REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 42 OF 2017

PETER NDUNGU NJIHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence dated 2nd November, 2017 of

Hon. G. N. Opakasi, RM, in Engineer CMCR (S.O.) No. 462 of 2016)

JUDGMENT

1. The appellant, Peter Ndungu Njihia, was charged, convicted and sentenced to life imprisonment for the offence of Defilement contrary to Section 8 (1) of the Sexual Offences **Act No. 3 of 2006**. The particulars were that on 11th May 2016, at [particulars withheld] Village in Kinangop, Nyandarua County, he intentionally caused his penis to penetrate the vagina of MWN, a child aged seven years.

2. Aggrieved by the lower court's decision, the appellant filed an appeal on the following amended grounds:

> *1. That, the trial magistrate erred in law and facts by convicting the appellant on defective charge sheet contrary to section 134 of the CPC cap 75 Laws of Kenya.*
>
> *2. That, the trial magistrate erred in law and facts by convicting the appellant whereas complaint name in the charge sheet is not the complaint name who testified in as PW1 nor either examined by PW4 the doctor.*
>
> *3. That, the trial magistrate erred in law and in fact by convicting the appellant yet principle applicable in case of circumstantial evidence were never applied.*
>
> *4. That, the same erred in both law and facts by convicting the appellant on case not proved not beyond reasonable doubt.*

3. The issues for determination based on the appeal are as follows:

> *1. Whether the charge sheet was defective and the consequences.*
>
> *2. Whether circumstantial evidence was relied on to convict the accused.*
>
> 3. *Whether the sentence meted was appropriate*.

4. The DPP opposes the appeal and filed written submissions.

5. This court's role on a first appeal is to re-evaluate and analyse the evidence on record as adduced in the lower court, and come to its own conclusions, being careful to note that it did not hear the witnesses or see their demeanour. (See **Okeno v Republic [1972] EA 32**).

6. The facts are as follows. The prosecution case commenced with the trial court conducing a *voir dire* of the complainant, declared her a vulnerable witness and appointed the Voluntary Children Officer Nyandarua South to be the intermediary. After hearing the evidence

through the intermediary, the accused demanded a *denovo* hearing before a new magistrate. This was granted.

7. In the hearing before a new trial magistrate, the complainant testified after a *voir dire* hearing. She said she was seven years old and in standard one. She testified that on a day she could not remember, she was headed home from school when she met the accused. It was raining and the accused told her that they could shelter at one Susan's house.

8. On reaching Susan's house the accused gave her Kshs 50/= and a cake, then took her to the bush next to Susan's house. There, he removed her trousers and unzipped his. She was not wearing any underwear. The accused took his thing for urinating and put it inside her thing for urinating. She was in pain but he continued. He stopped when the rain stopped. She saw blood coming out onto her trouser.

9. When she got home, her mother asked her who she had been with, and she told her all that had happened. They then went to Mama Shiko's house where they checked her thing for urinating. They decided to take her to hospital and to the police station where she was checked again - both at the police station and at Engineer Hospital.

10. In cross-examination, PW1 said she left school at 3.00pm and was headed home; that after she met the accused they sheltered at Susan's gate; that she did not scream when accused held her because he told her to keep quiet and that if she tells anyone what he had done, he would kill her.

11. PW2 MN is MWN's (PW1) mother. She testified that on 11th May, 2016 at around 5.00pm, MWM arrived home two hours later than usual. On asking MWN why she was late, she explained that she had sheltered from the rain with the accused. She kept crying, and eventually disclosed that the accused had taken her to a bush where he removed her trousers, told her to kneel and he put his penis in her vagina.

12. PW2 told a neighbour, MA, and they checked MWN. They noted she was walking with her legs apart as if in pain, and her pant had blood stains. On checking her vagina, she saw a whitish discharge. They then decided to take her to Meridian Clinic, then went to the police station. She was given a P3 Form and a PRC Form at Engineer Hospital.

13. PW2 was later recalled to identify the Clinic Card of MWN (MFI -3) which showed the age of the child.

14. PW3 MAN is a farmer and neighbour of MN (PW2). Whilst in her shamba, a daughter of PW2, L, came and told her she was being called by PW2. She went over and M (PW2) told her what had happened to MWM. Since she, PW3, is a Volunteer Community Health worker, she suggested they go to Nandarasi dispensary. She interrogated MWN who explained how she was raped.

15. They went to the hospital and after MWN was examined they were referred to Engineer Hospital where the doctor confirmed that MWN had been defiled. The following day they reported the matter to Kinangop Police Station. They were given a P3 Form which was filled at Engineer Hospital together with a PRC Form.

16. PW3 was unshaken in cross-examination. She said that members of the public arrested the accused after PW1 identified him, and the police then came and arrested him.

17. Dr. Mwangi Muchiri of Engineer Hospital testified as PW4. He examined MWN and filled the P3 Form on 12th May, 2016. He found, inter alia, that the entrance to her vagina was tender/painful, swollen and red; the hymen was intact but inflamed and tender; there was a whitish discharge; the high vaginal swab revealed pus cells (which indicated an infection process). His remarks were that "*signs of penetration are present with stretching but not tearing of hymen*".

18. The doctor also filled in the PRC Form. He indicated in it that there was a brownish stained underwear showing old blood. He produced the P3 Form and PRC Form as P. Exhibits 2 and 3, respectively.

19. In cross-examination, PW4 said the entrance to the vagina was inflamed and red, and because of the bruising, blood oozed. He confirmed that he did not examine the accused; that based on his findings, be concluded the child was defiled; that the hymen though not torn was over stretched; and that that did not mean there was complete penetration, as there may have been interruption.

