggrieved by the judgment of the High Court, the appellant lodged this second appeal based on six grounds in which he contends that the charge was fatally defective; the age of the victim was not proved; vital exhibits were not produced in court; vital witnesses were not called to testify; he was denied an opportunity to reply to the prosecution's submissions; and that his defence was not considered.

The evidence adduced before the trial court was, in brief, that the victim, **NW**, a girl said to be aged 11 years old, was a neighbour of the appellant at Tudor, Mombasa and well known to him. The fact that **NW** knew the appellant well was emphasized by the fact that previously the appellant was her father's tenant. On 14th September 2008, at about 4.00 pm, **NW** was at home washing utensils, in the company of

her minor siblings, MW, SM, and JN. The appellant came along, gave NW's siblings Kshs 20/= and asked them to go and buy him some chips. When they were gone, the appellant appeared with a white shirt, which he stuffed into NW's mouth before dragging her to his house, where he defiled her.

Shortly NW's siblings came back with the chips. MW, a sister of NW aged 12 years old who testified on oath after a *voir dire* examination, went to the appellant's house to deliver the chips but found the door locked. When she called the appellant and informed him that she had brought his chips, he asked her not to disturb him. As to the whereabouts of NW, the appellant told MW that she had gone to the beach. Unsatisfied, MW peeped into the appellant's house through a crack in the door and saw the appellant and NW lying naked on the bed with NW's mouth gagged with a white cloth.

MW rushed to the home of a neighbour, **Prudence Juma (PW4)**, which was about 20 metres away and called for help. PW4, who was also known to the appellant, went to his house in the company of her husband and another, where they forced open the door and rescued NW. Members of the public present proceeded to give the appellant a thorough beating before handing him over to the police. NW was subsequently taken to Coast General Hospital for treatment.

Dr. Lawrence Ngone (PW2) of the Coast General Hospital testified that he examined NW and found that her hymen was broken and her vagina reddening and swollen. A vaginal swab did not reveal any spermatozoa. He formed the opinion that the appellant had been defiled and classified the injury as maim.

When the appellant was put on his defence, he gave an unsworn statement and called no witness. The substance of his defence was that on the material day he left home to meet his cousin at a scrap yard in Tononoka. He got back at home at about midday to find PW4 emerging from his house. Upon inquiring what she was doing there, she answered that she was looking for her missing utensils. He assaulted her with a piece of wood and chased her away, after which she threatened to deal with him. Shortly, PW4's daughter came and told NW and her sister MW that PW4 wanted to see them. From inside his house he heard people asking for him as PW4 and her husband threatened to assault him. Two police officers appeared on the scene, arrested him and took him to Makupa Police Station where he was detained for five days before he was charged with an offence that he knew nothing about.

The appellant elected to prosecute his appeal on the basis of written submissions in which he expounded on the 6 grounds of appeal. In his view, the charge against him was fatally and incurably defective because the statement of offence referred only to section 8(2) of the Act and omitted reference to section 8(1) of the same Act. In addition, he submitted, **section 137(a) (ii)** of the **Criminal Procedure Code** requires that where the offence charged is created by enactment, the statement of offence must make reference to the section of the enactment creating the offence. The appellant urged that the requirement was mandatory and non-compliance with it rendered his conviction unsustainable.

Regarding the age of NW, the appellant contended that it had to be proved beyond reasonable doubt to justify the term of imprisonment imposed by the trial court. He argued that the respondent conceded before the High Court that NW's age was not proved and the court accepted that indeed it was not, because other than the NW who merely stated that she was 13 years old, no other witness testified on her age. Having found that the age was not proved, the appellant urged that the only option open to the first appellate was to acquit him. He could not be convicted of an indecent act with a child, he contended, because he was not charged with that offence.

Next the appellant argued that the trial court erred by failing to invite him to reply after the prosecution had made its final submissions contrary to **section 354 (2)** of the Criminal Procedure Code. He submitted that after counsel for the respondent replied to the appellant's written submissions, the court set the date for judgment without inviting him to reply. He cited **Mark Oiruri Mose v Republic, Cr. App. No. 295 of 2012 (Kisumu)** and submitted that the omission was fatal.

Regarding failure to produce vital exhibits, and to call vital witnesses, the appellant contended that neither the shirt with which NW was gagged was produced as an exhibit, nor were the persons who

arrested him called to testify. In his view, failure to produce the white shirt was contrary to **section 63(3)** of the **Evidence Act** and meant that it did not exist. He relied on the judgment of the High Court in **James Kuloba Walishe v Republic, Cr App No. 335 of 2006** and submitted that failure to call the people who arrested him as witnesses was a major gap in the prosecution's case. The appellant did not elaborate on the contention that his defence was not considered.

