IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 5 OF 2013

BETWEEN

ROBERT MUTUNGI MUUMBI…..…….……………..………………….....APPELLANT

AND

REPUBLIC.………..…………………………….….…..………………RESPONDENT

(Appeal from the judgment of High Court of Kenya at Mombasa (Muya, J.) dated 25th April 2013

in

H.C.CR.A. NO. 1 OF 2009)

****

JUDGMENT OF THE COURT

The appellant, ***Robert Mutungi Mumbi***, then aged 46 years old, was on 17th December 2008, convicted by the Chief Magistrates Court, Mombasa of the offence of defilement of a girl contrary to ***section 8(1)*** of the ***Sexual Offences Act, 2006 (the Act)***. He was sentenced to 20 years imprisonment. The particulars of the offence, as set out in the charge sheet, were that on diverse dates between 2004 and 16th June 2007 at ***[Particulars withheld]*** area in ***Mombasa District***, he committed an act which caused penetration with ***N K***, a girl child aged ***9 years*** old.

Being aggrieved by the conviction and sentence, the appellant lodged ***Criminal Appeal No. 1 of 2009*** in the High Court Mombasa. The prosecution, on the other hand applied for enhancement of the sentence from 20 years to life imprisonment. By a judgment dated 25th April 2013, the High Court ***(Muya, J.)*** held that the age of NK had neither been assessed nor proved beyond reasonable doubt. Finding himself handicapped for purposes of sentencing, which under the Act is dependent upon the age of the victim, the learned judge took refuge in ***section 179*** of the ***Criminal Procedure Code*** which empowers a court, if a complete minor and cognate offence is proved, to convict an accused person of such minor offence even though he was not charged with it. After reviewing the evidence, he concluded that it could sustain a conviction for the offence of indecent act with a child contrary to ***section 11(1)*** of the Act. As is evidently clear, the sentence prescribed by the Act for the offence of indecent acts is not dependent on the age of the victim, as is the case with the offence of defilement.

Although the learned judge did not expressly state that he had allowed the appeal to that extent,

quashed the conviction under section 8(1) and substituted therefor a conviction under section 11(1) of the Act, it can easily be surmised that that indeed was his intention. As regards the sentence, the learned judge upheld the sentence of 20 years imposed by the trial court.

The appellant was still aggrieved by that decision and preferred a second appeal to this Court. The grounds of appeal raise the following five issues:

i. ***That as framed, the charge of defilement under section 8(1) of the Act was defective because no reference was made to the punishment section, namely, section 8(2) of the Act;***

ii. ***That the age of NK was not proved to the required standard and therefore the sentence of 20 years imprisonment had no basis;***

iii. ***That the High Court had erred by convicting the appellant of the offence of indecent assault for which he was not charged and in respect of which he had not been afforded an opportunity to plead;***

iv. ***That the medical evidence that was adduced before the trial court did not connect the appellant with the offence; and***

v. ***That the High Court had not lived up to its bounden duty, as the first appellate court, of re-evaluating and re-examining the evidence and coming to its own independent conclusion.***

Before we delve into the merits of the above grounds of appeal, it is apposite to revisit the case against the appellant as presented to the trial court. NK is ***A N M's (PW1)*** adopted child**.** PW1 had found NK abandoned in a carton when she was approximately one year old. The record does not indicate when and when PW1 found the child and PW1 did not testify on the age of NK at the date of the alleged offence. When NK however testified on 14th May 2008, she informed the Court that she was 10 years old. According to the charge sheet dated 23rd July 2007, NK was 9 years old at the time the offence was committed. That was also the age entered in the P3 Form, although ***Dr. Lawrence Ngone (PW5)*** who filled the P3 Form did not testify to having assessed the age of NK.

At the material time PW1 and her family lived at ***[Particulars withheld]***, Mombasa in the same neighbourhood as the appellant. Indeed from the evidence of PW1 and that of the appellant, their respective houses were about 30 to 50 meters apart. There was no dispute therefore that the appellant was well known to NK.

On 16th June 2007, at about 10 am, PW1 sent NK to a butchery to buy some meat and gave her Kshs 500/- for that purpose. Instead of running the errand, NK went on a frolic of her own and spent the day playing with other children. She ended up at ***Kenyatta Beach*** were she spent some of the money entrusted to her by her mother. When it started getting dark, instead of proceeding back home, NK went to the appellant's house, where she spent the night. In her unsworn evidence presented after a *voir dire* examination, she testified that the appellant had sex with her three times that night, and that the two had been having sex since she was 6 years old.

The next morning she proceeded to her elder sister, ***N M's (PW3)*** house at ***Bamburi*** and informed her of

her liaison with the appellant. Subsequently PW1, who in the meantime had been searching for NK, was informed that she had been found. On 30th June 2007 PW1 reported the matter at Nyali Police Station. The appellant was arrested on 12th July 2007 and charged with the offence on 23rd July 2007.

PW5, the medical practitioner who examined NK on 9th July 2007 testified that he found her hymen broken though not freshly, healing bruises on her vaginal opening and venereal disease infection. He concluded that there was penetration, possibly by human penis and classified the degree of injury as maim. The same witness testified also that he examined the appellant on 20th July 2007 and found him to be physically and medically normal with no injuries. He also found that the appellant had no venereal disease infection.

Turning now to the grounds of appeal, the first issue raised is whether the charge was defective. The appellant, who appeared in person and presented written submissions, contended that the charge was fatally and incurably defective because it made no reference to section 8(2) of the Section Offences Act, which is the punishment section. For that proposition he relied on the judgments of the High Court in ***SAMUEL FODO GONA V. REPUBLIC, CR. APP. NO. 119 OF 2009 (MALINDI)*** and ***MUTINDA MWAI MUTANA V. REPUBLIC, CR. APP. NO. 283 OF 2008 (MOMBASA)***. The appellant also submitted that although the prosecution had the opportunity to amend the charge and rectify the defect under ***section 214*** of the ***Criminal Procedure Code*** that was not done, rendering a conviction founded on the charge unsustainable.

For the respondent, ***Mr. Monda,*** Assistant Director of Public Prosecutions submitted that whatever defect there was in the charge did not prejudice the appellant or occasion any miscarriage of justice. In his view, such defects were curable under ***section 382*** of the ***Criminal Procedure Code***.

The appellant is correct that ideally the charge must include both the section creating the offence and that prescribing the punishment, although it is worth noting that the forms provided in the ***Second Schedule*** to the Criminal Procedure Code on the framing of charges do not make any reference to the punishment section. This Court has emphasized time and again the importance of drawing a charge sheet with care and precision so that the accused person understands in clear and unambiguous terms the offence with which he or she is charged. That makes it easier for the accused person to plead to the charge and also to effectively prepare his or her defence. This is also a fundamental requirement of ***Article 50(2) (b)*** of the ***Constitution***, which demands that every accused person be informed of the charge with sufficient detail to answer it. *(*See also ***YOSEFU V. UGANDA [1969] EA 236).***

The charge in the present case was clear enough that the appellant was charged with defilement of a girl contrary to ***section 8(1)*** of the Act. The particulars of the offence were also given, the material part of which disclosed when and where the offence was alleged to have been committed and the name and age of the victim. ***Mr. Kenzi***, learned counsel, represented the appellant during his trial and raised no objection whatsoever on the competence of the charge before the trial court. The inescapable conclusion is that the appellant and his counsel were well aware, with sufficient particularity, of the charge that confronted him.

Section 382 of the Criminal Procedure Code is also relevant to the question raised by the appellant. 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 ***GEORGE NJUGUNA WAMAE V. REPUBLIC***, ***CR. APP. NO. 417 OF 2009***). In ***SAMUEL KILONZO MUSAU V. REPUBLIC, CR APP. NO. 153 OF 2013***, this Court declined to interfere with a conviction where the appellant was charged with ***"defilement contrary to section 8(1)(2) of the Sexual Offences Act"*** instead of ***"defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act***", after finding that he had suffered no prejudice.

Similarly in ***AMEDI OMURUNGA V. REPUBLIC, CR. APP. NO. 178 OF 2012***, this Court invoked section 382 of the Criminal Procedure Code and declined to interfere with the conviction where the appellant had, like in the present case, been charged under the punishment section without any reference to the section creating the offence. The Court found that the appellant had an opportunity to raise the issue

before the trial court but did not; that he was well aware of the charge against him and its particulars; that he had effectively participated in the trial; and that no miscarriage of justice had been occasioned.

The Court also rejected the reasoning of the High Court in ***SAMUEL FODO GONA V. REPUBLIC,*** ***(supra)*** and ***MUTINDA MWAI MUTANA V. REPUBLIC*** ***(supra),*** which had held, without reference to section 382 of the Criminal Procedure Code, that a charge sheet that cited only the punishment section was fatally defective. The Court expressed itself thus:

> ***"To our mind, we are satisfied that the irregularity in the charge-sheet did not imperil the appellant or occasioned him a failure of justice. Given the foregoing, the decisions of the High Court that the appellant sought to rely on were decided without subjecting the conclusions to the test of whether that omission occasioned a failure of justice and thereby prejudiced the appellant. To that extent they do not represent good law and ought to be discarded or disregarded."***

It is also noteworthy that in ***JOSEPH MWAMUYE V. REPUBLIC*** ***(2012) eKLR, Meoli, J***. declined to follow her own decision in ***SAMUEL FONDO GONA*** ***(supra)*** and stated as follows:

> ***"In the present case, the charge contains all the essential elements of the offence defined in section 8 (1). Thus it is sufficient. The era when technicalities were allowed to override substantive justice is hopefully behind us, with the enactment of section 159(2) (d) of the constitution. The appellant's right to a fair trial were upheld in as much as he was charged with a recognised offence and the proper plea taking procedure was, followed and I do not accept that the mere failure by the prosecution to insert section 8 (1) of the Sexual Offences Act in the statement of the offence ought to be fatal***."

We are satisfied that the failure to refer to the punishment section in the charge sheet did not occasion a miscarriage of justice in this case. Accordingly we reject this ground of appeal.

The second ground of appeal touches on the age of NK. The appellant contended that the NK's age had to be proved beyond reasonable doubt and that could only have been through an age assessment report or a birth certificate. In his view, because the sentence for defilement under the Act is dependent upon the age of the complainant, the age must be proved beyond reasonable doubt before an accused person can be sentenced. In this case, he argued, the age of NK was never established and therefore the sentence imposed by the trial court and the first appellate court was illegal.

The respondent's short reply on this point was that the High Court convicted the appellant of the offence of indecent act with a child contrary to section 11 of the Act and sentenced him to 20 years imprisonment. The prescribed sentence for the offence for which the appellant was convicted by the High Court, it was submitted, is imprisonment for not less than 10 years and that sentence is not dependent on the age of the victim. Accordingly we were urged to affirm that the learned judge did not err by sentencing the appellant to 20 years imprisonment.

The High Court found that NK's age was not proved. That finding satisfied the prosecution. That question therefore is not before us in this appeal. The narrow issue before us is whether the learned judge erred by sentencing the appellant to 20 years imprisonment. *Prima facie* there is nothing illegal about the sentence since the prescribed sentence under section 11(1) is imprisonment for a term not less than 10 years. We shall however say more on the sentence later in this judgment.

The third issue in this appeal relates to appellant's alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not

charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda's response was that the appellant could be properly convicted under section 179 of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged.

Section 179 of the Criminal Procedure Code provides as follows:

> "***179. (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.***

As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged.

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. (See ***ROBERT NDECHO & ANOTHER V. REX*** ***(1950-51) EA 171*** and ***WACHIRA S/O NJENGA V. REGINA*** ***(1954) EA 398***).

Spry, J. explained the essence of the first consideration as follows in ***ALI MOHAMMED HASSANI MPANDA V. REPUBLIC*** ***[1963] EA 294,*** while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

> ***"Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence."***

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial.

The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See ***REPUBLIC V. CHEYA & ANOTHER*** ***[1973] EA 500).***

In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied.

The appellant's fourth complaint is that the medical evidence that was adduced did not connect him with the offence charged. He submitted that ***section 36(1)*** of the Act required him to be subjected to DNA testing to determine whether he was connected with the offence, which was not done. In those circumstances, he contended, the prosecution did not prove its case beyond reasonable doubt. Lastly the appellant argued that the evidence adduced, which showed that NK was suffering from a venereal disease whilst he had no such infection, further negated his connection with the offence.

Mr. Monda urged us to uphold the concurrent findings of the two courts below on why NK could have had the venereal disease whilst the appellant did not. He also submitted that an offence under the Act could be proved even in the absence of DNA testing.

Section 36(1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.

In ***GEORGE KIOJI V. REPUBLIC, CR. APP. NO. 270 OF 2012 (NYERI),*** this Court expressed itself thus, on proof of commission of a sexual offence:

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."***

(See also ***KASSIM ALI V. REPUBLIC, CR. APP. NO. 84 OF 2005 and JACOB ODHIAMBO OMUMBO V. REPUBLIC, CR. APP. NO. 80 OF 2008 (KISUMU).***

Both the trial court and the 1st appellate court made concurrent findings of fact on the credibility of NK. The trial magistrate specifically recorded why it found the evidence of NK believable as is required by the proviso to ***section 124*** of the ***Evidence Act***. He noted that NK was firm in her evidence even after cross-examination, that her evidence was cogent, that she was well known to the appellant and that she had no illusion that it was him who had sex with her three times on the material night. As regards infection of NK with a venereal disease while the appellant was not infected, both courts did not attach much significance to that issue on the grounds that NK was examined on 9th July 2012 while the appellant was examined some 11 days later, on 20th July 2012, giving the appellant, a person who described himself as "an untrained doctor's assistant since 1983" all the opportunity for treatment.

In ***DAVID NDUMBA V. REPUBLIC, CR. APP NO 272 OF 2012 (NYERI),*** this Court upheld a conviction for a sexual offence even though the evidence showed that the appellant and the victim of the offence were not suffering from the same sexually transmitted disease. The Court was satisfied that there was other evidence upon which the conviction could be safely sustained. In the circumstances of this appeal, we do not see any basis for interring with the concurrent findings of the trial court and the first appellate court.

The last issue is whether the first appellate court failed in its duty to re-evaluate and reappraise the evidence. We do not think that there is any substance in this complaint. We have perused the record and it is readily apparent to us that the learned judge carefully went through the evidence, which enabled him to come to the conclusion that NK's age was not proved and that there was instead sufficient evidence on record to sustain the minor cognate offence of committing an indecent act with a child. These conclusions would not have been possible without a careful and meticulous evaluation of the evidence. We shall not say more in that regard.

As regards the sentence of 20 years imprisonment imposed upon the appellant, his contention, which we have rejected, is that without proof of NK's age, he could not be sentenced to imprisonment, even after conviction for an indecent act with a child. The sentence for the offence for which the High Court convicted him is not dependent on the age of the victim. However, we are alive to an issue on sentence raised in the appellant's appeal, which cannot be ignored because it is not merely a question of severity of the sentence.

The 1st appellate court quashed the appellant's conviction for defilement contrary to section 8(2) of the Act but convicted him of indecent acts with a child contrary to section 11(1) of the Act. The offence for which the High Court convicted the appellant is a minor and cognate offence of the major offence of defilement for which he had been sentenced to 20 years imprisonment. Having convicted the appellant of the minor offence, the High Court should have addressed its mind specifically to the issue of sentence. If the sentence of 20 years imprisonment was appropriate for the major offence of defilement, was that sentence appropriate for a first offender convicted of a minor cognate offence? The High Court did not address this important question. It upheld, for the minor offence, the sentence, which had been imposed for the major offence.

Section 361(1)(a) of the Criminal Procedure Code restricts the right of appeal to this Court from the High Court in the exercise of its appellate jurisdiction to questions of law only and declares that severity of sentence is a question of fact. However it is appreciated under ***section 361(2)*** of the Code that this Court can set aside or vary the decision of the trial court or the first appellate court on sentence if it is a wrong decision on a question of law. Consistent with those provisions, this Court has held that save in cases where the courts below have acted on a wrong principle or have overlooked some material factors, it will not interfere with their exercise of discretion on sentencing. In ***BERNARD KIMANI GACHERU V REPUBLIC, CR APP. NO. 188 OF 2000 (NAKURU),*** the Court reaffirmed the principle thus:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."***

(See also ***OGOLLA S/O OWOURA V. REGINA [1954] EA 270)*** and ***MACHARIA V. REPUBLIC (2003) 2 EA 559).***

In the circumstances of this appeal we are satisfied that there is basis for interfering with the exercise of discretion by the High Court as regards sentence because it did not address its mind to the suitability of retaining intact the sentence that had been imposed by the trial court for the major offence, even after quashing the conviction for the major offence and substituting therefor a conviction for the minor cognate offence. In the premises, we set aside the sentence of 20 years imprisonment and substitute therefor a sentence of 10 years imprisonment with effect from 17th December 2008.

Save as regards sentence, this appeal is otherwise dismissed. It is so ordered.

Dated and delivered at Malindi this 3rd day of July 2015.

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.