REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEALe NO. 22 OF 2020

NICODEMUS MUTUKU KIOKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable C. C. Oluoch dated 13th December, 2019 in Mavoko CM's Court Criminal Case No. 20 of 2018)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

NICODEMUS MUTUKU KIOKO.....ACCUSED

JUDGEMENT

1. The appellant, **Nicodemus Mutuku Kioko**, was charged with four counts of defilement contrary to Section 8(1) as read with 8(2) of the ***Sexual Offences Act*** No. 3 of 2006.

2. The particulars of the charge in count I were that on diverse dates between 3rd April and 30th April 2018 at daystar area in Athi River sub-county within Machakos county intentionally and unlawfully caused his male genital organ (penis) to penetrate the male genital organ (anus) of BMM a child aged 10 years.

3. The particulars of the charge in count II were that on diverse dates between 1st and 30th August 2018 at daystar area in Athi River sub-county within Machakos county intentionally and unlawfully caused his male genital organ (penis) to penetrate the male genital organ (anus) of DMW a child aged 10 years.

4. The particulars of the charge in count III were that on diverse dates between 10th August 2018 at daystar area in Athi River sub-county within Machakos county intentionally and unlawfully caused his male genital organ (penis) to penetrate the male genital organ (anus) of DMJ a child aged 10 years.

5. The particulars of the charge in count IV were that on diverse dates between 3rd April and 30th April 2018 at daystar area in Athi River sub-county within Machakos county intentionally and unlawfully caused his male genital organ (penis) to penetrate the male genital organ (anus) of CS a child aged 9 years.

6. In the alternative, the appellant was charged with four counts of the offence of indecent act with a child contrary to Section 11(1) of the ***Sexual Offences Act*** No. 3 of 2006.

7. He was tried and was found guilty in the said four counts of defilement. Upon his conviction, the appellant was sentenced to serve Twenty (20) years imprisonment on each count, the sentences running concurrently. Dissatisfied with the decision of the trial court citing the

following grounds:

1) That the learned trial magistrate erred in both law and in fact by basing the conviction against the accused person on a defective charge sheet thereby rendering the overall charges null and void.

2) That the learned trial magistrate erred in both law and in fact by failing to find that the key ingredients of the offence were not established against the appellant herein.

3) The learned trial magistrate erred in both law and in fact by failing to find that the totality of the oral evidence as narrated by the victims was based on lies, fabrications and coaching by the prosecution to suit its whims of falsely achieving the conviction of the accused person.

4) That the learned trial magistrate erred in both law and in fact by failing to find that critical witnesses needed to substantiate the prosecution's case were not procured hence waging gaps were left which created doubts on the appellant's culpability to have committed the offence in question.

5) That the learned trial magistrate erred in both law and in fact by failing to consider material contradictions and inconsistencies in the evidence which not only brought out the prosecution witnesses as incredible and worthless of belief but also impugned the whole prosecution case.

6) That the learned trial magistrate erred in both law when he failed to freshly, exhaustively, comprehensively and deliberately analyse weigh and consider the cogent defence case which exonerated the appellant from any wrong doing.

8. In support of its case the prosecution called 15 witnesses.

9. Upon conducting a *voir dire* examination, the Court found that PW1, **BM**, a minor aged 10 and born in 2008, was possessed of sufficient intelligence and understood the solemnity of an oath and could be sworn. According to him, during the April, 2018 holidays, he was playing in the field with a friend at 5pm when the appellant told him told him to board the appellant's motor cycle and accompany him to his house to pick a jacket. Upon their arrival at the appellant's home, the appellant told PW1 to remove his pair of trousers and boxers and to pull down his shorts to the knees after which the appellant pulled his own pair of trousers and pants down and inserted his organ into PW1's anus. Despite PW1 complaining to the Appellant that he was feeling pain, the Appellant continued sodomising PW1. When the Appellant was done, he warned PW1 not to disclose the incident to anyone on threat of harming him.

10. PW1 then put on his clothes and went home which was not far from the Appellant's bathed and went to sleep though at night he started feeling stomach ache and vomited but did not report the incident to his parents.

11. The following day, PW5, then aged 10 years, who had apparently seen him entering the appellant's house asked him what he was doing in the appellant's house and PW1 disclosed to him what had transpired at which point the said PW5 disclosed to him that he had similarly been sodomised by the Appellant. They then reported the matter to their head teacher who summoned their parents and the appellant was arrested.

12. According to PW1, the appellant had sodomised him on three different occasions but he never disclosed the same to his parents.

13. According to PW1, during the first incident, he had been sent to buy diapers when the appellant asked him to accompany him to the house while on another occasion the appellant sent him for vegetables from a grocery shop and sodomised him when he delivered the same. It was his evidence that the appellant was staying in a one roomed house and that he had known the appellant for a long time as they used to go to the same church.

14. PW2, **CS**, aged 9 years, was similarly subjected to *voir dire* examination and was found to possess sufficient intelligence and understood the solemnity of an oath. In his testimony, PW2, stated that in April. 2018, in the morning when he was playing outside with **D** and **B** at home, the Appellant, father's friend and used to go to their house, who was on a motor cycle asked him to take him to a shop to get clothes from Mama Kate who was ironing clothes. PW1 boarded the motor cycle and accompanied the Appellant. And they took the clothes to the Appellant house where the Appellant told PW2 to get onto the bed after which the Appellant also got onto the bed, pulled down PW2's shorts and since PW2 was facing the wall he did not see whether the Appellant removed his clothes. The Appellant the inserted his penis into PW2's anus after which the Appellant threatened to beat him like a dog if PW2 disclosed the incident and gave PW2 Kshs 50/-. After that the Appellant dropped PW2 home on his motor cycle where PW2 took a shower and went to sleep without disclosing to his mother, who inquired where he was, about the incident. He stated that he cried after the incident.

15. One day, PW2 saw the Appellant being beaten outside and he disclosed to PW1 that the Appellant had defiled him. PW1 also disclosed to him that he had similarly been sodomised by the Appellant and disclosed the incident to his brother and parents. According to PW2, the Appellant's house was one roomed and this was the first time that the Appellant defiled him.

16. At the time of the incident, PW2 had been circumcised but had not fully recovered. As a result of the defilement, he was infected and was taken to the Hospital days later. It was his evidence that no one else witnessed the incident as they were alone.

17. PW3, **DM**, an 11 year old boy testified after the court found on voir dire examination that he was possessed of sufficient intelligence and understood the solemnity of an oath. According to him during August, 2018 school holidays, he was playing with his friend E at around lunch time when the Appellant asked him to help him fetch water from a borehole. In order to get containers for fetching water, they went inside the Appellant's house where the Appellant switched on the radio and told PW3 to sit on the bed. The Appellant then removed his

clothes and inserted his penis into PW3's anus. Though PW3 cried after the ordeal, the Appellant gave him Kshs 100/- after the incident and threatened to cut off his penis should he disclose the incident. When the school opened, he reported the incident to his teacher, **Ndunga**, who reported the incident to the head teacher and the following day his parents were called. It was his evidence that the Appellant's house was a one roomed house partitioned by a curtain. He stated that mucus substance was oozing from his anus after the incident and he called his mother to see it.

18. Upon being examined, the Court found PW4, **DM**, a boy aged 10 years old testified, born on 10th October, 2008, similarly possessed of sufficient intelligence and understood the solemnity of an oath. In his testimony, PW4 stated that during the August, 2018 holidays in the evening at around 4pm, he was playing with PW1, PW2, PW3 and **Mwendwa** when the Appellant aboard his motor cycle went to their home and requested him to take him to his house to pick a jacket. They then proceeded to the appellant's house which was not far from where they were playing and entered the Appellant's house. The Appellant then switched on a radio and the motor cycle and told PW4 to lie on the bed which PW4 did. The Appellant then removed PW4's trousers, pull down his own trousers and inserted his penis into PW4's anus while promising to give PW3 money so as to buy his silence and also threatened to cut PW4'S penis should he report the incident. The Appelalnt also gagged PW4 by use of a celotape.

19. After the incident, the Appellant told him to go home which he did on foot. It was PW4's evidence that the Appellant's house was one roomed with a stove and a table. Upon reaching home, PW4 did his studies and the next day, being a Monday, the opening day, he went to school. It was his evidence that during the incident, he felt pain but did not narrate the incident to his mother due to the threats by the Appellant to cut off his penis.

20. When PW4 reported to school on Monday, in the company of **DM**, who had informed him that they had similarly been defiled, they reported the incident to their teacher, **Ndunga** who reported the matter to the head teacher. The head teacher called their parents and the Appellant was subsequently arrested. After they recorded they statements they went for treatment at Nairobi Women Hospital where they were treated and discharged.

21. According to PW4, he knew the appellant as the appellant used to ferry him and his mother to the market on his motor cycle and he used to hear people calling him "uncle". It was his evidence that during the incident, through the gap on the door, he saw one **Pastor Darius** in whose house the Appellant was staying passed by and the Appellant warned him not to make any noise.

22. PW5, **BON**, aged 10 years was examined and found by the court to be possessed of sufficient intelligence and understood the solemnity of an oath and was accordingly, sworn.

23. In his evidence, when he was in standard 3, as he was going to play, he met the Appellant digging in the farm and the Appellant sent him to buy for him a soap and take to his house which PW5 knew and wait for him. told him that he should go and wait for him in the Appellant's Shortly thereafter, the Appellant followed him to the house, told him to place the soap on the table and join him on the bed so that they could watch a movie on the Appellant's phone. The Appellant then told him to remove his trousers which PW5 did. However, when the Appellant told him to remove his boxers, PW5 shouted and cried suspecting that the Appellant intended to defile him. The Appelalnt then told him to leave and PW5 put on his clothes and left. According to PW5, he knew the Appellant whom he used to see getting into the house which was not far and they used to call him "uncle".

24. PW6, **Ndunga Benard Wambua**, a teacher testified that when they opened the school on 27th August, 2018, PW3, M and D went to him and they revealed to him that the Appellant, whom they referred to as "uncle" had been defiling them whenever school closed. According to the report, the Appellant would send them and once in his house, would switch on the radio and the motor cycle, remove their clothes and defile them after which he would give them money then threaten them that he would cut off their private parts should they disclose the incidents that had been going on for some time. However, the resultant pain when passing stool made them to disclose the incident and after sharing their experiences they decided to disclose the same to PW6.

25. PW6 then disclosed the same to the Deputy Head Teacher since the Head Teacher was not in the school. When the Head Teacher returned to the school they engaged her on the same. According to PW6, at that time he was teaching class 4 and all the complainants were his students.

26. PW7, **Pauline Muthoni Manga**, the Head Teacher, narrated that the matter was brought to her attention by her Deputy and upon receiving the report, she called PW3, **M** and PW5 who explained to her what had transpired just as they had narrated to PW6. PW7 then called the parents and sought from them whether they knew about the incidents but the parents denied any such knowledge. After that he accompanied them to Nairobi Women Hospital.

27. PW8, **John Njuguna**, an outpatient clinician at Nairobi Women Hospital, treated the PW1, PW2, PW3 and PW4. According to him, PW1 was born on 5th February, 2009. When PW1 went to the Hospital on 28th August, 2018 at 6pm with report of anal defilement, he examined him and found that PW1 had no injuries on his anus and he was able to control his bowel as sphincter muscles were intact and he had no infections. However, the final examination was consistent with the allegation of penal anal penetration.

28. According to him, PW2 was born in 2009 and upon his examination he found no injuries though he had been circumcised and was in the process of healing. He had no infections though it was his opinion that from the history the findings were consistent with anal penetration. He made similar findings upon examining PW3 and PW4.

29. When PW9, **JM**, PW4's father received a call from PW7, he interrogated PW4 who disclosed to him that the Appellant had attempted to defile him but he resisted and ran away. In cross-examination he stated that there was a day the Appellant told him that PW4 looks like a girl.

30. PW10, **RMM**, PW3's father received a call from PW7 on 28th August, 2018 to go to the school where he was informed of the incident. After that they set out to look for the Appellant who was arrested and the matter handed over to the police. According to the information he

received from PW3, the Appellant asked him to get him his jacket and once in the house, the Appellant sodomised him

31. PW11, **AKM**, PW2's father on 28th August, 2018 received information from a neighbour that some children had been defiled. When he went to the police station he established that the report had been made against his neighbour, the Appellant and that his son was one of the victims. He proceeded to Nairobi Women Hospital where PW2 informed him that the incident had been going on since he was in class 2. It was his evidence that the Appellant used to be his neighbour but moved 1 km away.

32. PW12, **NNK**, PW1's uncle and guardian, received a report from the head teacher on 28th August, 2018 that PW1 had been defiled and need to be taken to the Hospital and that the suspect was the Appellant. This, was confirmed to him by PW1. According to him, PW1 was around 10-11 years as he was born on 5th February, 2009. According to him, PW1 had complained to him of stomach ache for which he took him for treatment.

33. PW13, **Wycliffe Omari**, testified that he was informed by PW5 that at one point the Appellant sent him to buy a soap for him and when he took it to the Appellant's house, the Appellant removed his pair of shorts but when the Appellant attempted to remove his underpants he cried and the Appellant left him Upon receipt of the said information he made a report to the police. However, upon being examined, PW5 was found not to have been defiled.

34. PW14, **APC John Ochieng**, was on duty at Daystar Police Post on 28th August, 2018 when the Appellant was taken to the post on allegations that he had defiled three children. He escorted him to Athi River Police Station and recorded his statement. PW15, **Cpl. Caroline Seet**, the Investigations Officer, received the information of the defilements, recorded their statements, issued them with P3 Forms and sent them to Nairobi Women Hospital. She also took the Appellant into police custody awaiting the results of the medical examination after which he charged the Appellant. Upon her visit to the Appellant's house she established that the Appellant was staying in a single room.

35. Upon being placed on his defence, the Appellant testified that on 10th August, 2018, being a motor cycle rider, he was hired to do some work with two other people on 10th August, 2018, 11th August, 2018 and 12th August, 2018. A disagreement, however, arose among them after one of them was involved in an accident and their chairman sent him to Athi River Police Station to find out what the person had done. He established that the person had stolen iron sheets from the farm. While he was instructed to report back to the chairman, a brother of the person who was involved in the accident threatened the Appellant. According to him, he was waylaid by PW10 and PW12 who forced him to board their motor cycle and along the way they assaulted him, took his wallet with the documents and called the person who had threatened him, a taxi driver who took him to Daystar Police Post.

36. According to the Appellant, in 2013, he was staying with the complainants' in the same plot and a disagreement arose leading to him lodging a complaint at Kenya Power, Kitengela who took away PW10's welding machine. He later moved away from the said plot. He further stated that around May or June, 2014, he was attacked at the plot after PW10 alleged that he was working with thieves and that he intended to steal from Pastor Darius. He however did not follow up the matter.

37. In cross-examination, he stated that at the time of his arrest he was staying at Daystar AP Camp though in 2015-2016, he was staying in Pioneer. He denied that he was fellowshipping with the Complainants in the same church and asserted that he did not know the Complainants but used to see them before the incident. He admitted that he knew their parents having carried them. He agreed that the evidence he gave had not been disclosed to the investigating officer and stated that he had no grudge with the teachers who testified.

38. In support of his defence, the Appellant called **Peter Muthui**, DW2, who testified that in August, 2018, he was in a meeting with the Appellant when the Appellant was arrested.

39. In her judgement the learned trial magistrate found that based on the birth certificates, child health cards and a baptismal card produced, the complainants were aged below 11 years. She further found that based on the oral evidence, though there were no injuries at the time of the examination, the injuries could have healed over time. As regards the identity of the perpetrator, she found that the Appellant testified that he knew the children and their parents prior to the incidents who were neighbours. Based on the evidence on record, she found that there was no reason for the children to gang up against the Appellant and falsely accuse him of the offences. She found the complainants truthful, convicted the Appellant and sentenced him to twenty (20) years in jail in respect of each of the 4 counts, the sentences to run concurrently.

40. It was submitted by the Appellant that he was convicted on a defective charge sheet. According to him, in Count II the date of the offence was indicated as 10th August, 2018 while in PW4's evidence, the incident occurred on the last Sunday of the month hence it could not have been 10th of the month. It was submitted that the Appellant was prejudiced by this fact.

41. It was further submitted that there was no evidence of penetration since the medical evidence returned a negative result. It was his submission that the evidence tendered by the complainants was so uncannily similar that there seemed to have been some prior coaching on what they were going to say. It was further submitted that there were a myriad of inconsistencies and contradictions in the evidence tendered by the prosecution which go to the root of the case. To the Appellant, he presented a very cogent defence to the case which defence was unchallenged by the prosecution.

42. On the other hand, the Respondent submitted that the prosecution through PW15 produced the birth certificates, health card and a baptismal card for the minors as evidence.

43. As regards penetration, reliance was placed on the case of **Bassita vs. Uganda S. C. Criminal Appeal No. 35 of 1995** and it was submitted that medical evidence need not to be availed to prove that there was penetration and that oral evidence may be tendered in court to prove penetration. In this case there was evidence of insertion of the penis in the complainants' anus and they alleged that they felt pain when relieving their bowels. It was submitted that the absence of injuries around the anus could be explained on the fact that the victims were not examined immediately after the ordeal and that the injuries may have healed as some allege that they were sodomised in April.

44. As to whether penetration was occasioned by the appellant, it was submitted that the minors knew the appellant as their neighbour and also as their Sunday school teacher and that in his defence, the Appellant also confirmed that he knew the complainants and their parents prior to the incident and they were neighbours. Therefore, in all occasions, it is safe to conclude that the appellant was identified by recognition.

45. As regards the allegation that the charge sheet was defective, it was submitted that the discrepancy between the dates in the charge sheet and the evidence of the complainant in count III could have been due to the tender age of the witness. It was submitted that the contradiction in the charge and the evidences in court did not occasion any miscarriage of justice since the appellant knew the charges that he was facing and he tendered his defence hence the error is curable under section 382 of the ***Criminal Procedure Code***.

46. As regards corroboration the Respondent cited section 124 ***Evidence Act*** and submitted that once the court is satisfied that the complainant is telling the truth there is no need for corroboration

47. It was further submitted that the failure by the prosecution to call **Edwin, Kioko** and **Aunt** was not fatal to the prosecution case. While it is the duty of the prosecution to adduce evidence beyond reasonable doubt. Once the prosecution has satisfactorily discharged the burden of proving the main element of a charge as the trial court correctly held that the prosecution had proved the charge facing the appellant beyond reasonable doubt. Then there is no need to call many witnesses.

48. The Respondent's position was that the prosecution proved all the ingredients of the offence beyond any reasonable doubt and that the defence of the appellant was hopeless denial and could not dispel the overwhelming evidence tendered by the prosecution. In their view, the conviction was safe and that this appeal does not raise any basis to disturb the conviction.

Determination

49. I have considered the evidence on record as I am duty bound to do. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.** I have also considered the submissions made by the parties herein.

50. The prosecution's case was that on various days, the Appellant herein lured the 4 complainants into his house and defiled them. He thereafter threatened them that he would harm them should they disclose that fact. Scared by the threats the complainants did not disclose this fact to their parents but did so to their teacher upon the opening of the schools. When the complainants were taken for treatment no injuries were found that there was no evidence of penetration found. The Appellant was however arrested and charged with the 4 counts.

51. In his evidence the Appellant's defence was that there existed a grudge between him and some of the parents of the Complainants.

52. The first ground of appeal is that the charge sheet was defective. It is true and it is admitted that the charge sheet in so far as Count III was concerned disclosed a different date from the evidence adduced by the Complainant in respect of that Count. It is true that section 134 of the ***Criminal Procedure Code*** requires in mandatory terms that every charge should be precise and abundantly clear to the appellant. It provides that:

> ***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.***

53. Interpreting this provision, it was held in **Isaac Omambia vs. R, [1995] eKLR** that:

> **"the particulars of a charge [form] an integral part of the charge."**

54. However, the test in such cases was set out in **Cherere s/o Gakuli vs. R [1955] EACA 622** in which it was held that:

> **"The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity."**

55. It was therefore held in **Paul Katana Njuguna vs. Republic [2016] eKLR** that:

> **"In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective. In this appeal, the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under Section 382 of the Criminal Procedure Code."**

56. Dealing with the framing of a criminal charge in the case of **Willie (William) Slaney vs. State of Madhya Pradesh, [A.I.R. 1956**

Madras Weekly Notes 391], the Supreme Court of India held that:

> **"We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent…We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms that it must all be "explained to him", so that he really understands…but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality. … The essence of the matter is not a technical formula of words, but the reality. Was he told" Was it explained to him" Did he understand" Was it done in a fair way…Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."**

57. Other jurisdictions have also dealt with similar issues of defective charges. **In The State vs. Matlhogonolo Masole, 1982 (1) BLR 202 (HC) the High Court of Botswana,** citing with approval **(R vs. Greenfield, (1973) 57 Cr. App. Rep. 849)** while handling a similar situation, the court opined thus:

> **"...there is, however, one over-riding matter to be considered and that is whether or not the accused was prejudiced by the duplicity in the charge, as duplicity in a count is a matter of form, not a matter of evidence (R v Greenfield, (1973) 57 Cr. App.Rep. 849)."**

58. Similarly, in **Isaac Nyoro Kimita & Another vs. Republic [2014] eKLR**, it was appreciated that:

> **"In this case, we have no doubt in our minds that the appellant knew that it was practically impossible for him and others to have *"jointly"* defiled the complainant. He therefore understood the charge against him to have been that on the material date, while together, with others, engaged in an illegal enterprise, they successively defiled the complaint. This is confirmed by the fact that in the trial, the appellant extensively cross-examined prosecution witnesses and defended himself. In the circumstances, we find that the defects in the charge were minor and did not prejudice the appellant. They did not occasion any miscarriage of justice or violate the appellants' constitutional right to a fair trial."**

59. In **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** the Court expressed itself as hereunder:

> **"I have said elsewhere that the answer to this question must begin with section 382 of the Criminal Procedure Code. In material part, it provides that:**
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> **….** ***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 injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.***
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> **The proviso to Section 382 provides that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. Next, then, we must ask ourselves when it is appropriate to find that a charge sheet is fatally defective. Our case law has given pointers. Two cases are pertinent: the case of *Yosefa v. Uganda [1969] E.A. 236* – a decision of the Court of Appeals – and *Sigilani v. Republic [2004] 2 KLR 480* – a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. Sigilani held:**
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> **'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 a specific charge that he can understand. It will also enable an accused person to prepare his defence.'**
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> **As I have previously held, the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him" In this case, the Appellant was charged under section 8(1)(2) of the Sexual Offences Act. No such section exists in the Act. Did this prejudice the Appellant and occasion a miscarriage of justice" I have previously said that the answer to that question is provided by seeking to see if the accused person can be said to have understood the charges facing him well enough to understand the ingredients of the crime charged so that he can fashion his defence. This can be tested, for example, by how much or vigorously he participated in the trial process and whether the record shows that he was able to follow the proceedings and ask questions in line with his theory of defence. At the end of the day, therefore, the test is not at all a formalistic one but a substantive one. On my part, I have adopted a test that looks at the trial process in its totality rather than the retail defects separately. The aim is to establish if the trial process could have been said to be fair to the accused person. If the charge sheet has a technical defect but all the other procedures are meticulously followed and the other substantive rights of the accused person are evidently respected in the trial process, it will be easier for a Court to fairly immunize the technical defect in the charge sheet – especially if it is clear that the accused person understood what was facing him and his participation in the trial process vindicates that position. On the other hand, if a defect in the charge is followed by a series of other procedural or substantive mishaps or miscues in the trial process which all affect the rights of the accused person, in my view, the Court should be reluctant to utilize section 382 to cure the charge sheet even if each of the defects in the trial process could, standing on its own, be cured or treated as harmless error. An accumulation of singular**

streams of procedural defects which would otherwise be harmless errors spew into a river of substantive defect which would entitle an accused person to an acquittal upon appeal. Applying this approach to the facts of the present case, I can confidently say that no miscarriage of justice was occasioned by the technical defect in the charge sheet and I will proceed to "cure" it under section 382. If one needed evidence of that, one would begin with the very fact that the Appellant never raised the objection – including on appeal. That must be because he knew the charges he was facing. Second, a perusal of the Court record shows that the Appellant participated vigorously in the trial process and was well aware of the charges he was facing. All in all, I am certain that the trial process was fair and the Appellant had sufficient notice of the charges facing him."

60. In this case, I have, however considered the evidence on record, and I agree with the Respondent that there was no evidence of prejudice occasioned by that fact. I find that no miscarriage of justice was occasioned by the purported technical defect in the charge sheet which in any case is, in my view, curable under section 382 of the ***Criminal Procedure Code***.

61. Section 8 of the ***Sexual Offences Act*** provides as follows:

8. (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.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this section if -

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

62. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** where it was stated that:

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

63. In this case there is no question regarding the age of the complainants. From the documentary evidence adduced it was clear that the complainants were all aged below 11 years old at the time the offence was committed.

64. As regards identification, there was no doubt at all that the appellant was known to the complainants and their parents. Though the Appellant denied knowing them in his evidence in chief, he admitted in cross-examination that he knew the Complainants and their parents as one time neighbours.

65. Regarding penetration, section 2 of the ***Sexual Offences Act*** defines "penetration" as:

the partial or complete insertion of the genital organs of a person into the genital organs of another person.

66. Therefore, for the offence of defilement to be proved evidence must show that the appellant inserted his penis into the anus of the complainant. It is not sufficient that the said organs came into contact. However partial insertion suffices for the purposes of penetration as the said insertion need not be complete.

67. In this case, the evidence of penetration emanated from the complainants since the medical evidence was inconclusive. However, even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of sexual offence or circumstantial evidence. My position in this regard is fortified by the holding of the Supreme Court of Uganda in the case of **Bassita vs. Uganda S. C. Criminal Appeal No. 35 of 1995** where the Court held that:

"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

68. The Court of Appeal in **Martin Nyongesa Wanyonyi vs Republic Criminal Appeal no. 661 of 2010, (Eldoret), D. K. Maranga, D. Musinga& A. K. Murgor JJA** cited with approval **Kassim Ali vs Republic Criminal Appeal No. 84 of 2005** (Mombasa) where it was held that:-

"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence"

69. I however agree with the position taken in **Chrispine Waweru Njeru vs. R. [2015] eKLR** that:

"…medical examination has to be done at the earliest possible time where there is no eye witness and where there is a delay in doing the examination questions would arise as to the person responsible for breaking the hymen and the standard of proof in defilement cases is beyond reasonable doubt."

70. In this case, according to the complainants, the appellant inserted his penis into their anus. If that evidence was true, it would suffice for the purposes of proving penetration. Though corroboration in such matters is necessary, the Court could rely on such evidence if satisfied that the complainants were telling the truth. It is not in doubt that the evidence of a minor requires corroboration since the principle part of Section 124 of the ***Evidence Act*** states that:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

71. This position was reaffirmed by the Court of Appeal in **Bernard Kebiba vs. Republic [2000] eKLR** where it stated that:

"The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result."

72. Similarly, in **Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR** the Court of Appeal was of the opinion that:

"The relevant law in Kenya is succinctly set out in Chila vs. The Republic (1967) EA 722 at page 723:

'The law of East Africa on corroboration in sexual cases is as follows: the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that here evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.'

The decision was applied in Margaret v the Republic (1967) Kenya LR 267. In view of Consolata's evidence, it was necessary for sexual intercourse to be proved by establishing penetration: Halisbury's Statutes of England, Third Edition, Volume 8 page 440 para 44. Be that as it may, the trial magistrate did not warn himself as we have already held. That was a grave misdirection. In the absence of such a warning, the convictions for rape are not for sustaining unless we are satisfied that Consolata's evidence is true. We are not so satisfied and so the convictions cannot stand: Rv Cherap arap Kinei & Another (1936), 3 EACA 124."

73. It follows that as a general requirement, corroboration is necessary in sexual offences where the minor is the victim of the offence. What then is corroboration? The meaning of corroboration as defined or stated in the Nigerian case of **Igbine vs. The State {1997} 9 NWLR (Pt.519) 101 (a), 108** is thus: -

"Corroboration means confirmation, ratification, verification or validation of existing evidence coming from another independent witness or witnesses".

74. In **Mukungu vs. Republic [2002] 2 EA 482**, the Court of Appeal citing **Mutonyi vs. Republic [1982] KLR 2003**, held that:

"An important element in the definition of corroboration is that it affects the accused by connecting him or tending to

connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See Republic vs. Manilal Ishwerlal Purohit [1942] 9 EACA 58, 61."

75. In **R vs. Kilbourne [1973] 2 WLR 254, 267**, **Lord Hailsham** of St Marylebone LC stated:

"Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroborated in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed."

76. In **Khalif Haret vs. The Republic [1979] KLR 308, Trevelyan** and **Hancox, JJ** pronounced themselves as hereunder:

"What then, is corroboration? As was put succinctly in R vs. Kilbourne (at page 263) it means "no more than evidence tending to confirm other evidence". It is not, as the judge-advocate correctly stated, confirmation of everything, so that it amounts to a duplication of the evidence needing corroboration."

77. It is therefore clear that corroborative evidence or material ought to confirm, ratify, verify or validate the existing evidence and must emanate from another independent witness or witnesses. It must affect the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

78. In this case there was clearly no material corroborating the Complainants' evidence that it was the Appellant who defiled them. That however, is not the end of the matter. In sexual offences, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction since there is a proviso to Section 124 of the ***Evidence Act*** which states that:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

79. Dealing with a similar issue in the case of **Mohamed vs. R, (2008) 1 KLR G&F 1175,** the Court held that:

"It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that he child is truthful."

80. The Court of Appeal sitting in Mombasa in **Sahali Omar vs. Republic [2017] eKLR** held that:

"On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of section 124 of the Evidence Act…The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful…It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)…In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:

"…The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."

The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail."

81. Therefore, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. What is required of the trial court is to be satisfied that the victim is telling the truth. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. The fact of the warning must appear in the judgement of the trial court and the record itself must show that the trial court was so satisfied. It was therefore held in **Omuroni vs. Republic (2002) 2 EA 508** that:

"Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial judge to make favourable or unfavourable impression about the credibility of a particular witness."

82. This decision was relied upon by **Warsame, J** (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR** when he stated that:

> **"It is required, which is of paramount of importance, that a trial court must indicate or point out instances of demeanour which he noted and which he relies upon as a basis of accepting the evidence of a particular witness. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing the instances as to why and how he thinks that particular witness is a witness of truth. In this case the trial court did not pay any regard to this elementary principle of law in arriving at the decision as to whether the three complainants were witnesses of truth. In the absence of any basis for establishing whether the three witnesses were witnesses of truth, the trial court was wrong in its decision."**

83. In this case however, the learned trial magistrate found that the complainants' evidence was truthful. The Appellant however contends that this finding was not supported by the evidence and that the said evidence, as tendered by the complainants, was so uncannily similar that there seemed to have been some prior coaching on what they were going to say. In order to determine this one needs to deal with the salient features of the said evidence. According to PW1, he was playing with a friend, Edwin, when the Appellant, who was riding a motor cycle asked him to board the same and take his jacket to his house. He did so but when they arrived at the Appellant's house, the Appellant defiled him. This was at 5.40pm. That however was the third time such an incident was taking place. PW2, on the other hand was playing with his friends, Dennis and Brian in the morning when the Appellant asked him to take him to a shop to pick his clothes. PW2 boarded the Appellant's motor cycle and after picking the clothes they proceeded to the Appellant's house where the incident took place. As for PW3, he was also playing with his friend, **Edu**, at lunchtime when the Appellant asked him to help him fetch water. As they were to get containers from the Appellant's house, they went inside the house and the Appellant switched on his radio and the motor cycle after which the Appellant defiled him. This was around 12 noon. As for PW4, on the material day, the Appellant went to their home where he was playing with his friends, in the evening at around 4pm and requested him to take him to his house to pick his jacket. Once inside the house the Appellant switched on his radio and the motor cycle and defiled him.

84. From the foregoing summary of the complainants' evidence, can it be said that their evidence was so uncannily similar as to amount to concocted evidence? I don't believe so. While there certainly were similarities in the evidence, it was not exactly the same. The were discrepancies in the timing and how the Appellant allegedly lured the Complainants to his house. Again those present were not exactly the same people. Whereas the Appellant's case was that the charges trumped up by some of the parents of the Complainants' parents who had grudges against him, from the evidence, it is clear that the incident was not instigated by the said parents. The first report was made by the Complainants to their teachers who then summoned the parents. Therefore, even if the said parents had grudges against the Appellant, it is clear that the case was not commenced by the parents but by the Complaints through their teachers whom the Appellant admitted had no grudge against him.

85. As for the failure to call some witnesses, it has not been alleged that the evidence of the said witnesses was material to the case. It is not contended that any of the said witnesses witnessed the defilement. The best they could state was that they saw the Appellant with the Complainants and that would not have taken the case any further.

86. I have considered the evidence on record. I have no doubt in my mind that the Appellant lured the Complainants to his house. He then told the Complainants to remove their clothes and he similarly removed his. What happened thereafter however cannot be ascertained from the evidence on record. I also note that whereas PW4 testified that he was defiled, his father, PW9, testified that PW4 informed him that he ran away before he was defiled.

87. While the evidence of penetration was inconclusive, in this case however, the appellant faced the alternative charge of indecent act. Section 2 of the ***Sexual Offences Act*** provides *inter alia* 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;***

88. Section 11(1) of the ***Sexual Offences Act*** provides that:

> ***Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.***

89. Having considered the evidence presented before the trial court it is my finding that the Appellant indeed did lure the 4 Complainants to his house, removed their clothes, removed his and that there was contact between his genital organs and the bodies of the Complainants though no concrete evidence of penetration was adduced. From the evidence adduced it is my view that the evidence disclosed the commission of the offence of indecent act. Though that was not the main offence with which the appellant was charged, it is my view that indecent act is a cognate offence to the offence of defilement. Section 179 of the ***Criminal Procedure Code*** provides that:

> ***(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.***

90. As regards the power of the Court to convict the appellant of the cognate offence without affording the appellant an opportunity to address the issue, the Court of Appeal in **Robert Mutungi Muumbi vs. Republic [2015] eKLR** expressed itself as hereunder:

> **"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…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."** [Underlining mine].

91. The Court proceeded:

> **"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."**

92. Accordingly, I hereby set aside the appellant's conviction of the offence of defilement and substitute therefor the conviction of the offence of indecent act and sentence the Appellant to ten (10) imprisonment in respect of each count, the said sentences to run concurrently from the date of his incarceration on 28th August, 2018.

93. Judgement accordingly.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 26TH DAY OF JANUARY, 2022.

G. V. ODUNGA

JUDGE

In the presence of:

The Appellant

Mr Ngetich for the Respondent

CA Susan