Mr. Yamina, learned Principal Prosecution Counsel, for the respondent opposed the appeal. He submitted that the defect in the charge sheet was curable because the particulars of the charge were clear that the appellant caused his penis to penetrate the vagina of NW. In counsel's view the appellant was not occasioned any prejudice by failure to include section 8(1) of the Act.

As regards the age of NW, counsel conceded that it was not proved. He similarly conceded that the first appellate court had erred by convicting the appellant of the offence of committing an indecent act with a child contrary to section 11 of the Act, although incidentally it was the same learned counsel who urged the court to convict the appellant for that offence. It was submitted that under section 179 of the Criminal Procedure Code, the Court could properly convict the appellant for a lesser offence and he urged us to substitute the conviction under section 11 of the Act with conviction for sexual assault contrary to section 5 of the Act. On the sentence, counsel contended that although the prescribed sentence for sexual assault is a term of imprisonment for not less than 10 years, under section 5(2) of the Act the court had discretion to enhance the sentence to life imprisonment. On the circumstances of this appeal, it was submitted, an enhanced sentence of 15 years imprisonment was justified.

As regards the other grounds of appeal, counsel submitted that they were bereft of merit and that the appeal should be dismissed in its entirety.

In a second appeal like this, we are required to consider only issues of law. (See **section 361** of the Criminal Procedure Code, and **Karani v Republic (2010) 1 KLR 73**). The question of severity of sentence as distinct from legality of sentence is a question of fact in a second appeal and does not call for our consideration. Having carefully considered the grounds of appeal, we are satisfied that the issues raised by the appellant are indeed issues of law.

Section 8(1) of the Act is the provision that creates the offence of defilement while section 8(2) prescribes the punishment for defilement of a girl aged 11 years and below. The charge sheet did not make reference to section 8(1) but only to 8(2) of the Act. As the charge alleged that NW was aged 11 years, the charge referred only to the punishment section.

Section 137 of the Criminal Procedure Code, which sets out the rules for framing charges and informations, requires a charge or information to commence with the statement of the offence describing the offence briefly and in plain language and without stating all the essential elements of the offence. Where the offence charged is one created by an enactment, the statement of the offence is required to contain a reference to the section of the enactment creating the offence. This is the provision that the appellant contends was violated in his case.

As section 137(a)(iv) of the Criminal Procedure Code makes abundantly clear, the rules of framing the charge are not cast in stone. The Code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein section 382 of the Code focuses, not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice. As this Court observed in **Samuel Kilonzo Musau v Republic, Cr. App No. 153 of 2013**, that provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice. (See also **George Njuguna Wamae v. Republic, Cr. App. No. 417 of 2009**).

The first appellate court considered whether the failure to refer to section 8(1) of the Act had occasioned the appellant a miscarriage of justice and came to the conclusion that it had not. The learned judge expressed herself thus:

“...I have looked at the charge sheet herein. I have considered the same in light of the provisions of section 137 of the Criminal Procedure Code. I agree with the appellant that section 8(1) of the sexual Offences Act that creates the offence was not cited. However the particulars of the offence are clear and in plain language. They were read to the appellant and he fully participated in the trial. I find that the appellant did not suffer any prejudice...I therefore find that the omission was not prejudicial to the appellant.”

In **Amedi Omurunga v. Republic**, Cr. App. No. 178 of 2012, where, in a charge of defilement reference was made only to the punishment section, this Court held that the defect was curable. We are in agreement with the first appellate court that the failure to refer to section 8(1) of the Act did not occasion a miscarriage of justice in view of the clear statement of the particulars of the offence and therefore cannot form the basis for interfering with the decisions of the two courts below.

On the age of NW, the respondent has conceded, as it did before the first appellate court, that it was not proved as required. The only issue therefore is whether having found that the age of NW was not proved, the High Court erred by convicting the appellant of an indecent act with a child and as urged by the respondent, whether we should find that the offence that was proved was sexual assault. We shall address that issue later in this judgment.

We are not satisfied that there is any merit in the complaint regarding production of the white shirt as an exhibit or failure to call as witnesses the persons who arrested the appellant. The trial court, which heard and saw the witnesses as they testified, was satisfied by the evidence that was adduced that NW was gagged by the appellant in a bid to stop her from screaming for help. The evidence of NW in that respect was corroborated by that of her sister, MW, who testified that upon peeping through a hole in the door of the appellant’s house, she saw NW gagged and naked in bed. Having been so satisfied, no useful purpose would have been served by production of the shirt. The first appellate court, upon evaluating and reappraising the evidence was also satisfied that the appellant had gagged NW.

