REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 149 OF 2014

VINCENT KATANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable Yator- RM dated 5-09-2014 in Mombasa Criminal Case No. 1076 of 2013)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

VINCENT KATANA.....ACCUSED

JUDGEMENT

1. The appellant, **Vincent Katana**, was charged in the Chief Magistrate's Court at Mombasa in Criminal Case No. 1076 of 2013 with two counts of defilement contrary to section 8(1) as read with section 8(2) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars of the first count were that the appellant on the 11th day of March, 2013 at Mshomoroni Area in Kisauni District within Coast Province, intentionally caused his penis to penetrate the anus of **SK**, a child aged 9 years. He was also charged with the alternative charge of committing an indecent act with a child contrary to section 11(1) of the same Act, the particulars being that on the 11th day of March, 2013 at Mshomoroni Area in Kisauni District within Coast Province, intentionally his penis to touch the anus of SK, a child aged 9 years.

2. As regards the second count, the particulars were that on the 15th day of March, 2013 at Mshomoroni Area in Kisauni District within Coast Province, intentionally his penis to penetrate the anus of JR, a child aged 9 years. Alternatively he was charged with committing an indecent act with a child contrary to section 11(1) of the same Act, the particulars being that on the 15th day of March, 2013 at Mshomoroni Area in Kisauni District within Coast Province, intentionally his penis to touch the anus of JR, a child aged 9 years.

3. After hearing, the Learned Trial Magistrate found the appellant guilty of the two main offence of defilement, convicted him accordingly and sentenced him to life imprisonment in respect of count one while the sentence in count 2 was kept in abeyance.

4. Being dissatisfied with the conviction and sentence the appellant appeals based on the following grounds that:

> **1. The Learned Magistrate erred in law and in fact in convicting the Appellant mainly on the evidence of the minor(s) children which had evidence of coaching with intent to implicate the Appellant.**
>
> **2. The Learned Magistrate erred in law and in fact in convicting the Appellant on hearsay evidence.**
>
> **3. The Learned Trial Magistrate erred in law and in fact in failing to consider that the minor(s) children were taken to hospital three months after the occurrence of the alleged offence thereby casting doubt as to the connection between the alleged offence and the injuries reported as the evidence of PW2, the doctor.**
>
> **4. The Learned Trial Magistrate erred in law and in fact in failing to consider the evidence of PW2 who clearly stated that no sperms were found during the examination of the minors.**
>
> **5. The Learned Trial Magistrate erred in law and in fact in failing to appreciate the evidence of PW2 who stated that the minors suffered different injuries which would have resulted from a blunt object and not necessarily through defilement. She**

particularly failed to appreciate as if the minors were indeed defiled by the Appellant within a span of 3 days as alleged, the minors would have similar injuries. PW2 also stated that the nature of injuries on the first minor complainant, was expected to heal within 15 days at most. Considering that the minors were taken to hospital 3 months after the alleged offence, it raises doubt as to the cause of the said injuries.

6. The Learned Trial Magistrate erred in law and in fact in failing to consider the meaning of penetration as provided for in section 2 and 8(1) of the Sexual Offences Act, No 3 of 2006 and appreciate the fact that the prosecution failed to prove the occurrence of the act beyond reasonable doubt there being no sperms found.

7. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the prosecution failed to prove its case beyond reasonable doubt.

8. The Learned Trial Magistrate erred in law and in fact in failing to take into consideration the Appellant's defence and mitigating factors.

5. At the hearing of the case the prosecution called six witnesses.

6. PW1, **SK**, one of the complainants testified that he was 10 years and in class 3. On 11th March, 2013, at between 1.00 and 1.30pm he was from lunch returning to school when he met the appellant who called him to his kiosk, closed the door, told the said complainant to remove his clothes while he also removed his, made him lie down on his stomach on the bed and inserted his penis into the complainant's anus after which the appellant wiped his anus with a piece of cloth. He stated that he did not feel pain and did not scream. According to PW1, the incident took one hour. After the incident, the appellant told him not to disclose the same and he proceeded to school. PW1 however disclosed the incident to his friend, PW2, who relayed the information to his brother. PW1 also disclosed the same to his sister, **S K**. As a result, PW1, PW2 and his brother went to the appellant and later reported the matter to the police at Nyali. PW1 also went for treatment at Coast General Hospital after which they returned to the police station. It was his evidence that the appellant, whom he identified in court gave him 20/- which he used in buying potatoes. He however stated that the appellant had given him oranges twice.

7. According to PW1, the appellant had done to him the same act severally though he could remember the dates. On the date of the incident, the other neighbours were not present and though the appellant was one M's father who was younger than him, both the said M and the mother were not around.

8. PW2, JR, was the second complainant. According to him he was 9 years old and was in class 3. On 15th March, 2013 at around 7.00 am he was going to school from lunch when PW1 called him and told him that the appellant was calling him. He obliged and went to the appellant in his Kiosk and the appellant gave him a mango and an orange, took him to a bed in his house, removed both their trouser, removed his penis and inserted it in PW2's anus, after which she removed a red piece of cloth, wiped PW2's anus, and after PW2 had rested, told him to go home, and PW2 left for home.

9. According to PW2, though he did not report the matter he discussed the incident with his brother, **A**. However when Amos asked PW1 whether he had had sex with the appellant, PW1 confirmed the same and the said Amos then disclosed the incident to people. After the matter was reported to the mother, the matter was reported to Nyali Police Station where they recorded their statements, went to Makadara General Hospital for treatment where they were given a document. PW2 identified the appellant as the one who had defiled him and that he knew the appellant for a long time.

10. The P3 form for PW1 was filled in by **Dr Lawrence Ngone**. On examination he found PW1 to have laceration at the anal opening but there were no other injuries on his body. A rectal swab was done but the same did not reveal the presence of spermatozoa. Similarly the investigations did not reveal any signs of syphilis or hepatitis and hence it was concluded that PW1 had been injured at the anal opening with a probable blunt object. The said P3 form was produce as exhibit 1. He also produced a PRC form for PW1 and proceeded to produce P3 form for PW2 who was found to have a reddish inflammation of his anal skin. However there was no sign of spermatozoa, syphilis or hepatitis. It was therefore concluded that PW2 had been injured on the anal region and HIS p3 form was produced as exhibit 3 while his PRC form was produced as exhibit 4.

11. While acknowledging that he was the one who examined both complainants he stated that the P3 forms were filed in after 3 months. He averred that an anal injury can take over 6 months to heal.

12. **J R N**, the mother of PW2 testified as PW4. According to her, on 1st May, 2013, she was called by one **W** who informed her that PW2 had been defiled. She then went home where she found many people then proceeded to a village elder **Fatuma Jaa** who interrogated the appellant and the children after which they proceeded to the Police Station from where they were referred to Coast General Hospital where the complainants were treated. According to her PW2 revealed to her that it was the appellant who did the act to him. She also averred that PW2 was aged 9 years and was in class 4 having been born on 13/07/03. In cross-examination she explained that PW2 is also called **J M M** and was born on 11th July, 2003. PW4 produced PW2's birth certificate.

13. PW5 was **K R K**, the mother of PW1. According to her on 21st May, 2013, she was called by her husband, **K L** who informed her that her child had been defiled. Shen then took PW2 to Nyali Hospital after being informed by PW1 that the appellant, a neighbour, sodomised him 6 times. She however did not know when the incidents happened. The matter was then reported to Nyali Police Station. He testified that PW1 was 9 years and produced the birth certificate in support thereof.

14. **PC Virginia Wanjira**, attached to Nyali Police Station testified as PW6. According to her on 1st May, 2013, she was in the office when a group of 6 people accompanied by a village elder and the appellant went to the office and the complainants stated that they had been sodomised by the appellant. She then referred them to Coast general Hospital for treatment and later collected the PRC forms from the Hospital and charged the appellant. She also verified the ages of PW1 and PW2 and produced their respective birth certificates as exhibits.

According to her upon interviewing the complainants, she was informed that though the act occurred 3 times, the complainants could only recall the last incident. She however did note notice any physical injuries.

15. Upon being placed on their defence, the appellant chose to give an unsworn statement. According to him, he did not know why he was arrested. On 1st may, 2013, he was in his house because he used to work at night, when he was followed by a lady called **W** and **S K** to his house. The said ladies knocked and took him near the houses of the complainants' about 600 metres and 1 kilometre away from his house on the allegation that he had defiled the complainants. He was then taken to the Dog Section, Kisauni and upon the urging of the members of the public, he was taken to Nyali Police Station where he stayed for 5 days without recording his statement. His finger prints were then taken.

16. It was his evidence that he did not know the complainants as the Kiosk in question belonged to his cousin called **P K** and was about 30 metres from his house. It was his evidence that he used to assist the said Patrick in his Kiosk and did not know what happened on the alleged dates. According to him, it was **W** and **S** who reported the incident. He revealed that in 2012, the said persons had gone to his house and S informed him that she wanted to start a business at which point he gave her 5,000/=.

17. However when he started demanding for his money, **W** refused and instead suggested that she would connect the appellant to **S** to be the appellant's girlfriend. He however denied that he had defiled the complainants.

18. Upon the close of the case, the Learned Trial Magistrate found no evidence of malice or grudge between the appellant and the complainants to warrant them frame the appellant. It was his finding that the appellant was well known to them whom they referred to as their friend. Further the incident occurred during the day hence there was no possibility of mistaken identity. In his finding the ages of the complainants were proved by the production of birth certificate as 10 year.

19. The Court therefore found that the prosecution proved its case beyond reasonable doubt and proceeded to convict the appellant on the two main charges of the offence of defilement and sentenced the appellant to serve life sentence on the first count while keeping the sentence on the second count in abeyance.

20. The appellant submitted that his fundamental rights were violated by reason of his detention in custody for 6 days contrary to Article 49 of the Constitution as read with sections 36 and 37 of the ***Criminal Procedure Code***. He submitted that he was arrested on 1st May, 2013 but was not taken to Court until 5 days later on 6th May, 2013 without any explanation. In this regard the appellant relied on **Gilbert Chomondely vs. R Cr. Case No. 55 of 2006**, **Ndege vs. R [1991] KLR 567** and **Albanus Mwasi Mutua vs. R App. No. 120 of 2006**.

21. It was further submitted that the charge sheet upon which the Learned Trial Magistrate based his decision was fatally and incurably defective. It was contended that the charge sheets were rubberstamped by the OCS of the police station they originated from hence it was not clear whether the said charge sheets were genuine or not. In this respect the appellant relied on sections 134 and 137 of the Criminal Procedure Code as well as section 276(2) thereof. He also relied on **Yongo vs. R [1983] KLR**.

22. It was further contended that the *voir dire* inquiry was not conducted as required and in this in respect the appellant relied on **Ben Mwangi vs. Republic HCCR App. No. 471 of 2001**. To the appellant, the decision to admit the complainant's evidence was based on the Trial Magistrate's opinion that the child was intelligent enough and understood the nature of the oath and elected to swear him without *voir dire* inquiry.

23. It was further submitted that the age of the complainant as not established beyond reasonable doubt. It was the appellant's case that the birth certificates on the other hand did not disclose the names as those of the persons against whom the offences were committed. In the absence of proof of age, it was submitted that the sentence of life imprisonment was improperly imposed on the appellant.

24. The appellant further submitted at the Learned Trial Court ought not to have relied on the medical evidence as proof of the offence but should have opted for DNA test instead. As there was no evidence of spermatozoa found, it was contended that there was no evidence connecting the appellant to the offence charged.

25. It was further submitted that there were various contradictions were in the prosecution evidence hence the evidence of the 4 witnesses did not reconcile.

26. The other issue taken by the appellant was with respect of the failure to call other people mentioned in the prosecution case to testify.

27. The appellant also contended that though he had raised alibi defence this as not considered by the trial court and relied on **Sentale vs. Uganda**.

28. In her response, **Ms Ogweno**, Learned State Counsel submitted that the appellant was initially charged with defilement which charge was amended include the second minor with the alternative charge of indecent act. It was submitted that the trial court carried out *voire dire* on every minor separately hence nothing turns on that issue. It was submitted that there was no evidence of coaching as the minors gave independent evidence as to what happened to them

29. With respect to the period that the appellant took before he was arraigned in court, it was submitted that the issue was not raised before the trial court. Regarding the amendments to the charge sheet, it was submitted that after the amendments pleas were taken and no objection was raised to the same hence it is too late in the day to take up the issue at this stage.

30. 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.**

31. In this case the prosecution case was that the complainants were called by the appellant in his Kiosk where he enticed them with niceties after which he defiled then by inserting his penis into their anuses. Although the complainants did not report the incident to their parents, it was as a result of their talks on the issue that PW2's brother got wind of the same and went public about it after which the appellant was arrested and the complainants medically examined and the appellant charged. On his part the appellant denied knowledge of the offence and instead implied that the charges may have been instigated by the fact that one of the persons who reported the matter owed him some money.

32. In this case, from the evidence of the complainants, they knew the appellant very well. In fact there seemed to have been some kind of a rapport between the appellant and the complainants. In fact had it not have been for the fact that the complainants were overheard talking about their relationships with the appellant probably the appellant would not be in the dock today. I therefore agree that the evidence of the complainants cannot be termed as having been tailored to avoid the payment of the alleged debt. I associate myself with the sentiments of **Moses Kazibwe Kawumi, J** the in **Uganda vs. Tumusiime (Criminal Case No.034 of 2014) [2017] UGHCCRD** where he expressed himself as follows:

> **"I fail to find any justification in my mind as to how and why a six year old girl could be used to consistently tell a lie against a canteen operator and when the Parents could have contrived such a Plot. I have further failed to reconcile myself to the proposition that PW2 R would want to spoil the name of the Accused as alleged in Court. I have further failed to agree to the suggestion that PW3, a parent of the victim could have contrived such a plot as this to acquire monetary benefit from the school employing the Accused. On the basis of the above evidence and analysis, it is the finding of this Court that a sexual act was performed on the victim on the 2nd August 2014. PW1, the victim was the only person who testified against the accused as the perpetrator of the sexual act. Other witnesses learnt of it on being told by her…It is not disputed that the Accused and the victim knew each other well…I' am fully satisfied by the evidence on record that there could have been no error in the identification of the accused as the perpetrator of the sexual act on the victim"**

33. As regards the failure to conduct *voir dire* inquiry the record is clear that the same was conducted for both complainants and the Learned Trial Magistrate was satisfied that they understood the meaning of the oath. In **Mohamed versus Republic [2005] 2KLR 138** the court pronounced itself on this issue as follows:-

> **"The recording of a voir dire (under section 19 of the Oaths and Statutory Declarations Act) in the form of questions and answers may be an appropriate procedure where the procedure for recording proceedings is an elaborate one with short hand personnel and electronic recording it as it is England. The requirement for recording of proceedings in Kenya is however, regrettably, still in long-hand and it is not mandatory to record both the questions and answers from witness unless in the circumstances of any particular case, there is need for emphasis."**

34. Accordingly nothing turns on this issue.

35. On the failure to call some witnesses, I can do no more than reiterate what the Court of Appeal stated in **Benjamin Mbugua Gitau vs. Republic [2011] eKLR** that:

> **"It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see *section 143* Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys."**

36. In **Mwangi vs. R, [1984] KLR 595** the Court of Appeal held that:

> **"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."**

37. In cases of defilement, the prosecution is only required to prove three elements: the age of the complainant, that there was penetration and identity of the accused as being the culprit.

38. As regards the age of the complainants, PW4, **J R N**, the mother of PW2 testified that PW2 is also called **J M M** and was born on 13th July, 2003. The Birth Certificate gives the name of **J M N**. In my view the discrepancies in the names were not substantive as to render the determination of the identity of PW2 impossible in light of the explanation from the mother. I adopt the same position as regards the identity and the age of PW1. In my view where there are discrepancies between oral evidence and the contents of the birth certificate the latter takes precedence. I am therefore satisfied that both PW1 and PW2 were children and that they were born on 18th May, 2003 and 13th July, 2003 hence were 9 years at the time of the offence.

39. With respect to the identification of the appellant, the appellant was well known to the complainants. I therefore find that there was no possibility that the complainants were mistaken in their identity of the appellant.

40. As regards penetration, the medical evidence did not offer much assistance in so far as penetration by by the appellant of the anuses of the complainants was concerned since the report only proved the existence of lacerations and reddening of the skin. Similarly the investigations did not reveal any signs of syphilis or hepatitis and hence it was concluded that PW1 had been injured at the anal opening with a probable blunt object.

41. That only leaves us with the evidence of the complainants who were minors. On the issue of whether the evidence of the complainants, minors, required corroboration, the law is quite clear: it does. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction since section 124 of the ***Evidence Act*** makes this quite clear:

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

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

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

43. In this case, there was no specific finding by the Learned Trial Magistrate that the complainants were telling the truth hence corroboration was unnecessary. I have on my own considered the evidence of the complainants and considering the seriousness of the sentence involved I am not prepared to find that penetration for the purposes of defilement was proved. The sentiments of the Court of Appeal with respect to heavy minimum sentences in the case of **Hamisi Bakari & Another vs. Republic [1987] eKLR** are worth taking note of. In that case the Court held that:

> **"We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear."**

44. With respect to the delay in arraigning the appellant in Court in **Fappyton Mutuku Ngui v. Republic [2012] eKLR** it was held that:

> **"It is true that there is a delay of at least 4 days from the constitutionally-mandated 24-hours. However, while our previous jurisprudence on the issue was that the trial would be a nullity if the accused was detained beyond the time stipulated in the Constitution, this rigid rule has given way to a more flexible standard. In *Julius Kamau Mbugua v Republic [2010] eKLR* the Court of Appeal established the flexible rule that that a violation of the constitutional provisions stipulating the time within which an accused must be produced in court does not give rise to an automatic acquittal - because one can be adequately compensated by way of monetary damages. *David Njuguna Wairimu v Republic (2010) eKLR* is in accord. Our law as it stands now, I believe, is that the Court will scrutinize the conduct of the State to determine if it acted flagrantly to frustrate the rights of fair trial of the accused person. Courts will not excuse a deliberate attempt to delay the presentment of an accused person to the Court with the conscious intention of suppressing his rights or prejudicing his ability to defend himself. Hence, where there is a long delay, the Prosecution has an affirmative duty to offer an explanation for the delay. Where such an explanation is not forthcoming, the Court is entitled to infer that there was a deliberate attempt to frustrate the accused person's right to free trial. However, this does not appear to be the case here. While I do not condone the violation of the Appellant's constitutional rights in light of the above, the violation of the Appellant's right to be produced in court within 24 hours will not automatically result in his acquittal. He is, however, at liberty to seek civil remedies for the violation of his constitutional rights."**

45. In **Francis Muthee Mwangi vs. Republic [2016] eKLR** the Court expressed itself as hereunder:

> **"As Justice Mutungi stated in the case of Ann Njogu & 5 others V Republic, whose sentiments I share:-**
>
> > **'…. the section is very clear and specific – that the applicants can only be kept in detention or the cells, for up to 24 hours. At the tick of the 60th minute of the 24th hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants…..'**
>
> **There is a litany of authorities in relation to the right of an accused person to be brought to court within a prescribed period of time. In the case of Albanus Mwasia Mutua vs Republic the court of appeal held that the appellant's constitutional rights guaranteed under section 72 (3) of the constitution had been grossly violated because he was taken before the trial magistrate some eight months from the date of his arrest and no explanation at all was offered for that delay. The court made the following pertinent remarks:**
>
> > **'At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. .....'**

It is worth noting however that an accused person is not automatically entitled to an acquittal where the prosecution has not been given a chance to offer an explanation for failing to bring him to court on time. In the case of Eliud Njeru Nyaga vs Republic stated

> **'While we would reiterate the position that under the fair trail provisions of the constitution, an accused person must be brought to court within twenty four hours for non capital offences and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in automatic acquittal.'**

In the case of Paul Mwangi Murungu v/s Republic the court of appeal observed:-

> **'We do not accept the proposition that the burden is upon an accused person to complain to a Magistrate or a Judge about the lawful detention in custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person has been in custody for more than the twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. Under section 72 (3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the prosecution does not offer any explanation then the court as the ultimate enforcer of the provisions of the constitution must raise the issue.'**

All the above cases point to the need for courts to strictly observe the fair trial provisions in our constitution. The law of the land has to be obeyed particularly by those entrusted to enforce it. The police should be in the forefront of obeying the law and enforcing it. If the supreme law of the land says that an accused person has to be brought before court within 24 hours in the event of a non-capital offence and 14 days for a capital one, that law must be strictly observed failing which the police have a burden cast on them to satisfy the court that the accused had been brought before court as soon as was reasonably practicable.

Even though the delay herein has not been explained, I note that the appellant was arraigned in court on the third day and considering the nature of the offence before the court and the evidence adduced, I hold the view that it would not be fair to exonerate the appellant on account of the aforesaid delay only."

46. In this case the appellant did not raise the issue before the trial court. He has not disclosed the prejudice he suffered as a result of the said delay so as to enable the court determine the effect if any of the said delay. While this Court deprecates the failure to arraign suspects in court within the constitutionally prescribed time limits, each case must be determined on its own facts and at the end of the day, the court must determine the effect if any of the delay in arraigning the suspect in court. Where the delay is long and there is no explanation emanating from the prosecution and where the issue is raised at the earliest possible opportunity, the court will invariably find that the delay in doing so was a deliberate attempt to frustrate the accused person's right to free trial. In this case I do not have sufficient material on the basis of which I can make such a determination at this stage of the proceedings.

47. It was further contended that the charge sheets upon which the Learned Trial Magistrate based his decision was fatally and incurably defective as the same were rubberstamped by the OCS of the police station they originated from hence it was not clear whether the said charge sheets were genuine or not. In this respect the appellant relied on sections 134 and 137 of the ***Criminal Procedure Code*** as well as section 276(2) thereof.

48. In **Fappyton Mutuku Ngui v. Republic** (supra) 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. Applying the same test to the present case I am similarly satisfied 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 of the ***Criminal Procedure Code***.

50. The appellant contended that his alibi defence was never considered. The offence in question, it is alleged took place on 11th and 15th March, 2013. In his evidence the appellant did not talk about that date. Instead he talked about 1st May, 2013. Alibi defence in my view is a situation where the appellant contends that at the material time of the defence he was not present at the place the offence was allegedly committed and that he was in fact elsewhere. In this case as the appellant did not deal with the dates when the offences were alleged to have been committed, it is my view that the defence of alibi does not avail him.

51. As regards' the contradictions in the prosecution's case, whereas I appreciate that there were minor discrepancies in the evidence of the witnesses it is my respectful view that such minor discrepancies are common. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See ***Law of Evidence*** **(10th Ed) Vol. 1 at 46.**

52. As was stated in **John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:**

"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place and than that one or both suffered from a defective memory."

53. This was the position in **Willis Ochieng Odero vs. Republic [2006] eKLR,** where the Court of Appeal held:

"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of *section 382* of the *Criminal Procedure Code*."

54. Having considered the evidence presented before the trial court it is my view that the appellant was improperly convicted on the offence of defilement as the evidence of penetration was unsatisfactory. However, the evidence of the complainants that the appellant had contact with the complainants' anuses was proved as corroborated by the medical findings. Section 2 of the ***Sexual Offences Act*** provides that "indecent act" means an unlawful intentional act which cause 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. From the evidence adduced it is my view that the evidence disclosed the commission of the offence of indecent act which was an alternative charge.

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

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

56. While I harbour reservations about the lawfulness of mandatory minimum sentences under the current constitutional dispensation, in his case, the appellant took advantage of the tender ages of the complainants for his own personal gratification.

57. 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.

58. The next question is whether the sentences should run concurrently or consecutively. Section 14 of the ***Criminal Procedure Code*** provides for circumstances in which a court can direct sentences to run concurrently or consecutively. Section 14 provides in part as follows:-

> ***"(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.***
>
> ***(3) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.***
>
> ***Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences:-***
>
> > ***a. of imprisonment which amount in the aggregate to more that fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less or***
> >
> > ***b. of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose."***

59. Section 7 (1) of the ***Criminal Procedure Code*** stipulates that:-

> ***a. a subordinate court of the first class held by a chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court.***
>
> ***b. a resident magistrate may pass any sentence authorized…… or under the Sexual Offences Act.*** See also the High Court decision in ***Ali Abdi Shabura –v- Republic- H.C.CR.A No. 90 of 2007.***

60. In the case of **Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97**, the then Court of Appeal for Eastern Africa in a judgment read by **Sir Joseph Sheridan** stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

61. The Court of Appeal in **Peter Mbugua Kabui vs. Republic [2016] eKLR** expressed itself on the matter as hereunder:

> **"As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totaling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful" We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same."**

62. In sum, having considered the grounds of appeal raised by the appellant, and the rival submissions of the appellant and the learned State Counsel, **Ms Ogweno**, I sentence the appellant to serve 10 years imprisonment on each count which sentences will run consecutively. That, in my view, is the sentence commensurate with the offences committed by the appellant.

63. It is so ordered.

64. Right of appeal 14 days.

Judgement read, signed and delivered in open court at Mombasa this 7th day of September, 2018.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Ms Ogeno for the Respondent

CA Gladys