IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 89 OF 2014

BETWEEN

CORNEL OGUTU MIKWA …….... APPELLANT

AND

REPUBLIC …….. RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kisumu, (O. Makau, J.) dated 22nd November, 2013

in

HCCR.A. NO. 68 OF 2013)

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JUDGMENT OF THE COURT

1. The appellant, Cornel Ogutu Mikwa, was charged with the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act. The particulars of the offence were that on 17th January 2013 at Bondo town in Bondo District within Siaya County, he intentionally caused his penis to penetrate the vagina of PA, a child aged 15 years. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. He was tried before the Principal Magistrate's Court at Bondo and convicted for the offence of defilement in a judgment delivered on 23rd May 2013. He was subsequently sentenced to serve 20 years' imprisonment. The trial court made no finding on the alternative charge.

3. The appellant appealed against the conviction and sentence to the High Court. That appeal was dismissed in a judgment delivered on 22nd November 2013.

Background

4. The prosecution case was as follows. On 17th January 2013 PA's mother, BAO, (PW 2) was attending the market and had left PA (PW1) and a younger sibling at home under the care of her husband, the appellant. According to PA, at about 6.00pm on that day, her younger sibling had gone out of the house to play while she (PA) was left in the house with the appellant, her step father. The appellant summoned PA

from the sitting room to the bedroom under the pretext that he wanted to send her. In the bedroom, the appellant held PA and warned her not to scream. He removed her undergarment, undressed himself and defiled her. In her words, the appellant "did bad manners to me on my vagina. He inserted his penis into my vagina. I felt pain."

5. According to C O, (PW 6), a construction worker, on 17th January 2013 at about 5.30 pm, he went to the appellant's house to take alcohol. He entered the appellant's house without knocking and found the appellant "in bed with a girl" who "calls [the appellant] father". He called J O N, (PW4). PW4 stated that on being called by PW6, he entered the appellant's house, and found the appellant dressing up and "the victim was lying down." He identified the victim as PA. The appellant dressed up and left. PW 6 and PW4 then telephoned PA's mother, PW 2. They also called the chairman of community policing. PA was then taken to hospital.

6. Joseph Oduor, (PW3), a clinical officer at Bondo District Hospital, examined PA and noted that she had whitish substance (sperms) oozing from her vaginal orifice. He produced the P3 form that he prepared in which he remarked "obvious sexual penetration noted with presence of mobile spermatozoa."

7. Police constable David Barno, (PW5), of the Crime Office at Bondo Police Station was at the station on 17th January 2013 at about 9.00pm when he was assigned to investigate the matter. PA and her mother PW2 were at the station at that time. He interviewed them and recorded their statements before referring PA to Bondo District Hospital for treatment. He went to the appellant's house in a bid to arrest him but found he had disappeared. He later received a report that the appellant had been seen, and he went and arrested him.

8. In his defence, the appellant stated that he went to work on 17th January 2013 and that at 6.00pm "some two people came and arrested" him and took him to Bondo Police Station before being arraigned in court on 21st January 2013 for an offence he knew nothing about. He went on to say that he saw PA for the first time in court and that "we have some grudges with the family as the mother to the complainant is my aunt."

9. The trial court was not impressed by the appellant's defence and found as a fact that the appellant defiled PA and that the prosecution had proved its case beyond reasonable doubt and convicted the appellant.

10. On appeal, the High Court was satisfied that the offence of defilement had been proved and dismissed the appeal. Still dissatisfied, the appellant lodged the present appeal.

The appeal and submissions

11. In his memorandum of appeal, the appellant has complained that his conviction was based on a defective charge; that the trial magistrate convicted him under the wrong provision of the law; that the trial court should not have relied on the evidence of the victim, PA, who was PW1, because PA was not only coached but was coerced, threatened and intimidated into implicating the appellant; that the prosecution evidence was marred with contradictions, inconsistencies and discrepancies; that his trial was unfair because he was not provided with witness statements.

12. During the hearing of the appeal, the appellant who appeared in person relied entirely on his written submissions that amplified the complaints contained in his memorandum of appeal to which we have already referred. In his view, the "pooling" together of sections 8(1) and 8(3) of the Sexual Offences Act in the charge sheet rendered the same "fatally defective." Furthermore, the appellant argues, the trial court erred by convicting him for the offence of defilement "contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act" as that provision "provides for a mandatory life imprisonment sentence for sexual offenders against minors who are 11 years and below" which is not the case here.

13. The appellant states that PA was placed in juvenile remand where she was vulnerable to coaching and

intimidation and that the admission of her evidence in those circumstances violated the appellant's right to a fair trial under Article 50(4) of the Constitution which requires exclusion of evidence obtained in violation of any right or fundamental freedom.

14. Finally, the appellant argued that PA contradicted herself in evidence. For instance, PA stated in one breath that she was cautioned from screaming and in another breath stated that she was screaming; and that on one occasion she said she was aged 15 years and on a different occasion said she was aged 16 years.

15. Finally, the appellant argued that the prosecution did not disclose to him the evidence it was going to rely on and he was thereby prejudiced in the conduct of his defence.

16. Opposing the appeal, learned Principal Prosecution Counsel, Mr. L. K. Sirtuy, submitted that the appellant's complaints are baseless; that the issue of a defective charge sheet is an afterthought as it was not raised before the trial court; that the appellant was properly convicted under the relevant provision of the law; that the evidence of PW1 was properly obtained and was corroborated by the evidence of PW2 and PW3 and there are no contradictions or inconsistencies or discrepancies in the evidence; and that the appellant ought to have complained about witness statements during the trial.

Analysis and determination

17. We have considered the appeal and the submissions. This is a second appeal which, under section 361(1) of the Criminal Procedure Code, must be restricted to questions of law. [See **M'Riungu vs. R [1983] KLR455**].

18. The issues for determination are whether the charge sheet was defective; whether the appellant was convicted under the wrong provision of the law; whether the prosecution case was established to the required standard; and whether the appellant's right under Article 50(2)(c) of the Constitution to be informed of the evidence against him was violated.

19. As already mentioned, the appellant says that section 8(1) and 8(3) of the Sexual Offences Act were 'pooled together' thereby rendering the charge sheet defective. If we understand the complaint correctly, the appellant's grievance is that in drafting the charge sheet, the function word "and" should have been inserted between section 8(1) and 8(3) instead of lumping "section 8(1)(3)" together as was done here. Section 8(1) creates the offence with which the appellant was charged and provides that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. Section 8(3) prescribes a penalty and provides that a person who commits an offence of defilement with a child between the age of twelve years and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

20. Whereas more care should have been exercised in drafting the charge sheet so that a clear distinction is made in the statement of the offence of the charge sheet between the statutory provision of the Sexual Offences Act creating the offence and the provision of the same statute prescribing the penalty, the appellant has not demonstrated what prejudice he suffered on account of the omission or that there was a failure of justice as a result. Furthermore, the appellant could and should have raised this matter before the trial court. He did not do so. Neither did he do so on his first appeal. The omission is one which, in our view, is excusable under section 382 of the Criminal Procedure Code. We hold that there is no merit in the complaint that the charge sheet was defective.

21. As regards the complaint that the conviction was based on the wrong provision of the law, the appellant is right in saying that the trial court referred to section 8(2) as opposed to section 8(3) of the Sexual Offences Act when convicting the appellant. The trial court pronounced itself, "I accordingly convict the accused of the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act…"

22. Section 8(2) provides that a person who commits an offence of defilement with a child aged 11 years

or less shall upon conviction be sentenced to imprisonment for life. In sentencing the appellant, there can be no doubt that the trial court invoked section 8(3) which as we have already indicated provides that a person who commits an offence of defilement with a child between the age of twelve years and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. The reference in the judgment of the trial court to section 8(2) of the Sexual Offences Act was therefore inadvertent or a typographical error that had no bearing to the legal sentence that was meted out. We accordingly reject this complaint

23. As to whether the prosecution case was established to the required standard, there are concurrent findings by the trial court and by the first appellate court. The High Court on its part reviewed and reevaluated the evidence before concluding:

> "**This court like the trial court is satisfied that there was penetration perpetrated by the appellant and the victim of the said penetration was aged between 12 and 15 years. The evidence of penetration by the Pw 1 was corroborated by evidence of PW3, PW4 and PW6. PW4 and 6 were the eye witnesses who reported the matter to PW2, and the police. PW3 was the clinical officer who saw the freshly broken hymen and a whitish discharge coming out of the PWl's vagina. A high vaginal swab revealed presence of spermatozoa. All the above evidence was consistent with the act of penetration**."

24. We can only interfere with the findings of the lower courts if such findings are not based on evidence, or are based on a perversion of the evidence or unless no reasonable tribunal can reach such findings. As this Court said in **Adan Muraguri Mungara vs. R [2010] eKLR**, we must:

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR