REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 92 OF 2018

PETER KYALO WAMBUA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable G Shikwe- RM dated 8th May, 2018 in Kithimani SRM's Court Criminal Case No. 55 of 2016)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

PETER KYALO WAMBUA.....ACCUSED

JUDGEMENT

1. The appellant, **Peter Kyalo Wambua**, was charged in the Kithimani SRM's Court Criminal Case No. 55 of 2016 with the offence of defilement contrary to 8(1) as read with section 8(2) of the ***Sexual Offences Act. No. 3 of 2006*** the particulars being that on the 22nd day of August, 2016 at Kitnendu Sub-Location, Yatta Sub-County within Machakos County, the Appellant intentionally touched the anus of PKM child aged 11 years. In the alternative he was also charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same Act, the particulars being that during the said period at the same place he intentionally touched the anus of the same child with his penis.

2. After hearing the evidence, the learned trial magistrate found the appellant guilty in the said main count and convicted him accordingly. He proceeded to sentence the appellant to life imprisonment in accordance with section 8(1) of the said Act.

3. In support of its case, the prosecution called 7 witnesses. According to PW1, the complainant, he was 13 years old in class 4 and he knew the appellant. On 22nd August, 2016 at 8pm the appellant found the complainant at a crusade and told the complainant to follow him home where he told the complainant that he could spend the night and go home the following day. Thinking that the appellant would not harm him, the appellant took him to his rented house, bought a loaf of bread which they ate, told the complainant to sleep, switched off the lights and proceeded to sodomise the complainant. According to the complainant, he left at 10pm after the appellant threatened to kill him should he reveal the said incident to anyone. Eventually, the complaint revealed the same to his head teacher, **K** and was taken to the Hospital.

4. PW2, **John Nzioka**, a clinical officer at Matuu Level 4 Hospital, examined the complainant and filled a p3 form for him on 13th October, 2017. According to PW2, the complainant had a complaint of sodomy. On examining the complainant, he found no abnormality on the genitalia or anus and there was no discharge. He examined the complainant 21 days after the date of the alleged act which was on 29th September, 2016. According to him, it was therefore difficult to detect. He proceeded to produce the P3 form as exhibit.

5. PW3, **SK**, a standard 6 pupil testified that he first met the appellant in 2015 at 2pm though he could not remember the date or month. According to him, he went to the appellant's house and the appellant gave him food after which they went to a lodging where the appellant sodomised him. The following morning, they took tea. It was his evidence that they were living together with the appellant since 2015 and that the complainant herein and one **Kioko** also lived with the appellant. In 2016, his mother went for him and he left the appellant's home leaving the complainant and the said **Kioko** behind.

6. It was his evidence that the first time the complainant and **Kioko** went, the appellant bought bread and juice for them and told PW3 to go watch a movie at the movie shop. When he returned at around 9pm, the appellant started sodomising them and the following day, the appellant gave the complainant Kshs 30/- and told him to go home. He then bought them tea and left for work. They later reported the matter to the head teacher, **Mrs Mbondo**, some time in 2016 and the head teacher called PW3's aunt and the following day a report was made at Yatta Police Station. According to PW3, the appellant sodomised him repeatedly since 2015 to 2016 after he ran away from home with the appellant who was not related to him. In his evidence his parents did not know where he was at the time. He testified that both himself and the complainant did not scream during the incidents and they were sleeping on the floor covered with gunny bags with fillings while covering themselves with blankets.

7. In cross examination, he stated that the appellant met him on the road and enticed him by taking him to a hotel and buying food for him after he told the appellant that he was heading to Nairobi on foot and the appellant informed him that since Nairobi was far, he would buy for PW3 food and PW3 decided to follow him.

8. PW4, **JK**, the complainant's mother testified that the complainant was 12 years having been born on 2nd May, 2005. On 22nd August, 2016 the complainant left with other kids from the area for a crusade in Sofia at 6pm and was to return the following morning. However, the following day the other kids informed her that they had not seen the complainant on their return. PW4 then left and went to Sofia to look for the complainant who returned home on 23rd at 9 am. Upon interrogation, the complainant kept quiet and was withdrawn. According to PW4, the complainant was not even helping her with the chores and started diarrhoearing and PW4 bought for him drugs from the chemist. When the schools opened the headmistress, **Miss K**, called her and informed her that there was a report from [Particulars withheld] Primary School where PW3 was learning that he had seen the appellant with the complainant. Upon interrogation, the complainant admitted that the appellant had sodomised him and gave him Kshs 30/= to buy his silence and that he did not disclose the same to PW4 due to fear that he would be beaten. He was then taken to the Hospital and also recorded their statements. On 18th October, 2016, the appellant who had ran away was arrested. PW4 identified the P3 form.

9. In cross-examination she stated that it was PW3 who reported to his school when he saw the appellant take the complainant to his house. PW4 stated that she washed the complainant's clothes which were bloody but had she known she would not have done so. She denied that there was a frame up.

10. PW5, **Benjamin Maingi**, a senior Clinical Officer at Matuu level 5 Hospital, examined the appellant who was 24 years old at the time and all his tests turned out negative save for the HIV test which was positive. According to him, the appellant confirmed to him that he had sodomised the boys.

11. PW6, **SK**, the head teacher at [Particulars withheld] Primary School, testified that on 1st September, 2016 at 7pm he was called by the head teacher of [Particulars withheld] Primary School who told him that he had rescued a boy from Sofia Market locked up by the appellant and that two of PW6's boys were involved in the incident. PW6 summoned the complainant to his office and he confirmed that on 22nd August, 2016, he was locked up by the appellant at his home and given Kshs 30/=, sodomised and warned not to divulge it. PW6 then called the parents who confirmed and the complainant confirmed the same in their presence. The matter was then reported to the police.

12. PW7, **PC Matilda Wanjiru**, the investigating officer was called on 12th October, 2016 in the evening by Sofia AP Camp Officer who informed her that they had the appellant in their custody and other 4 boys who had allegedly been defiled on different dates. She notified the OCS and they went to pick the appellant and the said boys at the Camp. At Yatta police they took the statements of the complainant who positively identified the appellant and the complainant informed her that he was at a church crusade when the appellant defiled him by inserting his penis in his anus and bribed him with Kshs 30/- the following day and told him not to tell anyone. He however disclosed the same to the Headmaster. PW7 then escorted the complainant to Matuu for treatment where the P3 form was filled in. She also got a copy of the notification of birth for the complainant showing that he was born in 2005 and was 11 years at the time of the incident. PW7 also visited the scene of the offence which was at Sofia market in a one roomed rental house with a bed and two mattresses. She then produced the birth notification as an exhibit.

13. In cross-examination, PW7 stated that when she visited the appellant's house, the neighbours disclosed that could see the appellant with many different young boys.

14. Upon being placed on his defence, the appellant in his unsworn statement stated that on 12th October, 2016 he woke up in his house and took tea and on returning to his house from an HIV training at Matuu, some two people, a man and a woman instructed him to lead them to his house after which he was taken to Sofia Police Post. He however denied all the charges levelled against him.

15. In his judgement the learned trial magistrate found that all the ingredients of the offence were proved and that the appellant did not challenge the evidence adduced apart from merely denying the offence.

16. It was submitted that the ingredients of the charge were that the appellant touched the complainant's anus hence the same did not constitute the offence of defilement but indecent act. It was his case that it was wrong to charge him with the main count and the alternative count when the particulars were the same. It was therefore his case that the charge sheet was defective. He submitted that charge against him was unknown to law. It was further submitted that the evidence of PW1 that he was sodomised was at variance with the particulars in the charge sheet. It was his case that he was substantially prejudiced by being convicted on an offence not only unknown to law but on a defective charge in absence of any amendment. To the appellant the mistake or error cannot be cured under section 382 of the ***Criminal Procedure Code*** since he was not accorded a fair hearing.

17. It was submitted on behalf of the Respondent by **Ms Mogoi**, learned prosecution counsel that although the victim in this matter was a boy, the ingredients required to prove the offence of defilement remains the same and that is the age of the victim, penetration and the identification of the Appellant as the perpetrator.

18. On the issue of the age of PW1, it was submitted that this element was proved with the production of PW1's birth notification (Exhibit 4) by PW7 which showed that he was born in the year 2005 meaning that he was 11 years at the time of the commission of the offence. On the issue of penetration, it was the testimony of PW1 that the Appellant had sex with him on 22nd August, 2016 at 8pm from his house. He testified that after they ate bread which the Appellant had bought, they slept. The Appellant switched off the light then went ahead to sodomise him. PW1 left the house the following day after the Appellant warning him that he would kill him if he told anyone about the incident. PW1 however informed his head teacher. Though PW1 did not illustrate to the court what exactly the Appellant had done to him, he was 13 years at the time he was giving his testimony and considering that age, it is clear that he clearly understood what it meant to have sex.

19. It was submitted that though from the medical examination by PW2 no abnormalities were noted on the genitalia or the anus, it was the opinion of the witness that the evidence would have been lost considering the time that had lapsed from the time of commission of the offence. It was submitted in support of the evidence of PW2 that it was possible that after 21 days, no physical evidence would be observed on examination. With the evidence of PW3 that corroborates the evidence of PW1 that the Appellant had bought them bread which they ate he then sodomised them in the night and PW1 left the following day, goes ahead to confirm the fact of penetration hence the same was proved beyond reasonable doubt.

20. On the issue of the identity of the Appellant as the perpetrator, it was the evidence of PW1 that he met the Appellant in a crusade and he took him to his house, he bought bread which they ate then slept. The Appellant defiled him. From the foregoing, it is clear that PW1 spent some time with the Appellant and the time was sufficient for him to see the Appellant very well and identify him as the one who defiled him. Further, it was confirmed by PW3 who was also a victim of the Appellant that PW1 was in the house of the Appellant and that the Appellant did defile them. PW1 pointed at the Appellant in court as the person who sodomised him. It was therefore submitted that the Appellant was positively identified by PW1 and PW3 as the person who committed the offence and the same did not have any error.

21. It was submitted that the unsworn defence by the Appellant was a mere denial that did not shake or create doubt in the prosecution's case. The Appellant opted not to talk or give an explanation about his whereabouts of the day of the alleged offence and only spoke about the day of his arrest hence failed to challenge the overwhelming evidence against him at all. Accordingly, it was submitted that the prosecution's evidence was precise, consistent, direct, clear and without any doubt whatsoever that the appellant committed the offence he was charged with. The trial Court in reaching its decision to find the Appellant guilty, duly analysed the evidence led by the Prosecution and Defence and was satisfied that it led to the irresistible conclusion that the Appellant did commit the offence of defilement charge hence convicted him. The decision of the Court was well reasoned and supported by evidence.

22. It was further submitted that the appellant was given a chance to mitigate by the trial court and upon considering his mitigation, the circumstances of the case and other elements, it sentenced him to life imprisonment which in the Respondent's view is sufficient. The court was therefore urged to uphold the conviction of the Lower Court and confirm the sentence considering the status of the Appellant, the fact that he was preying on young and unsuspecting boys and the need to protect the society from the spread of HIV/ AIDS.

Determination

23. 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.

24. The prosecution's case was that on 22nd August, 2016, the complainant had gone for a crusade when the appellant convinced him to go and spend the night in the appellant's house which the complainant agreed to do. However, while there the appellant sodomised him and gave him Kshs 30/= and warning him from disclosing the incident. The complainant however disclosed the same to his head teacher who then relayed the information to the police. PW3, had also gone through the same ordeal and testified that he was present when the complainant was defiled. The medical examination of the complainant however did not support the offence since it was done several days after the incident.

25. 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.

26. 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."

27. In this case there is no question at regarding the age of the complainant. From the documentary evidence adduced it was clear that the complainant was 11 years old at the time the offence was committed.

28. 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.

29. 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.

30. In this case, the evidence of penetration emanated from the complainant and PW3 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 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** where the court cited with approval **Kassim Ali vs Republic Criminal Appeal No. 84 of 2005** (Mombasa) where the court stated:-

"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"

31. In this case there was evidence from the complainant that the appellant had sex with him using his penis after switching off the light. PW3, in his evidence testified that the appellant sodomised them. According to PW3, this had been going on between him and the appellant since 2015.

32. As regards identification, there was no doubt at all that the appellant was known to both the complainant and PW3. The appellant did not contend to the contrary. Accordingly, there was satisfactory evidence that it was the appellant who sexually assaulted the complainant.

33. However, the particulars of the offence were that the appellant intentionally touched the anus of the complainant. It was not stated that the appellant penetrated the anus of the complainant. Neither was it indicated which organ the appellant touched the anus of the complainant with. Accordingly, the particulars of the offence did not disclose the offence of defilement.

34. 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;

35. 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.

36. Therefore, for the purposes of that alternative charge, it does not matter whether in doing so, the appellant used his male genital organ or any part of his body.

37. Having considered the evidence presented before the trial court it is my view that the appellant was improperly convicted on the offence of defilement. 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.

38. 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].

39. 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."

40. The appellant contends that the charge sheet was incurably defective. 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."

41. 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."

42. 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."

43. 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."

44. 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."

45. 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)."

46. Dealing with a submission similar to the one made by the 1st appellant herein the Supreme Court of New South Wales in the case of **R vs. Fenwick, [1953] 54 S.R [N.S.W. 147],** in a case where two men were charged in one count with raping the same woman, held that:

"It mattered not whether they acted in pursuit of a common purpose or each raped the woman independently of the other."

47. 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."

48. 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:

…. 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.

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:

'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.'

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."

49. In this case while I agree that considering the particulars of the offence as drawn, the appellant ought not have been convicted of the main charge, certainly the particulars of the alternative charge were proved and this court has the power to substitute the conviction for the offence of defilement with that of indecent act since 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***.

50. 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.

51. As regards the sentence, the appellant's action was heinous. In this case, the appellant took advantage of the tender age of the complainant for his own selfish gratification. Had he penetrated the complainant he would have exposed him to a life threatening disease. In **D W M vs. Republic [2016] eKLR** where the Court held that:

"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "*Shall be liable to imprisonment for life*" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

52. However, as was appreciated in **Tito Kariuki Ngugi vs. Republic [2008] eKLR**:

"The Appellant…caused her trauma which she will have to live with for the rest of her life."

53. This Court does not condone offences against minors and vulnerable persons. As was appreciated by **Madan, J** (as he then was) in **Yasmin vs. Mohamed [1973] EA 370**:

"The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved."

See also **Omari vs. Ali [1987] KLR 616.**

54. In the premises I allow the appeal in so far as the conviction and sentence imposed on the appellant in respect of the offence of defilement is concerned, substitute therefor a conviction of the offence of indecent act and sentence the appellant to serve 15 years' imprisonment to run from the date of his incarceration on 12th October, 2016.

55. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 17th day of January, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant in person

Mr Kimani for Miss Mogoi for the Respondent

CA Geoffrey