REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.101 OF 2013

FRANCIS NDICHU KURIA……....……..……...…APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

(Being an appeal from the judgment of the Hon. W. Ngumi Ag. Senior Resident Magistrate) in Githunguri Chief Magistrate's Criminal Case No.1054 of 2012 delivered on 31/05/2013)

JUDGMENT

Francis Ndichu Kuria the appellant herein was charged with attempted defilement contrary to Section 9 of the Sexual Offences Act No.3 of 2006. It was alleged that on the 21st September, 2012 at about 1.00 pm at ***[particulars withheld]*** Trading Centre in Githunguri District within Kiambu County intentionally and unlawfully attempted to defile F N G a girl aged twelve years.

In the alternative he was charged with indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No.3 of 2006 in that on the same date and place he unlawfully and intentionally caused his genital organ (Penis) and the genital organ (vagina) of the said F N G to come into contact.

He was found guilty of the main charge, convicted and sentenced to twenty years imprisonment. He was aggrieved by the judgment of the learned trial magistrate and preferred this appeal.

In a Memorandum of Grounds of Appeal dated 12th May, 2015 he was aggrieved that the charge sheet was defective, that the medical evidence was not satisfactory, that the prosecution failed to summon vital witnesses, that the learned trial magistrate relied on extraneous issues to convict him and that the case was not proved beyond reasonable doubt.

In his filed written submissions, he submitted that the charge sheet ought to have been amended since the complainant had stated in her evidence that something was inserted inside her yet in the medical evidence it was stated that the hymen was intact. That further, the prosecution had requested for the amendment of the charge sheet but later reneged on the issue. He submitted that the medical evidence adduced was not satisfactory since the medical officer who testified in court did not elaborate the cause of the bruises and redness on the labia minora of the complainant. He further submitted that PW2 who was the Clinical Officer who produced the medical report of the complainant was not a medical officer capable of giving evidence in respect of the injuries that the complainant sustained. It was also his submission that crucial witnesses were not called to testify even after they were summoned by the complainant's mother. He added that the testimonies of the witnesses who were called were contradictory and the court ought not to have relied on their evidence while convicting him. Further, according to the appellant the charges were framed against him because of the grudge that existed between himself and PW3.

The appeal was opposed.Learned State Counsel Mr. Mureithi submitted that the mere intention by the prosecution to amend the charge sheet did not render the same defective. He submitted that the appellant relied on case law which was not submitted to the court and so the court could not confirm the content of the same. He submitted that the medical evidence was sufficient. He also submitted that all the necessary witnesses in support of the prosecution case were called and that the evidence was not contradictory. He urged the court to dismiss the appeal.

From the foregoing, I frame the issues for determination as:-

(a) Whether the charge sheet was defective.

(b) Whether sufficient evidence (including medical) was tendered in proof of the prosecution case.

(c) Whether all crucial witnesses were called.

(d) Whether on the whole the prosecution discharged its burden of proving its case beyond reasonable doubt.

Defective charge sheet

What constitutes a proper charge sheet is defined under Section 134 of the Criminal Procedure Code which provides that:-

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

The above definition is codified in the case of **Yosefu and Another –Vs- Uganda (1960) E.A. 236** in which the East Africa Court of Appeal held that:-

> **"the charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act."**

Essentially a charge sheet should clearly spell out the nature of the offence and must disclose the particulars of the same in very clear and unambiguous manner. It should be rich in content such that the accused person understands itas to enable him to plead to it and competently defend his case. In the instant case, the statement of both the main charge and its alternative were properly spelt out and their particulars stated in such clear manner that the appellant was able to understand the charges facing him. The law under which the charges were framed was clearly indicated and to that extent the charge sheet was framed in conformity with Section 134 of the Evidence Act. The mere fact of the intention by the prosecution to amend the charge sheet did not render the same defective.

The evidence

For the court to determine whether the evidenceon record was sufficient to found a conviction, it must re-evaluate it and come up with its own independent finding. The court must however bear in mind that it has neither seen nor heard the witnesses. **See Okeno –Vs- Republic (1972) E.A, 32.**

Four prosecution witnesses testified. **PW1,** F N G the complainant testified that on the 21st September, 2012 at about 1.00 a.m. she was in their house with her sister and younger brother. The sister was aged five years. She was in standard seven by then. Her mother had gone to a funeral. Her two siblings went out to play while she was left in the house watching television. She then proceeded to a veranda from where a teacher who was passing by called her to his house.The teacher is the appellant herein.He intimated to her that he wanted to send her. When she went to his house, the appellant held money in his hand as if to give it to her. That is when he held her mouth, removed her stockings and underpants and

threatened that if she screamed he would beat her. He removed his trouser, belt and begun to defile her. He then gave her Kshs.250.00 and let her go. She took her stockings and pants and ran away and did not tell anyone what had happened.

On 23rd September, 2012 PW1's younger brother saw some Kshs.50/- hidden under a mattress. Her mother demanded to know where it had come from. That is when she disclosed the source of the money. She initially lied to her mother that the appellant had defiled her. But after intensive interrogation she opened up and narrated her ordeal. Her mother demanded they go to hospital where she was examined. She later reported the matter to the police station. She produced the Kshs.50/- in court as balance of the Kshs.250/- she had been given by the appellant. It was her further evidence that she had known the appellant for two days and he lived in a neighbouring plot to their house.

PW2,Joseph Njau and a Clinical Officer at Kiambu Hospital testified that the complainant had been seen at Kigumo Health Centre with a history of being defiled by a person known to her on 21st September, 2012. He examined her on 23rd September, 2012 and he found that the libia minora was bruised and appeared red. The test for HIV was negative, urinalysis showed puss cells and her hymen was intact. PW3 testified by the time he examined Pw1 she had bathed and changed clothes. She was put on medication to prevent conception and HIV. She was also given antibiotics. PW3 produced her P3 Form (P.Exihibit 2) in which he concluded that PW1 had been defiled.

PW3, M N M and the mother of PW1 testified that on the 23rd September, 2012 her younger son was looking for pliers and a torch when he came across coins adding up to Kshs.50/-. He rushed to her and asked her whether she had lost any money. Since she had not lost any money she asked her children whether there was anyone who had lost money. That is when PW1 disclosed that the money was hers and on further interrogation she told PW3 how she came about the money. She further told her that she had expended Kshs.200/- out of the Kshs.250/- the appellant had given her. She told PW3 that the appellant had defiled her in exchange for the money and that he had threatened to kill her if she disclosed to anyone what had happened. That is when PW3 took her to hospital and thereafter reported the matter to the police. She confirmed she saw bruises on PW1's private parts. She stated that she was 12 years old having been born on 15th January, 2000 and she identified her birth notification card in court.

PW4, Police Constable Wycliff Kibidi of Kibichoi Police Station summed up the evidence of PW1, 2 and 3. He confirmed that he issued the P3 form to PW3. He testified that after the report the appellant went into hiding but later presented himself to the police station and he was arrested. He visited the scene in the presence of a Corporal Komen, the complainant and her mother where the complainant identified the seat on which she was defiled. That is when the appellant was charged. PW4 produced the birth notification card of the complainant as an exhibit.

The appellant gave an unsworn statement of defence. He stated that he was a teacher at Kigumo Primary School. He knew the complainant's mother who was a teacher at ***[particulars withheld]*** Primary School. According to him, PW3 wanted her children to transfer from ***[particulars withheld]*** Primary School to Kigumo Primary School where he taught. In the cause of their discussion about the transfer of children from one school to the other she disclosed to him that she had separated from her husband and she wanted a male partner who would be her friend and as well assist her to educate her children. She also borrowed him some money which he declined to give her. That led her to stop talking to him and he next saw her on the 25th September, 2012 when he was arrested.

From the above summary, it is clear that PW1 was candid in her evidence particularly what she told her mother PW3. It is trite to note that the incident occurred to the exclusion of anyone else except the perpetrator and the victim. The trial magistrate was then guided by assessment of the truthfulness of the evidence of the minor complainant. In this regard, this court is equally of the view that her evidence was truthful. She initially hesitated to disclose what had happened but upon persistent pestering by her mother she eventually told the truth. Under Section 124 of the Evidence Act, the evidence of a minor need not be corroborated and what guides the court in founding a case against an accused is the court's conviction that the minor is telling the truth. For avoidance of doubts I duplicate Section 124 as under:-

> **"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 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."**

In addition, PW1's evidence was corroborated by that of PW2 the clinical officer who filled her P3 form and in his evidence he concluded that there was sexual assault meted against her. Although he concluded that it was defilement it is clear that there was no penetration which is the operative word for the definition of the offence of defilement under Section 8(1) of the Sexual Offences Act. Therefore, I am in total agreement with the draftsmanship of the charge sheet in which the appellant was charged with attempted defilement. It is as the appellant attempted to penetrate the genital organ (vagina) of PW1 that he bruised her libia minora.

Having said so, it is important that I determine whether or not PW3 being a Clinical Officer was competent to examine PW1 and fill her P3 form. According to the appellant a clinical officer is not a competent medical officer to so fill the P3 form. Section B of the Medical Examination Form (P3) is filled by a **medical officer/practitioner**.However, the qualifications of **the medical officer/practitioner**is not given. My understanding of the person referred to therein is that person who is trained in medicine such as a clinical officer or a practicing doctorand any of them is competent to fill a P3 form. Regard must be given to the fact that not all medical facilities in our Republic are equipped with practicing medical doctors and where the medical doctors can be found may be far out of reach for most people. In those instances, P3 forms are competently filled by clinical officers. I also refer to the case of **Erick OnyangoOndeng –Vs- Republic (2004) @ KLR** in which the court observed that:-

> **"We do not think much turns on the appellant's complaint that PW5 was not competent to fill in a P3 form under Section 48 of the Evidence Act. PW5 is a clinical officer who testified on behalf of his colleague, Alfred Toronke who examined and treated PW2 at Matuu District Hospital. In our opinion a clinical officer is qualified to fill in a P3 form. This is an area of his competence. (See Raphael KavoiKiilu –vs- Republic, Criminal Appeal No. 198/2008; Section 2 of the Clinical officer Act (Training, Registration and Licensing) Act Cap 260 LOK."**

In **RapahelKavoiKiilu –Vs- Republic**, the Court of Appeal relied on Section 2 of **the Clinical Officer Act (Training, Registration and Licencing Act) Cap 260 LOK** which defines a clinical officer as **"a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act..."**

Section 7(4) of the Act states that:-

> **"A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the minister by notice of gazette."**

Therefore, the clinical officer testified in his area of competence and sohis evidence was reliable and admissible.

On the issue of the prosecution failing to call crucial witnesses there is no rule governing the number of witnesses that the prosecution should call. It is in the discretion of the prosecution to call such number of witnesses as it thinks shall support its case. See Section 143 of the Evidence Act which provides that:- "**No particular number of witnesses shall, in the absence of any provision of law to the contrary, be**

required for he proof of any fact." And in any event this being a sexual assault case against a minor there is no need for corroboration by independent witnesses as long as the court believes that the minor is telling the truth. Be that as it may, at no point did the appellant intimate to the court that he wished that any particular witnesses be summoned to testify pursuant to Section 150 of the Criminal Procedure Code. The Section provides that at any stage of atrial or other proceedings under the Code the court may summon any person as a witness if the evidence of such a person appears essential to the just decision of the case. As such, no gap existed in the prosecution's case that would have necessitated the summoning of an additional witness. Respectively, that ground of appeal fails.

From the foregoing, it is my view that the prosecution discharged its burden in proving the main charge of attempted defilement contrary to Section 9(1) and (2) of the Sexual Offences Act. The appellant's defence that he was framed up was an afterthought and did not rebut the strong prosecution's case against him. Under Section 9(2), a person who commits the offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years. The learned trial magistrate imposed a sentence of 20 years upon noting that the appellant was a teacher who ought to have been more responsible. But again, a sentence is aimed at reforming a person. Although stiff sentences in sexual assault offences are aimed at curbing the vise in the society, in imposing them the court should be cautious not to be too harsh as to harden the offender. that is to say the penalty must be commensurate with the offence given the circumstances of the case in totality. In the present case, while acknowledging the seriousness of the offence and the responsibility of the offender to the children and the society at large, it is my view that a sentence of twelve years would have sufficed.

In the end, the appeal partially succeeds. I dismiss the same on conviction. I set aside the twenty years imprisonment term and substitute it with a twelve (12) year jail term.

It is so ordered.

DATED and **DELIVERED** in **NAIROBI** this 2nd day of **JUNE**, 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1. Appellant in person.

2. M/s Kimiri, for the respondent.