IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MWERA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 581 OF 2010

BETWEEN

ALEXANDER LIKOYE MALIKA .....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega (Lenaola, J) dated 9th June, 2009

in

KAKAMEGA HCCRA NO. 25 OF 2009)

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JUDGMENT OF THE COURT

The appellant, **Alexander Likoye Malika** was charged before the Senior Resident Magistrates' Court, Butere, with the offence of defilement. The charge sheet was framed as follows:

> **"DEFILEMENT OF A CHILD CONTRARY TO SEC. 8 (1) (2) OF THE SEXUAL OFENCES ACT 2006.**
>
> **PARTICULARS OF OFFENCE: ALEXANDER LOKIYE MAUKA: On diverse dates between late October and early November, 2008 at [particulars withheld] sub location in Butere District of the Western province intentionally and unlawfully had carnal knowledge of "G.A" a child aged seven years".**

There was an alternative charge of Indecent Act with a child contrary to Section 11 (1) of The Sexual Offences Act No. 2006 and particulars thereof were that the appellant, on diverse dates between October and November, 2008 at the same place he indecently assaulted **"GA"** by touching her private parts namely vagina.

The trial magistrate (B. O. Ochieng) found it necessary to call for a psychiatrist report before the plea was taken and upon perusal of the same the trial magistrate was satisfied that the appellant was in a fit and proper state of mind to take plea.The charge was then read out to the appellant and explained in

Kiswahili language to which the appellant responded:

"It is true."

The facts of the case were then read out in detail by the Court Prosecutor. These facts included that the complainant was a seven year old girl who lived with her grandmother; that the appellant worked for the said lady as a farm-hand; that he had lured the girl by giving her presents and in the process repeatedly defiled her; that the grandmother, upon noticing that the girl walked with difficulty examined her private parts and found that the girl had been defiled; that the girl later revealed to a Clinical Officer and to the police that it was the appellant who was the defiler - to all these facts the appellant responded:

"The facts are true. I understand them."

And upon conviction the appellant in mitigation:

"it is my first offence."

The trial magistrate upon perusal of the medical records found that there was actual penetration and contraction of HIV and other sexually transmitted diseases and further noted that the appellant was not remorseful for the deeds he had committed – thus a sentence of life imprisonment was pronounced as required by Section 8 (1) (2) of The Sexual Offences Act.

The appellant filed an appeal to the High Court of Kenya, Kakamega (Lenaola,J) and the record shows that the appellants' only complaint was against sentence – he requested for reduction of sentence to enable him be free to get married and have children. The learned judge considered the principles governing sentence on a first appeal and found that the appellant had not demonstrated any factor to enable him to interfere and the appeal was dismissed. Those orders provoked this appeal.

May we, by way of commentary only remind that there is ordinarily no appeal against conviction resulting from a plea of guilty – See Section 348 of the Criminal Procedure Code which only permits an appeal regarding legality of sentence. A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous, or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the appellant could not in law have been convicted of the offence charged.

We have in this judgement laid out the process that was employed by the trial magistrate who first called for a psychiatrists' report to satisfy himself that the appellant could understand the charge he was facing; the record then shows that the charge was read out in the English language and translated to the Kiswahili language and the appellant admitted the charge and the facts when they were read out in some detail by the court prosecutor.

Although the record does not indicate whether English language in the first appellate court was translated to the appellant we noted that the appellant addressed us in Kiswahili language when the appeal came for hearing before us.

In the homemade Memorandum of Appeal the appellant takes various issues, firstly, that the particulars in the charge sheet were defective; that he did not understand the charge because it was not read to him in his language; that there were constitutional breaches because the trial court did not afford him an advocate to represent him and that the plea was not unequivocal.

This being a second appeal we are mandated by Section 361 (1) (a) of the Criminal Procedure Code to consider only matters of law but not factual issues which the two courts below have considered and re-evaluated on first appeal unless it can be shown that there has been misdirection in the treatment of the

facts or that the conclusions reached could not be reached by a reasonable tribunal or that the High Court, as first appellate court, has abdicated its duty of analysing and re-evaluating the evidence to reach its own conclusions in the first appeal.

The appellant who appeared in person before us as in the earlier courts relied on the Memorandum of Appeal and written submissions which he handed over to us and which we admitted as part of the record.

Mr. D. N. Ogoti, learned Senior Assistant Director of Public Prosecutions opposed the appeal submitting that the appellant who had pleaded guilty was not entitled to take a second bite after the first appeal had been dismissed. On whether the charge as framed was defective learned counsel thought that it was not an issue because, according to him, that should have been taken at the first opportunity and in any event, he further submitted, such defect, if any, had not caused any prejudice to the appellant.

The only legal issue that arises in this appeal is whether the charge as framed and the particulars thereof was defective and what effect such defect, if found, would have on the conviction of the appellant.

The appellant was charged with the offence of defilement contrary to Section 8 (1) (2) of The Sexual Offences Act of 2006 which provides that:

> **"(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."**

That Act requires that the particulars of the charge give specific details to show that penetration did, indeed, take place.

The particulars of the charge before the learned trial magistrate stated that the appellant on diverse dates:

> **"... intentionally and unlawfully had carnal knowledge ..."** of the child aged seven years.

We must therefore consider whether omitting the phrase "***causing penetration"*** and using instead ***"carnal knowledge***" in particulars of the offence would render the charge defective.

Section 134 of the Criminal procedure Code provides of particulars of a charge:

> **"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."**

Further, Section 137 (a) (iii) of the same Code on rules for framing a charge provides that particulars should be described in brief and in ordinary language. There is no requirement that description of an offence must carry the exact wording of the Section providing for the offence.

Blacks' Law Dictionary (9th ed. 2004) at 241 defines carnal knowledge as:

> "**Carnal knowledge. Archaic. Sexual intercourse, esp. with an underage female – Sometimes shortened to knowledge. [Cases: Incest 6; Rape 7.C.J.S. Incest S5; Rape S 17]**
>
> **"The ancient term for the act itself was 'carnal knowledge' and this is found in some of the recent cases and statutes. The phrase 'sexual intercourse,' more common today apart from legal literature, is also found in recent cases and statutes. Either term, when the reference is to rape, is sometimes coupled with the word 'ravish.' And unlawful**

intercourse with a girl under the age of consent is often characterized as 'carnal knowledge and abuse.'" Rollin M. Perkins & Ronald N. Boyce, Criminal Law 201 (3d ed.1982)."

Whereas the Sexual Offences Act uses the phrase "***causing penetration"***, carnal knowledge is an all encompassing term that includes the ingredients of defilement. The term "***carnal knowledge***" as used in the particulars of the charge sheet gave reasonable information of unlawful intercourse with a child which involved penetration. Therefore although the narrative of the particulars as drafted did not carry the exact wording of the Sexual Offences Act, the meaning of the information within the narrative is illustrative of the nature and ingredients of the offence stated. In any event, whether or not the particulars of the charge were clear enough for the appellant to understand is a question of fact which ***Section 361 (1)*** of the Criminal Procedure Code does not mandate us to consider in a second appeal like this one.

We agree with counsel for the respondent that the appellant was not embarrassed or prejudiced in any way as ***Section 382*** of the said Code provides that no finding, sentence or order passed by a competent court shall be reversed or altered on appeal or revision on account of error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings unless such error, omission or irregularity has occasioned a failure of justice to the party before the court.

This court was faced with a question of sufficiency of particulars of an offence in a charge sheet in **Mahero v Republic [2002] 2 KLR 406** and the court held:

"In the appellant's case we have perused through the record of the trial court and are satisfied that the appellant understood the charge he faced, he asked relevant questions to the charge and in no way was prejudiced."

In **Frank Ochieng Otieno v Republic (Kisumu) Criminal Appeal No. 363 of 2011 (ur)** we had no doubt that the charge sheet was defective because it stated that the offence charged was contrary to Section ***"8 (1) (3)"*** instead of ***Section 8 (1)*** as read with ***Section 8 (4).*** We held in that case that:

"On the issue of alleged defective charge, there cannot be any gainsaying that there was indeed a defect: instead of the charge stating that the appellant was charged with defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006, it read that the offence was contrary to Section 8 (1) (3) of the said Act. The anomaly was not noticed by the learned trial magistrate. However, he still sentenced the appellant as if he had been properly charged. The learned Judge of the High Court clearly appreciated the defect and specifically stated that the appellant had been sentenced under Section 8 (4) of the said Act given the age of the complainant. Without saying so, it is clear that the learned Judge resolved the defect under Section 382 of the Criminal Procedure Code. She plainly had jurisdiction to do so. In our view, nothing should turn on this complaint as the irregularity did not in any case cause any prejudice to the appellant. He in fact does not appear to have noticed that defect himself when he appealed to the High Court because he did not complain about it. Accordingly, we find that the defect in the charge sheet was curable and was indeed properly resolved by the High Court under the provisions of Section 382 of the Criminal Procedure Code."

We are of the considered opinion that the narrative of the offence in the charge sheet was sufficient notwithstanding that such narrative did not carry the exact wording of the Section providing for the offence.

On the appellant complaint that he did not understand the charge because it was not read to him in his language we have shown in this judgment that the trial magistrate went an extra mile by establishing that the appellant understood the charge and the appellant pleaded guilty in Kiswahili language to the charge and the detailed particulars that were read out to the trial court. We have also noted that the appellant addressed us in Kishwahili language and he did not request us to have the proceedings before us

interpreted into any other language. That complaint on the issue of language therefore has no basis at all.

There was no requirement under the retired Constitution, and there is no requirement in the current constitutional dispensation, that every accused person charged with any offence be accorded a lawyer by the State at state expense. That ground of appeal has no basis as well and is accordingly dismissed.

We have considered the appeal and for the reasons stated find that the same has no merit at all and we accordingly dismiss it.

Dated and delivered at Kisumu this 23rd day of April, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR