REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 48 OF 2019

JO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence by the Senior Principle Magistrate's court at Ngong

(Hon. L.D. Ogombe,)delivered on 14th August 2018 in criminal case No.6 of 2017)

JUDGMENT

1. The appellant was charged with two counts of incest under section 20 of the Sexual Offences Act No.3 of 2006. In count 1, particulars were that on 18th February 2017 at around 1300hrs in Kajiado west district within Kajiado County, he intentionally caused his private organ to penetrate the private organ of MC, a child aged 13 years.

2. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act. Particulars being that on diverse dates between 3rd September 2015 and 25th February 2017 at the same place he intentionally and unlawfully caused his male organ to touch the female organ of MC, a child aged 13 years.

3. In count 2 particulars were that on 18th February 2017 at around 1300hrs in Kajiado west district within Kajiado County, he intentionally caused his private organ to penetrate the private organ of JMJ, a child aged 10 years.

4. He faced an alternative count of committing an indecent act with a minor contrary to section 11(1) of the Act. Particulars stated that on the same day 18th February 2017 at the same place he intentionally and unlawfully caused his male organ to touch the female organ of JMJ, a child aged 10 years.

5. The appellant pleaded not guilty and after a trial in which the prosecution called 7 witnesses and the appellant's defence who also called one witness, he was convicted on both counts 1 and 2. He was sentenced in count 1 to serve life imprisonment and twenty years imprisonment in count 2. The sentences were to run concurrently.

6. The appellant was aggrieved with both conviction and sentences and filed this appeal raising the following grounds, namely;

> ***1. That the learned trial magistrate erred in law when he convicted him despite the fact that provisions to sections 26 and 36 of the Sexual Offences Act were not complied with;***
>
> ***2. That the learned trial magistrate erred in law by convicting him and failed to find that the charge was defective;***
>
> ***3. That the learned trial magistrate erred in law when he convicted him despite materials contradictions in the prosecution case;***
>
> ***4. That the learned trial magistrate erred in law by convicting him on insufficient evidence;***
>
> ***5. That the learned magistrate erred in law when he dismissed his defence.***

7. During the hearing of the appeal, the appellant relied on his written submissions and urged the court to allow the appeal, quash convictions and set aside the sentences. In his written submissions, filed on 8th July2020, the appellant submitted that the prosecution did not prove the

ingredients of the offence namely; age, penetration and identity of the attacker. He relied on ***Charles Wamukoya Karani v Republic*** (CRA No. 72 of 2013), for the submission that the critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant.

8. According to the appellant, PW1 testified that he defiled her on 25th Frbruary2017 while PW2 also testified that he defiled her in 2015; that he again defiled her several times the last being 25th February 2017. He argued that he could not defile his own children. He stated that he was framed by his wife as he had stated in his defence.

9. The appellant further submitted that it was not possible that both PW1 and PW2 were defiled on the same day and same time 1300hrs; that PW3 claimed that PW1 was HIV positive yet no medication was given to her; that after further testing she was found to be HIV negative and that despite PW2 stating that she had been defiled several times no report was made. He argued that although PW2 was said to have been impregnated by him no DNA test was conducted to establish this fact.

10. The appellant went on to argue that **Dr. Caroline Mwende** PW4, testified that PW2 was said to have been defiled on 18th February 2017 and again that PW5 testified that PW1was also said to have been defiled on the same day, 18th February 2017 but the complaint was made on 26th February 2017, raising questions on when the two were actually defiled and the reports made. According to the appellant, PW5's testimony was suspect in that she said that at one time the PW1 was HIV positive and another time that she was negative.

11. He argued that the evidence of PW1, PW2, PW3, PW4 and PW5, was unbelievable and the trial court was wrong in basing conviction on those testimonies. He therefore submitted that the prosecution did not prove its case beyond reasonable doubt. The appellant questioned the credibility of PW3's evidence given that she assisted PW2 procure an abortion but did not inform the police about it.

12. The appellant again argued that the evidence of PW1 was contradictory. He relied on ***Thomas Oluoch Okumu v Republic*** (CRA No. 589 of 2001), for the submission that where there is doubt in a witness testimony, the benefit of doubt should go to the accused.

13. On credibility of witnesses, the appellant relied on ***Ndungu Kimani v Republic*** [1980] KLR 282 for the proposition that a witness in a criminal case upon whose evidence it is proposed to rely on should not create an impression in the mind of the court that he is not a straight forward person.

14. The appellant further argued that the charge sheet was defective. He submitted that according to the particulars of the offence, the offence was committed on 18th February 2017 at 1300hrs to MC. However, in PW2's testimony, the offence was committed on diverse dates from 2015 and the last day was on 28th February 2017.

15. He also argued that the main charge and alternative charge read differently. He submitted that whereas the main charge reads that the offence was committed on 18th February 2017, the alternative charge reads on diverse dates between 3rd September 2015 and 25th February 2017. He contended that the charge sheet has very many alterations and that it is at variance with the evidence which makes it defective. He relied on ***Jason Akumu Yongo v Republic*** [1983] eKLR, for the submission that an indictment is defective not only when it is bad on the face of it, but also when for that reason it does not accord with the evidence given at the trial.

16. The appellant further relied on ***Joel Kamunga & Another v Republic*** [1989] eKLR for the holding that a charge is defective if particulars in the charge are at variance with the evidence adduced; ***State of Uganda v Wagara*** [1964] EA 366 (P.368) where the court **(Udoma, CJ,)** stated that in the absence of any amendment, the prosecution is bound by the particulars in the charge. (See also **Vuro v Uganda** [1967] EA 632.)

17. The appellant again took issue with the trial court for failing to consider his defence. According to him, he gave credible evidence that he was framed up by his wife (PW3) which evidence was corroborated by that of DW2 and that PW3 assisted PW2 procure abortion to defeat justice.

18. He argued that the prosecution relied on suspicion which cannot be the basis of conviction. He cited ***Sawe v Republic*** [2003] KLR 364 for the submission that suspicion, however strong, cannot be the basis of conviction. He also relied on ***Mary Wanjiku Gichiru v Republic*** (CRA No. 17 of 1998) among other decisions and urged the court to allow his appeal, quash the convictions and set aside the sentences.

19. Mr. Meroka learned appearing on behalf of the Prosecution, opposed the appeal. He argued that the prosecution proved its case beyond reasonable doubt. According to Mr. Meroka, both PW1 and PW2 testified that the appellant was their father and that PW3 confirmed that she was the appellant's wife and mother of the complainants. This, he argued, proved a relationship between the appellant and the complainants. He also submitted that PW1 testified that she was 10 years. Birth certificates were produced as PEX 1 and 2 and that both complainants were in class 3 and 8 respectively and were therefore minors.

20. On penetration, Mr. Meroka submitted that there was evidence that both PW1 and PW2 had been defiled; that PW4's testimony was positive on that fact and that PW2 was expectant but miscarried. He argued that although the appellant stated that there was a misunderstanding between him and PW3 that was not the case.

21. On sentences, counsel submitted that on count 1 the appellant was sentenced to life imprisonment while he was sentenced to twenty years in count 2 but the court did not indicate whether the sentences were to run concurrently. He urged the court to affirm the sentences but sentences to run concurrently. He urged that the appeal on both conviction and sentence be dismissed except that the sentences run concurrently.

22. I have considered this appeal; submissions by parties and the authorities relied on. I have also considered the trial court's record and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reevaluate, reanalyze and reconsider

the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see witnesses testify and given due allowance for that.

23. In ***Okeno v Republic*** [1973] EA 32. The court stated:

> ***"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] EA 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"***

24. Further in ***Kiilu v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

25. PW1 JM, a class 5 pupil aged 10 years, testified after a voire dire examination, that on 28th February 2017 she was watching TV with her sister and brothers. Her brother went outside while her sister went to cook. Her mother had gone to work. The appellant asked her to take drinking water to him in his room. When she did, the appellant told her to undress but she refused. He forcibly undressed her and defiled her. She felt pain but he warned her not to scream otherwise he would cut her with a panga. She told the court that she had not had sex before. After the appellant was done, he threatened to kill her if she revealed what had happened.

26. The following day, she and her sister went to church and that was when she disclosed to her sister what had happened to her. She testified that her sister suggested that they go and report the matter to the police. They reported that matter and they were advised to go to Nairobi Women Hospital Ongata Rongai. A police officer accompanied them to hospital. They were both treated and returned to the police station. She however told the court that her sister never told her that the appellant had also defiled her. She did not bleed after she was defiled.

27. **PW2 MC,** a 13-year old class 8 pupil, testified after voire dire examination, that the appellant was staying with them from 2015. The witness told the court that the appellant had defiled her on several occasions. She testified that on 28th February, the appellant called and asked her to take water and a broom for him in his house which she did. The appellant asked her to enter the house but she hesitated. He however forced her inside, closed the door and asked her to undress but again she refused. He threatened her and ordered her to undress. He undressed her and forced her on the bed and defiled her. He warned her not to scream. Although she felt pain for that was the first time she was having sex, she did not tell anyone because the appellant had warned her. She did not bleed. She went and took a shower.

28. The following day, a Sunday When they went to church she and PW1 decided to report the matter to police. They were escorted to the hospital where they were treated and returned to the police station the following day and recorded statements. The appellant was arrested 4 days later.

29. She testified that although the appellant defiled her for several years, she did not tell anyone because she had been threatened with dire consequences if she did so. She told the court that she was expectant with the appellant's child and that it was the doctor who informed her that she was expectant when she went to hospital.

30. **PW3 AWM**, mother to PW1 and PW2 and the appellant's wife, testified that PW1 was born on 18th April 2006 while PW2 was born on 3rd July 2003 and were 10 and 13 years old respectively. She testified that in 2015 PW2 started crying and told her that the appellant was making her a wife. She took her to Ngong Hospital where she was treated, but she did not get one medicine. When she asked the appellant for money to buy medicine for PW2, he tore the hospital documents so that she did not report to police. He sat her down and promised not to do it again.

31. When the children went up country in December 2015, the appellant was unhappy about it. PW1 and PW2 refused to return from up country and wanted to attend school there but the appellant would hear none of it. The children returned to Nairobi but she did not know that the appellant was defiling them.

32. The witness told the court that PW2 became pregnant and the matter was reported to the police. The complainants were taken to hospital and treated. she was informed at the hospital that PW2 was expectant. She decided to assist PW2 procure an abort. She went to a chemist in March 2017 and had PW2 procure an abortion. She however did not tell the police that she had assisted PW2 procure an abortion. She also told the court that PW1 was found to be HIV positive and that she had never told her that the appellant defiled her.

33. The witness told the court that the problems between the appellant and her started from the fact that the he was defiling the complainants. She denied coaching the complainants to testify against the appellant. She however told the court that prior to 2015, they had marital problems because of the appellant's multiple affairs.

34. In cross-examination, PW3 admitted that she assisted PW2 procure an abort because it was affecting her but not because she wanted to destroy evidence. She also denied that she was the one who reported the appellant to the police. She admitted that the appellant and were

tested for HIV and were negative but she could not trust the results. She stated that she was the only one supporting the children and the appellant never assisted in supporting the children. The matter was reported to the authorities and each parent was asked to contribute Kshs. 2,000 per month.

35. **PW4 Dr. Caroline Muendi** from Ngong Sub-County Hospital testified that on 1st March 2017 PW1 aged 10 years was taken to the hospital by police with a history of defilement from 18th February 2017. She had been tested at Nairobi Women Hospital and was HIV negative. She had pus cells in her urine. Her genital organ was slightly bruised with lacerations on the left side labia manora; hymen was torn which was consistent with penile penetration. There was no discharge or blood. She concluded that there was penetration. She signed the P3 form which she produced as an exhibit.

36. She also examined PW2 on the same day also with a history of defilement for several dates with the last one being on 25th February 2017. She was aged 13 years. She had also received treatment at Nairobi Women Hospital. There were no injuries on her private parts. The hymen was torn; there was no blood discharge or infection. Tests conducted showed that she was HIV negative. The conclusion was that there was penetration.

37. In cross-examination, the witness testified that she relied on the PRC Form from Nairobi Women Hospital; that PW1 had pus cells which are a urinary tract infection but not a sexually transmitted infection. It is a predisposal when one is sexually active.

38. **PW5 Peter Wanyama**, a Clinical Officer from Nairobi Women Hospital who testified on behalf of C.M. Aloti, told the court that PW1 visited the facility on 28th February 2017 at 8.30pm with a history of defilement on 18th February 2017. That was according to the PRC Form, the complaint to the police had been made on 26th February 2017. Upon examination there was evidence of Penile Penetration. Tests done showed pus cells in the urine, blood showed HIV positive and therefore the minor was HIV positive. He stated that it was possible for a person to test HIV positive/Negative but later test HIV Negative/Positive during the window period since the rapid test like the one done on PW2 is not as accurate and may lead to false results.

39. The witness also testified regarding PW2 who was also examined on 28th February 2017 with a history of defilement. On examination her private parts were normal; the hymen was torn which led to conclusion that there was penetration. According to the tests done on PW2, she was pregnant and had pus cells. The GVNC and PRC Forms had the same conclusions. The documents were produced as exhibits.

40. In cross-examination, the witness testified of the possibility of there being discordant couples where some people are just carriers. He also admitted that DNA tests can be done on the pregnancy to determine paternity. He told the court that although PW1 was expectant, she did not disclose the father of the child. He also stated that only PW1 could tell what happened to the pregnancy.

41. **PW6 No. 96893 PC Sharon Akoth** the investigating officer testified that on 26th February 2017, she was called by the Deputy OCS and informed of the report by the complainants. She took them to Nairobi Women Hospital Ongata Rongai where they were examined and the doctor confirmed that they had been defiled. She then recorded their statement and they disclosed that they had been defiled by the appellant; that PW1 had been defiled since September 2015 and that they were again defiled on 18th February 2017. The appellant was arrested two days later and escorted to Nairobi Women Hospital for examination. He was HIV Negative.

42. She also testified that PW3 did not have birth certificates for the complainants but immunization cards showed their dates of birth as 18th April 2006 and 2nd July 2003 respectively. She told the court that PW1 tested HIV Positive but later tested Negative; that PW2 was pregnant but she learnt PW2 was no longer expectant when she testified in court. In cross-examination the witness told the court that the appellant and PW3 were also tested but were HIV Negative. She told the court that PW1 and PW2 went to the police station alone.

43. **PW7 Nelly Maureen Papa,** a government analyst testified that acting on request of No. 96716 PC Vienna of Kiserian Police Station, she examined paternity of the minors on 6th September 2017 after obtaining samples from the appellant as well as PW1 and PW2. After analyzing the samples, she concluded that the appellant was the biological father to the two minors.

44. When put on his defence, the appellant testified on oath and told the court that he was arrested by police officers and taken to the police station where he was informed that he had defiled the two minors. He denied the offence. He told the court that one evening as he was watching TV, PW3 came with PW2 and informed him that PW2 had love letters from boys and asked him to talk to her. He asked PW2 to take him to the boy's home. They went to the boy's home at 7pm where he confronted the boy and his parents. He warned the boy not to write letters to PW1 anymore.

45. A week later, PW3 rebuked him for going with PW2 to confront the boy. She asked the appellant if he wanted to sleep with PW2. He warned him that he would see. Later PW3 started shouting at him saying that she would live alone. She thereafter set him up and had him arrested and taken for tests. PW1 tested HIV Positive while PW2 was found to be pregnant. According to the appellant, PW2 had pregnancy from one of the boys but PW3 assisted her procure abortion.

46. He also told the court that there was a boy who wanted to marry PW1 and although PW3 supported the idea, he declined to support it because he wanted PW2 to complete school. He denied committing the offences. He contended that if PW1 was HIV Positive, and he was the one responsible, he should also have tested HIV Positive.

47. **DW2 SC**, the appellant's daughter and sister to PW1 and PW2, testified that one day PW3 found PW2 with boys and informed the appellant. The appellant confronted PW1 over the issue. Later, PW3 conspired with PW2 to fix the appellant by alleging that he was responsible for her pregnancy. After PW3 found out that the pregnancy was not the appellant's, she assisted PW2 procure an abort to interfere with evidence and defeat justice. According to DW2, PW2 had two abortions and not one and that the last abortion was on 12th December.

48. It was on the basis of the above evidence that the trial court convicted the appellant prompting this appeal. The appellant blamed the trial court on various ground. They included that the prosecution evidence was inconsistent and contradictory; that the charge sheet was defective; that the prosecution did not prove its case beyond reasonable doubt and that the trial court ignored his defence.

49. I have considered the evidence on record and evaluated it myself. This being more or less a defilement case, the prosecution was required to prove three key ingredients in order to secure a conviction. First, age. The prosecution was to establish that the complainants were minors; second, that there was penetration and third, that the appellant was responsible.

50. Regarding age, there is evidence that PW1 and PW2 were born in 2006 and 2003 respectively and were therefore minors at time the offences were said to have been committed. The immunization cards showed their dates of birth. The complainants also testified about their dates of birth. There was no argument from the appellant that they were not minors. For that reason, I am satisfied that the first ingredient of age was proved.

51. The second ingredient was that of penetration. The prosecution led evidence through both PW1 and PW2 that they were defiled. PW4 testified that she attended to both PW1 and PW2 and that there was evidence that they had been defiled. This was according to PRC forms and other documents from Nairobi Women Hospital. She filled the P3 form to that effect. She also testified that PW2 was expectant a fact that confirmed penetration. PW3 also confirmed that PW2 had procured an abortion.

52. PW5 testifying on behalf of ***CMA*** who previously worked with him at Nairobi Women Hospital, stated that there was evidence of penetration. There were bruises in the private parts and that PW2 was expectant and that PW1 tested HIV positive but later tested negative. The witness did not however tell the court who ***CMA*** was, his/her qualifications and or his/her competence to conduct medical examinations. That notwithstanding, there was cogent evidence that PW2 had been defiled. The same cannot be said about PW1, given that the competence of the person who attended to her first was not established.

53. The last and more important ingredient in so far as this appeal is concerned is whether the appellant was the person responsible for the defilement of PW2. The prosecution case was that it was the appellant who defiled the two minors. This was according to the evidence of PW1, PW2 and PW3. PW1 and PW2 testified that the appellant defiled them on several occasions. He asked each of them to take him drinking water and defiled them in the process. He then threatened them with dire consequences if they revealed what had happened.

54. The appellant on his part denied that he was responsible for the defilement. He testified on oath that he was framed up by his wife, PW3. According to the appellant, PW3 brought to his attention the fact that PW2 was receiving love letters from boyfriends and she asked him to talk to her. He inquired from PW2 the boy responsible and he went to the boy's home with PW2 and confronted the boy and his father over the issue. He asked the boy to stop writing love letters to PW2.

55. According to the appellant, his action infuriated PW3 and she threatened him that he would see. In his view, that was the reason why PW3 decided to frame him up with the offence of defilement. The appellant pointed out that PW3 had assisted PW2 procure an abortion to conceal the real person responsible.

56. The appellant's position was supported by DW2, their daughter and elder sister to PW1 and PW2. She told the court that the appellant did not defile PW1 and PW2. It was her evidence that PW2 was impregnated by a boyfriend and not the appellant. DW2 stated that in fact PW2 conceived and procured abortion twice and that PW3 assisted her sister procure abortion to defeat justice so that the appellant would be held responsible.

57. I have considered the evidence of the prosecution and that of the appellant on this aspect. The prosecution case was that the appellant defiled the two minors. The appellant denied this. His case was that he was framed up because of the stance he had taken on realizing that his daughter was receiving love letters from boys. He also stated that the boy wanted to marry PW2 which PW3 supported but he opposed it.

58. The question that arises here is whether the appellant was responsible or a case made up against him. There is evidence that the appellant and PW3 had issues. PW3 stated that at one time the appellant had multiple affairs. She also stated that the appellant did not support the family including the children's education. The issue was reported to the authorities and each parent was directed to pays Kshs. 2000/= per month.

59. PW3 also appeared to contradict herself in her testimony. She was recorded to state that PW2 had told her that the appellant was making her a wife. She took her to Ngong Hospital and she was given medication. When she went home she asked the appellant money to buy medicine for PW2 but the appellant tore the documents. PW3 was again recorded to testify that the minors had not told her that the appellant was defiling them. In other words, she did not know that the complainants were being defiled by the appellant. Pw3 also admitted that she assisted PW3 procure an abortion. The appellant and DW2 stated that PW3 did so as a way of concealing the truth regarding the real perpetrator.

60. If the appellant was responsible, why did PW3 assist PW2 procure an abortion when the child would have assisted in determining whether the appellant was responsible or not? The appellant's argument that he was framed up cannot be dismissed in the face of the conduct of PW3 and her role in assisting PW2 procure an abortion and hiding it from the police if indeed the pregnancy was a threat to PW2's heath.

61. The law in criminal trials is clear that the prosecution must prove its case against an accused person beyond reasonable doubt. It must prove that the accused actually committed the offence he is charged with.

62. In ***Bakare v State (***1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria, amplified the phrase "beyond reasonable doubt", stating:

> ***"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the***

person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".(emphasis)

63. In ***Stephen Mulili v Republic*** (CRA No. 90 of 2013), the Court of Appeal held that;

> ***"[The degree is well settled; it need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean beyond a shadow of doubt…If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."***

64. In ***Pius Arap Maina v Republic*** [2013] eKLR, the Court of Appeal also stated that the prosecution must prove a criminal charge beyond reasonable doubt and any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused.

65. The fact that the appellant may have been framed up cannot escape attention given the fact that according to the prosecution, PW1 at first tested HIV Positive while both PW3 and the appellant tested Negative. PW1 was later said to have tested Negative. DW2 testified that PW2 had a boyfriend who impregnated her. This was in support of the appellant's assertion that he had confronted the boy after the issue of the boyfriend had been brought to his attention by PW3. This coupled with the fact that PW3 assisted PW2 procure abortion which was concealed from the police raised doubts about the credibility of the prosecution's case.

66. The appellant again challenged the prosecution case on the basis of inconsistencies and discrepancies in its evidence and that the charge sheets were defective. He argued that the evidence contradicts when the offences were committed.

67. In count 1, particulars of the offence as stated in the charge sheet were that the appellant defiled PW1 on 18th February 2017 at around 1300hrs**.** That also appears to be the same thing with regard to count 2. The appellant questioned whether it was possible for him to commit the two offences against two different people on the same day at the same time. the prosecution did not offer any explanation on this.

68. But more fundamentally, the appellant's challenge is that the charges were defective. According to him, the evidence did not accord with the particulars of the offence. the prosecution maintained that the charges were not defective and urged the court to dismiss the appellant's appeal.

69. An accused person is entitled to a fair trial guaranteed under Article 50(2) (b) of the Constitution. equally important is section 134 of the Criminal Procedure Code which 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"***

70. In ***Benard Ombuna v Republic*** [2018] eKLR, the Court of Appeal stated that:

> ***"It is strite that an accused person is entitled to not only be charged with an offence recognized under the law but also to be furnished with all the necessary details of the offence so as to enable him appreciate the nature of the charge(s) against him and to prepare an appropriate defence. The converse would prejudice an accused person's right to a fair trial…"***

71. The court however concluded that:

> ***In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charge preferred against him and as a result, he was not able to put up an appropriate defence."***

72. I have considered the argument by both sides and perused the trial court's record. The appellant was initially charged with defilement which was later amended to incest. Particulars in the charge sheets in both counts 1 and 2 stated that the offences were committed on the 18th February 2017 at 1300Hrs. However in their testimonies, both PW1 and PW2 told the court that they were defiled on 28th February 2017. Further, PW4 testified that the two minors had a history of defilement on 18th February 2017. She also stated that PW2 had a history of defilement the last one being 25th February 2017. PW5 stated that the last defilement was on 18th February 2017, while PW6 testified that the report was made on 26th February that there had been defilement, the last one being 18th February 2017.

73. The charge sheets stated that the offences were committed on 18th February 2017 while the complainants testified that they were defiled on 28th February. The charge sheets in my view were not defective. The appellant knew from the charge sheets that he face offences of defilement of his children otherwise known as incest. He was able to prepare for his defence and indeed cross examined prosecution witnesses and tendered his defence.

74. What I find material in this appeal is that there were contradictions in the prosecution case. The prosecution did not try to explain the obvious discrepancy in its case regarding dates on which the offences were committed. The victims who were defiled either knew the dates or they did not. The prosecution had a duty to correct the discrepancy through an amendment to the charges or the witnesses in case it was due to forgetfulness. This would have dispelled any impression that its witnesses were not telling the truth.

75. The discrepancies were material and went to the root off the prosecution case given that he appellant was charged with specific offences committed on specific date.

76. In that respect, I agree with the appellant that where particulars in the charge sheet are at variance with the evidence adduced, the contradiction makes the charges unsustainable.

77. From my discourse above, I am satisfied that the trial court fell into error by not only failing to consider the discrepancies in the prosecution case, but also to appreciate his defence. The appellant's conviction was unsafe.

78. In the end, I find that the appellant's appeal has merit. The appeal is allowed, both convictions quashed and sentences set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Kajiado this 25th day of September 2020.

E. C. MWITA

JUDGE