20. PW5, PC Everlyne Cherotich was the Investigating Officer. On 12th May 2016, at about 8.00am she received the complainant, her mother, and a Children's Officer. The report was that the child had been defiled on 11th May, 2016 at about 5.30pm. She recorded the details of the report and of the accused who defiled her. MWN had already been taken to Nandarasi Health Centre, so she issued a P3 Form. She recorded statements of the witnesses and produced the clinic card for MWN as P. Exhibit 3. She later liaised with AP Officers from Ndunyu Njeru who arrested the accused.

21. The accused gave unsworn testimony. He said that he was a farmer; that on 12th May 2016, he went to the shop having left the shamba; that he met two Administration Officers on his way, who were in the company of his brother; that accused and his brother were not in good terms; that his brother pointed him to the police officers who arrested the accused and took him to Engineer/Kinangop Police Station. He denied the offence and was charged in court.

22. The accused went on further to state that, his father died and his mother left him with his step-mother and step-brothers who wanted to disinherit him and was the reason they falsely accused and brought a case against him.

Analysis and Determination

23. I now apply the evidence to the issues for determination.

Defective Charge Sheet

24. The appellant submits that there were at least two defects in the charge sheet. The first is that the charge sheet omitted the words "unlawful" between the words '*intentionally*' and '*caused*'. That failure to include the words says the appellant, suggests there was nothing unlawful or forbidden by the law.

25. He cited **Isaac Omombia v Republic [1995] eKLR** which says that the charge is sufficient if it contains a statement of the specific offence or offences with which the accused is charged.

26. Secondly, the appellant argues that the charge sheet in the offence section indicates the name of the victim as MWN, whilst in the complainants section the name indicated is MWN, and elsewhere in the evidence she is indicated as MW.

27. The DPP accepts that the Charge Sheet reads MWN and the record reads MWN. She submits that this is no more than an accidental typographical error; that there was no prejudice to the accused who was present when the complainant gave her testimony, and he cross-examined her.

28. She relied on **Section 137 (d)** of the **Criminal Procedure Code** which provides that:

> ***"…..the description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation;……"*** (Emphasis added)

Further that **Section 382** of the **Criminal Procedure Code** provides that:

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

29. In light of the above provisions, it is clear that the critical role of the court when faced with the question of a defective charge sheet, is to determine whether the defect, error, omission or irregularity has occasioned a failure of justice. This determination is made taking into account not only whether the person alleging the defect had opportunity and did or did not raise issue with the defect; and whether the charge sheet was reasonably sufficient to identify the complainant or accused without necessarily stating their correct name abode, degree, style or occupation.

30. It must always be kept in mind that people can sometimes use multiple names, some varying in pronunciation or spelling, some use aliases or *nom de plume* and *nom de guerre*. All these variations of name should never be allowed to defeat the substantive justice which is the core responsibility or the courts. This ground of appeal fails.

31. There can be no doubt that despite the typographical error in the charge sheet and the omission of the word 'unlawful', the accused perfectly understood what the charge against him was. His thorough cross-examination of PW1 and more so the detailed cross-examination of the doctor disclose he knew what the offence was. For example, when cross-examining the doctor he asked whether there was full penetration, which the source of the blood was, and whether the hymen was torn.

32. In **Isaac Nyoro Kimita & another v Republic [2014] eKLR Criminal Appeal No. 187 of 2009** cited in the case of **Erick Maina Mbulele v Republic [2018/ eKLR**, the court stated:

> ***"He (the appellant) 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 complainant. 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 appellant's constitutional right to fair trial."***

33. I have taken a similar posture in this case, and find that the defects in the charge sheet were minor and did not prejudice the appellant.

Circumstantial Evidence

34. The appellant complained that the trial court relied on circumstantial and uncorroborated evidence which is not the best evidence. He asserted, relying on **Parvin Singh Dhalay v Republic [1997] eKLR,** that evidence must irresistibly point at the accused without other co-existing circumstances that would weaken a conviction.

35. The DPP, correctly argues that the evidence of PW1 was the best evidence as it was direct eyewitness evidence; that PW1 testified to what she saw and what happened to her at the hands of the accused who was a neighbour she knew.

36. Attention was drawn to the case of **Erick Maina Mbulele v Republic [2018] eKLR** where the Court stated:

"[8] On the issue that the evidence of the complainant, a minor, was not corroborated, although that the law is quite clear that the evidence of a complainant who is a minor requires corroboration, 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.

[9] Section 124 of the Evidence Act makes this quite clear. It provides that;-

"124. 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.

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 evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court satisfied that the alleged victim is telling the truth."

37. In light of the foregoing, this ground also fails.

On sentencing

38. The appellant alleges that the sentence was excessive and improper in light of the new jurisprudential paradigm since the advent of the Supreme Court case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. He adds that his imprisonment on the basis of a mandatory sentence should be considered unconstitutional.

39. The DPP argues that the sentence was lawful, that the appellant had not shown any remorse, reform or rehabilitation; and that the offence was a gender based crime against a child aged 7 years.

40. The proceedings show that the accused gave his mitigation, then the trial court stated:

"Sentence : I have carefully considered the mitigation of the accused person, however the offence herein which the accused has been convicted of carries a mandatory sentence.

The accused is therefore sentenced to life in prison."

41. I agree with the appellant that the trial magistrate did not exercise any discretion at the time of sentencing but she instead found she was bound by the mandatory nature of the sentence.

42. To this extent, I would set aside the sentence meted for failure of the exercise of discretion.

Disposition

43. The appeal on conviction fails. The appeal against sentence is set aside. A fresh sentence will be meted after a sentence hearing is held on a date to be fixed at the reading of this judgment.

Administrative directions

44. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

45. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

46. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 11th Day of May, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State

2. Peter Ndungu Njihia – Appellant in person in Naivasha Maximum Prison

3. Court Assistant – Quinter Ogutu