REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL APPEAL NO. 21 0F 2016

ROBERT WEKESA SIMIYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Original Conviction and Sentence in Criminal Case No. 263 of 2015 in the Senior Resident Magistrate's Court, Engineer, (M. K. Mutegi, SRM)

JUDGMENT

1. The accused was charged with the offence of defilement contrary to section 8(1) of the **Sexual Offences Act No. 3 of 2016** with an alternative charge of committing an indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act No 3 of 2016.** The particulars of the offence on the 1st charge were that the accused on 12th March, 2015, in Nyandarua County intentionally caused his penis to penetrate the vagina of AN a child aged 7 years. The particulars of the 2nd charge were that the accused on 12th March, 2015, in Nyandarua County intentionally touched the vagina of AN a child aged 7 years.

2. The accused was convicted with defilement and sentenced to life imprisonment, after a hearing in which the prosecution called 3 witnesses.

3. Dissatisfied by the lower court decision the accused has appealed to the High Court through an amended petition of appeal dated 20th July, 2018, on the following grounds of appeal:

> **1. That the learned trial Magistrate erred in law and facts in finding that the prosecution had proved its case beyond reasonable doubt in spite of the glaring contradictions, inconsistencies and insufficient evidence.**
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> **2. That the learned trial Magistrate erred in law and in fact in convicting the accused in absence of crucial witnesses**
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> **3. That the learned trial Magistrate erred in law and in fact by convicting the accused on a defective charge sheet.**
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> **4. That the learned trial magistrate erred in law and in fact by failing to consider the defence of the accused person.**
>
> **5. That the conviction and evidence were against the weight of evidence on record.**

4. The appellant was unrepresented in the lower court, but was represented by Ms. Murugi in the appeal. I deal with each of the grounds of appeal in sequence, as dealt with by both parties in their submissions.

Defective Charge Sheet

5. The appellant argues that the charge sheet was defective on the ground that the charges as framed do not provide for punishment for the offence if the accused person is found guilty. He states that the accused was charged under the definition section (**section 8(1))** and not the punishment section (**section 8(2))** of the Act. Thus, that the charge sheet was not properly framed so as to elicit an unequivocal response or plea from the accused. He states that he pleaded, was tried, and convicted under the wrong provisions of law. That he was charged under section 8(1) but convicted under section 8(2), when the latter section was not part of the charge.

6. Defects in charge sheets is an aspect of law that has been the subject of numerous court authorities. In the case of ***Isaac Omambia v Republic, [1995] eKLR*** the court considered the ingredients necessary in a charge sheet and stated as follows:

> **"In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence**."

7. In **Peter Ngure Mwangi v Republic [2014] eKLR,** the Court of Appeal court quoted with approval the **Isaac Omambia case** and determined that

> **"A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, and Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO V R, (1983) eKLR that:**
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> **"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:**
>
> > **(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,**
> >
> > **(ii) when for such reason it does not accord with the evidence given at the trial."**

8. In the present case, it is true that the punishment section in the charge as framed is missing in the charge sheet. Does this render the charge sheet being declared defective? As stated in the ***Omambia case***, what is important in a charge sheet is 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 to the accused as to the nature of the offence. The particulars in the charge sheet specifically state that the accused:

> **"… intentionally caused his penis to penetrate the vagina of A.N. a child of seven years".**

9. In the **Peter Ngure case**, above, the Court of Appeal was further guided by their holding in the case of **Peter Sabem Leitu V R, CR.A NO. 482 of 2007 (UR)** where they stated and held as follows:

> **"The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."**

10. Applying the principles in the above authorities, it is clear that the omission of the punishment section neither invalidated the charge sheet nor did it in any way prejudice the appellant. In any event **Section 382** of the **Criminal Procedure Code** provides that:

> **"Subject to the provisions hereinbefore contained, 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. Provided that in determining whether an 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."**

11. In reliance on this statutory provision, the court is required to take into account whether the issue should have been raised at an earlier stage of the proceedings, and here I note that that was not done, but also note that the accused, being unrepresented, may not have been in a position to raise the issue at that stage. Nonetheless, I do not think that any prejudice was occasioned by the wording of the charge sheet and would not interfere with the trial court's decision on this point.

Whether the victim's evidence can be relied on and failure to call mother as witness

12. The appellant argued that despite the court conducting a *voir dire* examination, the court failed to make a proper finding that the child was telling the truth in accordance to **section 124** of the **Evidence Act**. That in this case the court determined that the child was telling the truth because she was able to identify the accused. Further that the court confused identification with recognition and that the court ought to have given the appellant benefit of doubt. He argued that it is doubtful whether the child was telling the truth since she testified that after being defiled the accused threatened to kill her if she mentioned the incident to anyone and later on told the investigating officer that after being defiled she was given money by the accused. The appellant also points out that the victim stated that the incident happened on a Tuesday while 12th March 2015, which is alleged date of incident is a Tuesday. The appellant questions the contradictory information given by the victim.

13. The appellant further argued that failure to call the mother of the victim as a witness was fatal to the prosecution case as she would have been in a better position to shed more light on the events that occurred since the victim testified to having told her mother exactly what happened.

14. The issue of identification and evidence of single identifying witnesses in sexual offences has been the subject of many cases. Some of these are set out in the case of ***Charles Amboko* Anemba & Another v Republic [2015] eKLR** where the court relied on the following cases on this issue: **R v Turnbull & Others (1976) 3 ALL ER 549**, which has been generally accepted and greatly used in our judicial system, where the Court considered the factors that ought to be taken into account when the only evidence turns on identification by a single witness. The Court said:

> **"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

15. In the Court of Appeal case of **Wamunga v Republic (1989) KLR 426** it was held:

> **"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."**

16. Here, the evidence of the victim was that the accused was well known to her as he was their neighbor. The incident having happened during the day in broad daylight, it is clear that the victim was able to see her perpetrator very well. She was clear in her evidence and was under no confusion. She even knew the house they were taken to as the accused's house. I do not see any real possibility of error on who the perpetrator was given her prior knowledge of the appellant. During the *voire dire* examination the trial magistrate confirmed that the victim had good understanding and in my view she was very aware of her testimony. There is no doubt from the evidence that the appellant was properly identified.

17. The appeal also impugns the medical evidence availed as inadequate to prove the offence. That no treatment notes were availed; that no bleeding was reported and no spermatozoa seen despite the trial court wrongly asserting so.

18. In **George Kioji vs. R - Nyeri Criminal Appeal No. 270 of 2012** (unreported) the court held that:

> **"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."**

19. The evidence of a victim alone in this case is sufficient for conviction of a perpetrator if the evidence by the victim is highly believable. The trial magistrate adverted to section **124** of the **Evidence Act**. He satisfied himself that PW1 was telling the truth. He stated the reason for this belief to be that PW1 was able to identify the accused who was a neighbor she saw frequently, and that she gave a clear and concise narration of what happened on the material day. The question is whether those reasons cited by the trial magistrate are sufficient reasons for believing in the truthfulness of the witness. I think so. If a child gives clear and concise evidence that is not easily shaken, that would be a parameter for measuring the truthfulness of the witness. All that **Section 124** of the **Evidence Act** requires is that the reasons for believing the witness be recorded. There are no strait-jacketed reasons that must be recorded. What matters most is the impression made on the trial magistrate by the overall evidence of the witness. Those are the reasons he must record. In this case, I am satisfied that there was compliance with **section 124** of the **Evidence Act**.

20. It might be important, but not mandatory, for other forms of evidence to be adduced in court in support of the prosecution's case. The identification of the appellant is proper from my analysis and the prosecution evidence is smooth flowing and both the PRC and P3 forms indicate signs of forceful penetration aspects that bolster the prosecution's case.

21. With regard to the failure to call the victim's mother to give evidence, I note that the trial court indicated at one stage that the mother be called to testify. At the end the court did not call the mother. I am not aware of any legal requirement that a particular witness or particular number of witnesses must be called. What determines the outcome is the strength of the prosecution's case. Here, in my view, even without the mother's evidence, the prosecution was able to make out its case.

Whether the prosecution proved their case beyond reasonable doubt

22. The appellant impugned the judgment given the contradictions in the victim's story on the dates and days and also on what happened after she was defiled. In the case of ***Jackson* Mwanzia Musembi v Republic [2017] eKLR** where the court, relying on the Uganda Court of Appeal case of **Twehangane Alfred v Uganda- Criminal Appeal No 139 of 2001, [2003] UGCA, 6**, noted that it is not every contradiction that warrants rejection of evidence. The court put it in the following words:

> **"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do**

not affect the main substance of the prosecution's case."

23. In my view, the contradictions highlighted by the appellant in the complainant's evidence do not affect the main substance of the prosecution's case on defilement. In my view, the case on defilement was strong and the evidence forceful, and was not shaken.

24. However, it is necessary to point out certain errors on the record. The trial magistrate in his judgment gravely misdirected himself, as pointed out by the appellant, in finding there were spermatozoa in the complainant's vagina. The PRC and P3 form indicated that there were no spermatozoa seen in the victim's vagina after conducting of a vaginal swab. This may mean that the magistrate actually believed and relied on that information in writing the judgment.

25. Having re-evaluated the evidence, I find that that aspect of the judgment was clearly against the nature of the evidence, and must be disregarded. I find that there was no spermatozoa. This, however, does not negate the overall evidence of defilement as I have already found.

26. I also noted that the trial magistrate did not keenly note down the demeanour of the victim or that the victim's mother was not willing to take part in this trial and at some point offered to withdraw the case, despite the mother being the prime guardian of the victim. Further, the record shows that the Doctor did not treat the victim; he only filled the P3 form on the 16th March 2015 and no treatment notes were produced.

27. Despite these shortcomings and being cautious in my own assessment of the overall evidence upon which the conviction by the trial court was premised, I come to the conclusion that the accused was properly convicted on proof beyond reasonable doubt. Accordingly, I uphold the trial court's decision for the reasons stated herein

28. The appeal is therefore dismissed.

29. Orders accordingly.

Dated and Delivered at Naivasha this 16th Day of October, 2019

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Maingi for the State

2. Murugi for Appellant

3. Appellant - Robert Wekesa Simiyu - present

4. Court Clerk - Quinter Ogutu