As regards the appellant’s arrest, the evidence of PW4 was that after NW was rescued from the appellant’s house, members of the public arrested the appellant and beat him up before taking him to Tononoka Police Post. The evidence of MW was that she accompanied the appellant when he was taken to the police post, though her recollection was that he was arrested by two police officers. **PC Beatrice Achieng** who was summoned by the trial court to explain why the appellant had not been presented to court within 24 hours of his arrest, explained that the appellant was arrested by members of the public and looked unwell when he was presented to the police. Consequently, the police had to first take him to hospital for treatment, where he was admitted thus occasioning the delay. Again both courts below were satisfied regarding the circumstances under which the appellant was arrested, thus making it unnecessary to call more witnesses to testify on the issue. Besides, this is not the type of case where the court would be entitled to draw an adverse inference against the prosecution for failure to call an essential witness. (See **Bukenya & Others v. Uganda [1972] EA 549**).

The ground of appeal founded on the alleged violation of section 354 (2) of the Criminal Procedure Code by denying the appellant an opportunity to reply to the respondent’s submissions plainly has no substance. The record indicates that after counsel for the respondent made his submissions in opposition to the appeal, the appellant was invited to make final reply, after which he is recorded as saying, **“I have nothing to add.”** This ground of appeal is totally bereft of merit.

On the last issue pertaining to the appellant’s conviction for the offence of indecent act with a child contrary to section 11(1) of the Act, we agree that it is a minor offence compared to the offence of defilement of a child contrary to section 8(1) and (2), under which the appellant was charged and whose prescribed punishment is life imprisonment. However, with respect the appellant could not have been convicted of indecent act with a child simply because of the definition of that offence under the Act. Section 2 of the Act defines “indecent act” as follows:

“indecent act” means an unlawful intentional act which causes-

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

(b) exposure or display of any pornographic material to any person against his or her will.”
(Emphasis added).

The evidence on record, in particular the evidence of NW and the medical evidence adduced by PW2 which was accepted by the two courts below was that the appellant had caused his penis to penetrate the vagina of NW. Accordingly, with penetration having been proved, the appellant could not be convicted of committing an indecent act with NW as the High Court did.

Section 5 of the Act, which provides for the offence of sexual assault and which the respondent invites us to invoke, provides as follows:

“5(1) Any person who unlawfully-

- a. ***penetrates the genital organs of another person with-***
 - i. ***any part of the body of another or that person; or***
 - ii. ***an object manipulated by another or that person except where such penetration is carried out for proper and professional medical hygiene or medical purposes;***
- b. ***manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person’s body, is guilty of an offence termed sexual assault.***

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.”

The real question is whether a person charged with the offence of defilement under section 8 (1) can be convicted of the offence of sexual assault contrary to section 5(1) of the Act by virtue of the provisions of section 179 of the Criminal Procedure Code. Defilement is constituted by committing an act which causes penetration with a ***“child”***, defined to mean a person who is less than 18 years old. The Act defines ***“penetration”*** to mean partial or complete insertion of the genital organs of a person into the genital organs of another person. Defilement therefore entails penetration of the genitals of a child, genitals qua genitals. The prescribed punishment for defilement is dependent on the age of the child defiled, classified into three clusters, so that the younger the child, the stiffer the sentence. Hence the punishment for defilement of a child who is 11 years or less is life imprisonment; that of a child of between 12 and 15 years is imprisonment for not less than 20 years and defilement of a child between 16 and 18 years is imprisonment for not less than 15 years.

Sexual Assault on the other hand is provided for in section 5 of the Act. Unlike defilement, which can be committed only against a child, sexual assault can be committed against ***“any person”***. That offence or its punishment is not tied to the age of the victim. The offence is constituted by committing an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim’s genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.

We are satisfied that the offence of sexual assault can be committed against a child. Where for example there is cogent evidence of penetration of a child by the accused person but the age of the child is not proved, the perpetrator may properly be convicted of sexual assault. As this Court observed in ***James Maina Njogu v. Republic, Cr App No. 38 of 2004 (Nyeri)*** regarding section 179 of the Criminal procedure Code:

“It is clear from this section that the power of the court to convict an accused person of an offence lesser than the offence with which the person is charged is only available when the “remaining particulars are not proved”, the “remaining particulars” being the particulars necessary to prove the major offence and which particulars are not required to be proved in respect of the minor offence.”

In the same vein, we stated as follows in **Robert Mutungi Muumbi v. Republic**, Cr App. No. 5 of 2013:

“An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted.

We have ultimately come to the conclusion that the evidence on record discloses the offence of sexual assault, which is a cognate and minor offence of the offence of defilement with which the appellant was charged. We accordingly allow the appeal, quash the conviction for the offence of committing an indecent act with a child contrary to section 11 of the Act and set aside the sentence of 15 years. In lieu thereof we substitute a conviction for the offence of sexual assault contrary to section 5 (1) of the Act and impose a sentence of 10 years imprisonment from the date of sentence by the High Court. It is so ordered.

Dated and delivered at Mombasa this 27th day of May, 2016

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR