Case Number:	Criminal Appeal 65 of 2015
Date Delivered:	11 Mar 2016
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Wanjiru Karanja, Paul Kihara Kariuki, James Otieno Odek
Citation:	Boniface Mutua Ngolanya v Republic [2016] eKLR
Advocates:	Miss Ng'etich & Mr. Kivihya for the State
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	H. C. Cr. A. No. 239 of 2011)
Case Outcome:	Appeal on conviction dismissed, appeal on sentence allowed
History County:	Nairobi
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), KARANJA & OTIENO-ODEK, JJ.A)

CRIMINAL APPEAL NO. 65 OF 2015

BETWEEN

BONIFACE MUTUA NGOLANYA……APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Gitumbi, J.) dated 15th November 2013

in

H. C. Cr. A. No. 239 of 2011)

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JUDGMENT OF THE COURT

1. Boniface Mutua Ngolanya, the appellant herein, was convicted by the Chief Magistrate's Court at Thika on the charge of defilement contrary to section 8(1) and (2) of the Sexual Offences Act, No. 3 of 2006. The brief particulars of the charge were that on the 25th day of February 2010, in Thika District, within the Central Province, he committed an act which caused penetration with NW (hereinafter referred to as the complainant), a child aged 15 years and who has a disability.

2. The prosecution evidence led before the trial court was that on the material day, at about 3:00pm, the complainant was washing dishes with her sister, P N (PW3). The appellant came into the house and took the complainant away. P followed the appellant to his house. She found the complainant on the appellant's bed, with the appellant on top of her. The complainant's panties were on the floor and the appellant had his trousers pulled down.

3. P told the complainant that she was being called by their father; the appellant got up, gave the complainant Kshs 5.00 and warned her not to say anything about what had happened. Word of this incident got to P M K (PW4) who is the complainant's father.

4. The matter was reported to PC Caroline Adhiambo (PW5) of Ngari Police Post. She referred the

complaint to the Thika District Hospital and to the Nairobi Women's Hospital for treatment. At the Thika District Hospital, the complainant was treated by Dr. Karuri who filled in a P3 form. This form was produced in court on his behalf by Dr Juliet Kinyua (PW6). A medical report from the Nairobi Women's Hospital was also produced. The reports from both hospitals indicated that the complainant had been defiled.

5. In his defence, the appellant denied having sexually assaulted the complainant. He claimed that he was being framed by Paul (PW4) who was jealous of him because he had bought a parcel of land.

6. After consideration of this evidence, the trial court convicted the appellant and sentenced him to serve ten years imprisonment. The appellant was aggrieved with his conviction, so he appealed to the High Court. In that appeal, he alleged that the entire trial was a nullity because it proceeded on a defective charge. In this regard, the appellant contended that the age of the complainant did not fall under the provisions of section 8(1) and (2) of the Sexual Offences Act, and thus the particulars contained in the charge sheet were at variance with the charge. That section of law provides for the offence of defilement with a child under the age of eleven years.

7. The appellant also took issue with the particulars of the charge, where the charge sheet stated the date of the offence as being the 25th February 2010. He claimed that the evidence tendered before the court was that the complainant was treated on the 22nd February 2010. Finally, the appellant claimed that since Dr. Karuri who conducted the medical examination on the complainant did not testify in person, he was denied an opportunity to cross examine him on the contents of the P3 form, and that therefore there was a gap in the prosecution case. For these reasons, he urged the first appellate court to reverse his conviction and acquit him.

8. Miss. Ng'etich, learned counsel for the State, opposed that appeal. She submitted that the charge was proved to the required standard, and that the evidence showed that there was no doubt that the appellant defiled the complainant. In addition, learned counsel urged the court that the sentence meted out on the appellant was lenient and not in accordance with the provisions section 8(1) and (3) of the Sexual Offences Act.

9. The High Court rejected each of the grounds of appeal, holding that even if the appellant was charged under section 8 (1) as read with sub-section (2), and not sub-section (3) of the Sexual Offences Act, this was a minor error which could be rectified under section 382 of the Criminal Procedure Code. The first appellate court further held that the appellant had ample opportunity to cross examine Dr. Kinyua on the contents of the P3 form. The first appellate court therefore dismissed his appeal on conviction. With regard to the sentence imposed out on the appellant, the first appellate court noted that the trial magistrate had passed its sentence based on the wrong provisions of the law. The court stated that ***"the appellant should have been sentenced to not 10 but to 20 years imprisonment for defiling the complainant who was aged 15 years at the time of the offence."****(sic).* The court therefore corrected this error and sentenced the appellant to serve a term of twenty years imprisonment.

10. The appellant has now preferred this second appeal in which he has raised three main grounds of appeal. The first is that the first appellate court erred by enhancing his sentence without administering a caution as required in law. In his view, it was imperative for both the learned judge and counsel appearing for the state before the High Court to serve him with a notice that the sentence meted out on him could be enhanced if he proceeded with the appeal. The appellant submitted that since this was not done, the sentence was improperly enhanced. He therefore urged us to reverse the sentence imposed on him by the High Court.

11. The appellant's second ground of appeal is that the two courts below relied on a fatally defective charge sheet to convict him. The appellant submitted that the charges brought under section 8(1) and (2) of the Sexual Offences Act relate to defilement of a child under the age of twelve years, yet the complainant was aged fifteen years. He submitted that this error was prejudicial to him, and could not have been cured by section 382 of the Criminal Procedure Code.

12. The third ground of appeal is that the first appellate court relied on evidence that was not credible to sustain his conviction. He took issue with the particulars of the charge, which indicate that the offence was committed on the 25th February 2010. He submitted that the prosecution witnesses testified that the complainant was treated on the 22nd February 2010, which is three days before the alleged act was said to have been committed. He further submitted that the whole of the prosecution evidence was contradictory and that the courts below did not give adequate consideration to his defence. He therefore asked us to quash the conviction and vacate the sentence imposed on him.

13. The appeal was opposed by Mr. B. L. Kivihya, Assistant Director of Public Prosecutions, who urged us to dismiss it. Learned counsel submitted that the conviction of the appellant was based on sound evidence. Regarding the appellant's complaint that his sentence was improperly enhanced, Mr. Kivihya submitted that the High Court did not enhance the sentence, but merely corrected the sentence by imposing the minimum term of twenty years that is stipulated in section 8(3) of the Sexual Offences Act.

14. This is a second appeal and section 361 of the Criminal Procedure Code constrains this Court to consider only matters of law. Moreover, this Court will not interfere with the concurrent findings of fact of the courts below unless we find them perverse, or if in our assessment, there was no evidence upon which those findings could be based. Decisions of this Court enunciating these principles abound. For example, in ***Boniface Kamande & 2 Others v Republic [2010] eKLR (Criminal Appeal 166 of 2004)*** this Court held that:

"On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it."

15. We have duly perused the record of proceedings both before the trial court and the first appellate

court. We have also considered the submissions of the appellant and learned counsel for the state.

16. The first issue that we must address is the appellant's submission that the charge against him was fatally defective. He alleges that it is defective because he was charged under section 8(1)(2) of the Sexual Offences Act, while there is in fact no such section in law. In his view, he ought to have been charged with the offence under section 8(1) as read with 8(2) of the Act. Secondly, the appellant alleges that the charge sheet was defective because subsection 2 of section 8 of the Act applies where the age of the complainant is under eleven years, while in his case, the age of the complainant was given as fifteen years.

17. It is trite law that an accused person must be charged with an offence that is known in law, including the correct particulars in the charge sheet, so that the accused person is informed of the offence with which he is charged, and the likely sentence that he would receive if convicted. This information enables the accused person to adequately prepare his defence. In this regard, we adopt, with approval, the sentiments of the High Court in ***Sigilai v Republic [2004] 2 KLR 480*** where it was held that:-

"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence to the charge."

18. On the complaint that section 8(1)(2) does not exist, we believe that this is a defect that is curable under section 382 of the Criminal Procedure Code which provides in part that:

"…no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code unless the error, omission or irregularity has occasioned a failure of justice."

19. In the circumstances, we do not perceive that there was any failure of justice, and we therefore reject this ground of appeal.

20. We now turn to consider whether the charge sheet was defective because the particulars referred to the complainant as being a child under the age of fifteen years. The particulars of the charge are an integral part of the charge sheet. In the words of this Court in ***Isaac Omambia v Republic [1995] eKLR (Criminal Appeal 47 of 1995) –***

"In this regard, it is pertinent to draw attention to the following provisions of [section 134] of the Criminal Procedure Code which makes particulars of a charge an integral part of the 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."

21. The question that we must now consider is whether or not the charge sheet provided the appellant sufficient, or reasonable, information as to the charge that he was facing. We think that it did. The charge clearly spelt out that the appellant was on trial for the offence of defilement of the complainant. The particulars gave further information as to the date and place that the offence was said to have occurred. We therefore do not think that the appellant suffered any prejudice, and we reject this ground of appeal.

22. Related to this issue is the appellant's challenge based on the victim's age. In sexual offences, the age of the victim is a fundamental aspect of the charge. As was stated by this Court in ***Kaingu Elias Kasomo v Republic Criminal Appeal No. 504 of 2010 (unreported)*** as cited in ***Martin Nyongesa Wanyonyi v Republic [2015] eKLR (Criminal Appeal No. 661 of 2010***:

"[The] age of the victim of sexual assault under the Sexual Offences

Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

23. In the charge sheet, the age of the complainant was said to have been fifteen years; the P3 form also states that the victim was fifteen years. The victim's mother on her part stated that the complainant was seventeen years old. In ***Peter Omukunya Mango v Republic Criminal Appeal No. 243 of 2012 (unreported)*** this Court held that:

"… where the Court is satisfied that the offence of defilement has been committed (that is where it is proved that the victim was below the age of 18 years), but the court entertains doubt whether or not the victim falls within any of the stipulated age brackets in [sections 8(2), 8(3) and 8(4) of the Sexual Offences Act respectively, both the High Court and this Court has power to pass a sentence which is favourable to the appellant and which corresponds with the apparent age of the victim."

24. In the present appeal, there appears to be no basis upon which Dr. Karuri estimated the age of the complainant as being fifteen years old. We therefore find that the courts below ought to have taken the complainant's age as seventeen years; that was the apparent age of the complainant and more importantly that is the age that her mother said she was. It follows therefore that the first appellate court erred in sentencing the appellant under the provisions of section 8(2) of the Sexual Offences Act.

25. The appellant has also challenged his conviction on the basis of several inconsistencies in the prosecution evidence. In particular, he submitted that there were contradictions as to the date that the offence occurred and that there was also a contradiction with regard to the evidence of Priscilla (PW3), who testified that the appellant had taken away the complainant, with that of her father, who testified that he had sent the children to the appellant's house to watch television. We do not think that these contradictions affected the tenor and weight of the prosecution evidence. We are reinforced in this finding by the sentiments of this Court in

***Joseph Maina Mwangi v Republic* [2000] eKLR (Criminal Appeal No. 73 of 1992)** where this Court stated of discrepancies:

"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences."

26. The evidence on record clearly shows that the complainant was defiled by the appellant. In the result, we find and hold that there is not a single reason to warrant our interference with the concurrent findings of fact by the two courts below. The conviction of the appellant was safe and the first appellate court was right to confirm it. We therefore find and hold that the appeal against the conviction is without merit and it is accordingly dismissed.

27. With regard to the sentence imposed on the appellant by the first appellate court, we are of the view that bearing in mind the age of the complainant, the appellant ought to have been sentenced under the provisions of section 8(4) of the Act. We therefore set aside the sentence of twenty years imprisonment and substitute therefor the term of fifteen years to run from the date of conviction.

28. Orders accordingly.

Dated and delivered at Nairobi this 11th day of March, 2016.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR