IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 27 OF 2018

BETWEEN

BENARD OMBUNA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (Thuranira, J.) dated 18th March, 2015

in

H.C.CR.A No. 199 of 2013.)

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JUDGMENT OF THE COURT

1. In his second appeal the appellant in this appeal is challenging his conviction which initially was for the offence of attempted defilement contrary to ***Section 9*** of the ***Sexual Offences Act*** and subsequently, substituted by the first appellate court with a conviction for the offence of committing an indecent act with a child contrary to ***Section 11(1)*** of the ***Sexual Offences Act***.

2. His appeal is predicated on only one point of law that is, that his conviction was based on a defective charge sheet. The appellant claims that the charge sheet was defective on two fronts; firstly, the particulars thereunder were at variance with the offences he was charged with; and secondly, the evidence tendered at the trial court was equally at variance with the particulars stated. It is on that basis that the appellant insists that his conviction was not safe and ought to be set aside.

3. It is trite that an accused person is entitled to not only be charged with an offence recognized under the law but also to be furnished with all the necessary details of the offence so as to enable him appreciate the nature of the charge(s) against him and to prepare an appropriate defence. The converse would prejudice an accused person's right to a fair trial contrary to ***Article 50(2) (b)*** of the ***Constitution***. This is the rationale behind ***Section***

134 of the ***Criminal Procedure Code*** which stipulates:

"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."

4. Before delving into the merits of the appeal an overview of the pertinent facts will place the issue in question in perspective. On 2nd February, 2013 between 6:00 p.m. and 7:00 p.m. PM (PW4) left her 1 ½ month old baby in the care of her sister in law, NNA (PW1) who was then 12 years old as she went to the market to buy vegetables. Shortly thereafter the appellant who was well known to NNA as a friend to her brother, DM (PW2), came and inquired if there was anyone else in the house. After NNA responded that there was no one else the appellant entered the house. He directed her to put the baby she was holding down; to lie down on the seat and remove her underpants. NNA obliged and the next thing the appellant did was to lie on top of her.

5. Meanwhile, P who was close by heard the baby crying and she accelerated her pace whilst calling out to NNA. This stopped the appellant dead in his tracks before he could penetrate NNA. He stood up, ordered NNA to dress up and took a seat pretending nothing had happened. P who was then at her door step noticed male shoes at the door and upon entering the house she found the appellant seated with the baby on the chair. She placed the vegetables she had purchased on the table and called NNA who did not respond. She then drew open the curtain which partitioned the living room from the bedroom and found NNA dressing up. She asked NNA why the baby was crying but NNA kept mute. When P picked up the baby she noticed that the appellant's trousers were open.

6. The above scenario raised P's suspicion as to what might have transpired however she held her peace until the appellant left. Once again she asked NNA what had happened and NNA broke down while opening up about all that the appellant had done. P then called her husband, D to come home and when he did she relayed what NNA had told her. D reported the incident at Kitengela police station and NNA was taken for medical examination. Dr. Geoffrey Wagira (PW5) who examined NNA and filled the P3 form indicated that even though NNA's hymen was intact he had observed that there was interference with her vaginal wall.

7. Apparently, efforts to trace the appellant hit a snag since he had gone underground. Fortunately, a few days later he was traced in Kawangware and apprehended. Thereafter, he was arraigned in court and charged with one count of attempted defilement and an alternative count of committing an indecent act with a child. The particulars of the offence of attempted defilement as set out in the charge sheet were as follows:

"On the 2nd day of February, 2013 at Kitengela Township within Kajiado County the appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of NNA a child aged 12 years."

On the other hand, the particulars of the alternative charge were a copy and paste of the particulars of the main charge.

8. It is those particulars that the appellant takes issue with. He argues that the particulars disclosed the offence of defilement and not attempted defilement or committing an indecent act with a child because there was no element of penetration. Moreover, those particulars were at variance with the evidence adduced that there was no penetration. Nevertheless, the trial court considered the anomaly as technical and capable of being cured under ***Article 159(2)(d)*** of the ***Constitution*** hence convicted the appellant for the offence of attempted defilement and sentenced him to 10 years imprisonment. In his words, the trial magistrate expressed as follows:-

"Before I conclude my judgment I should make a comment on the charge sheet as drafted and the particulars. Even though the same is at variance Article 159(d) of the Constitution is to the effect that justice shall be administered without undue regard to procedural technicalities. The evidence on record is very clear as to the facts and the facts as given established the offence. To

me, the variance of the particulars and the charge sheet is a technicality which can be cured under Article 159(d) of the Constitution.

I therefore find that the offence of attempted defilement as defined in Section 9(1) (2) of the Sexual Offences Act has thus been committed."

9. In his appeal to the High Court, the appellant raised the issue of the defective charge sheet and in a judgment dated 18th March, 2015 the learned Judge (**Thuranira, J**.) rendered herself in the following manner:

"***On whether the charge sheet was defective, in Count I, the charge is that of attempted defilement while the particulars of the offence reflect that there was penetration. The medical evidence on the other hand reflected that there was no penetration... I therefore agree with the submissions by the Appellant that the charge in the main count is defective. The charge is that of attempted defilement while the particulars of the offence reflect actual defilement.***

The Appellant was in the alternative charged with the offence of committing an indecent act with a child. The complainant's and the doctor's evidence establish that there was contact between the complainant's and the Appellant's genital organs. The alternative count was therefore proved. Consequently, the Appellant ought to have been convicted in the alternative count. The sentence of ten (10) years is within the law for the offence of indecent act with a child.

With the foregoing, I substitute the conviction for attempted defilement to that of indecent act with a child. The sentence remains the same. Orders accordingly."

10. The appellant was not satisfied with the substitution of his conviction. In his view, the learned Judge fell into error by failing to appreciate that the particulars set out in the charge sheet for the alternative count equally did not disclose the offence of an indecent act with a child but that of defilement. As such, it could not be the basis for substitution of his conviction. All in all, he should have been acquitted of all charges.

11. In his response, Mr. Naulikha who appeared for the State stayed clear from the issue of the charge sheet and simply submitted that we ought not to interfere with the concurrent findings of the two courts below. As far as he was concerned, the appeal lacked merit because there was overwhelming evidence against the appellant to justify his conviction.

12. We have considered the record, submissions by the appellant and counsel as well as the law. It is not in dispute that the particulars as set out in the charge sheet in respect of both the main and alternative counts disclosed the offence of defilement rather than attempted defilement or committing an indecent act with a child respectively. Does the anomaly render the charge defective? We think so because as this Court observed while considering the import of ***Section 134*** of the ***Criminal Procedure Code*** in ***Isaac Omambia vs. R [1995] eKLR*** particulars of a charge are an integral part of the charge. Therefore, where the particulars fail to disclose the offence (s) an accused is faced with the same renders the charge sheet defective.

13. Be that as it may, as this Court appreciated in ***JMA vs. R [2009] KLR 671*** that not all defects in a charge sheet will render a conviction thereunder invalid. Over time, the test of determining whether a charge is fatally defective so as to render any conviction a nullity has been established, both in our jurisdiction and other jurisdictions. In that regard, the Supreme Court of India in **Willie (William) Slaney vs. State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391],** held that:-

"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."

14. Similarly, this Court while faced with the same issue in ***Isaac Nyoro Kimita & another vs. R [2014] eKLR*** echoed those sentiments as follows:-

> ***"In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants "jointly" defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term "jointly" in the particulars of the charge?"*** *[Emphasis added]*

15. In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence. Was this the case here?

16. Looking at the record and the evidence as a whole we cannot say that the appellant did not understand the nature of the charges against him. It is quite clear from his cross examination questions to the prosecution witnesses that he understood he was accused of having inappropriate sexual contact with NNA and that there was no penetration. Therefore, in as much as the particulars did not disclose the offences he was charged with or coincide with the evidence to the extent that there was no penetration on NNA, in our view, did not render the charge sheet fatally defective. We say so because it is clear from the evidence that the appellant had inappropriate sexual contact with NNA and to hold otherwise simply because the particulars in the charge sheet were defective would be an affront to justice. Our position is reinforced by the following sentiments of the Supreme Court of India in the

> ***Willie (William) Slaney case*** :
>
> ***"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.***
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> ***To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent."***

17. Consequently, we find that the defect was curable under ***Section 382*** of the ***Criminal Procedure Code*** which provides in part:

> ***"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:…"***

18. Accordingly, we see no reason to interfere with the appellant's substituted conviction for the offence of committing an indecent act with a child as the same was established to the required standard. Similarly, we find that the sentence of 10 years imprisonment is within the confines of the law. In the end, the appeal lacks merit and is hereby dismissed.

Dated and delivered at Nairobi this 8th day of February, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR