IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 14 OF 2017

BETWEEN

SIMON MUKUSU….....APPELLANT

AND

REPUBLIC..... RESPONDENT

(An Appeal against the judgment of the High Court of Kenya at Kitale ***(B. Thuranira, J.)*** *dated 17th March, 2016*

in

HCCRA NO. 72 OF 2014)

****

JUDGMENT OF THE COURT

[1] The appellant was convicted by the Resident Magistrate's Court, Kitale for the offence of defilement of a child contrary to **section 8(3)** of the **Sexual Offences Act.** He was sentenced to serve twenty years imprisonment. His appeal to the High Court against conviction and sentence was dismissed. He now appeals against the judgment of the High Court.

[2] The particulars of charge against the appellant alleged that on diverse days between April, 2012 and 9th September, 2012 he defiled **NM** (name withheld), a child aged 15 years (complainant)**.**

[3] The complainant (PW1) testified at the trial, that she was a standard six primary school pupil; that she was born in March, 1997; that she had sex with the appellant who was her boyfriend repeatedly; that the appellant was a neighbour; that her mother discovered the relationship and took her to hospital where it was discovered that she was pregnant.

[4] JW (PW2) (name withheld) who is the complainant's mother, testified at the trial that the complainant slept out on the night of 16th June, 2012; that when the complainant returned in the morning she punished her; that on questioning she revealed that the appellant often used to pick her at night, sleep with her till 5.00 am and return her; that JW went to the home of the guardian of the appellant to report his conduct but the guardian became hostile; that JW took the complainant to a dispensary where she was examined and found to be pregnant; that she went to the school and was given a referral letter which she

took to the Chief who referred her to the District Commissioner and to the Children's Department; that the complainant was taken to the district hospital where her pregnancy was confirmed.

[5] Linus Ligare, (PW5) a clinical officer attached to Kitale District Hospital testified that he examined the complainant and found that her hymen was torn and old looking; and that through a pregnancy test which was positive, he concluded that the complainant had had sexual interaction. He filled a P3 form which he produced in evidence. Patrick Nyongesa Musombi (PW3) a county police officer attached to the DO's office at Kimilili testified that he arrested the appellant on 27th September 2012.

[6] PC Caleb Yator (PW4) a police officer attached to Kitale police station who was the investigator of the case against the appellant recorded statements of witnesses and caused the appellant to be rearrested and charged.

[7] The appellant who made an unsworn statement in his defence during the trial, stated that he was a Form Four (4) secondary school student, and that he was arrested on 15th July, 2012. He explained how he was taken to the police and subsequently charged.

[8] The trial magistrate made a finding that although no other independent witnesses were called, the evidence of the complainant was believable and concluded as follows:

> **"With the evidence availed in court which has not been controverted in any material details by the accused's sworn statement of defence, it points out that the accused is guilty. I say so because the accused only offered a mere denial of knowledge of the charges he faces without confronting the specific issue that he had a sexual relation with NM. a minor aged 15 years resulting in penetration as proved by PW 5 and P. exhibit 2."**

[9] The High Court reviewed the evidence of the complainant and the other witnesses including the defence of the appellant and came to the conclusion that the prosecution case was proved beyond any reasonable doubt and that there was no merit in the appeal.

[10] The appellant is dissatisfied with the judgment of the High Court, and has filed a memorandum of appeal in person that lists six grounds but actually only raise four grounds. Essentially the appellant faulted the High Court for: upholding his conviction based on contradictory evidence; upholding a conviction based on a poorly investigated case; and accepting identification by recognition when no first report made by the complainant was produced in court.

[11] At the hearing of the appeal the appellant filed a supplementary memorandum of appeal that raised other grounds of appeal namely, failure to comply with provisions of **section 200(3)** of the Criminal Procedure Code (CPC); failure to hold *voire dire* examination of the complainant; and upholding conviction in the absence of a DNA test. The appellant also relied on written submissions that he filed to support the grounds of appeal and in addition orally replied to the submissions of the counsel for the respondent.

[12] We start by considering the grounds in the supplementary memorandum of appeal. The complaint is that **section 200(3)** of the (CPC) was not complied with. The evidence of the complainant and her mother was received by **Hon. J. A. Owiti – a Senior Resident Magistrate.** The record shows that Hon**. P. Wasike – a Resident Magistrate** subsequently took over the trial, and that the prosecutor brought to the attention of the court the provisions of **section 200** of the CPC. **Section 200(3)** of the CPC gives a right to an accused person to demand that any witnesses who had given evidence before the previous magistrate, be re-summoned and reheard when another magistrate takes over the trial. In this case, the appellant was represented by a counsel at the trial who informed the trial court that she was instructed that the trial proceeds from where it had reached. The complaint of non-compliance with **section 200(3)** of the CPC is therefore without merit.

[13] Similarly, the complaint that *voire dire* examination of the complainant was not done is also without merit. This is because **section 19(1)** of the Oaths and Statutory Declarations Act provide that *voire dire*

examination is required where the witness is a child of tender years. As to who is a child of tender years, we wish to reiterate what this Court stated in **Patrick Kathurima vs Republic [2015] eKLR** that:

> ***Whereas the question of whether a child is of tender years remains a matter for the good sense of the court as was stated by this Court in MOHAMMED –VS- REPUBLIC [2008] IKLR (G&F) 1175, we see no reason for departing from the observation made in KIBANGENY –VS- REPUBLIC (Supra) that the expression "child of tender years" for the purpose of Section 19 of the [Act] means, "in the absence of special circumstances, any child of any age, or apparent age, of under fourteen years." That indicative age has been followed by courts ever since, See, for instance, JOHNSON MUIRURI –VS- REPUBLIC [1983] KLR 445, where this Court, in respect of a 13 1/2 year old child approved the step taken by the trial court;***
>
> ***"The learned Judge substantially followed the correct procedure before allowing her to be sworn by recording his examination of her whether she was possessed of sufficient intelligence to justify the reception of her evidence and that she understood the duty of speaking the truth".***
>
> ***We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children Act defines a child of tender years to be one under the age of ten years. That definition is preceded by the words "In this Act, unless the context otherwise requires…". That definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes.***

[14] Needless to state that the provisions of **section 19(1)** of the Oaths and Statutory Declarations Act do not apply herein because the complainant was 15 years of age and therefore not a child of tender years. Lastly, it was not mandatory that the appellant be subjected to a DNA test. What was imperative was proof of the ingredients of the offence of defilement, and this could be done even without the evidence of DNA test.

[15] The appellant complains that the case was poorly investigated and that the evidence was contradictory. He states that the evidence regarding the age of the complainant was contradictory. We have perused the submissions of the appellant's counsel at the trial and in the High Court regarding the quality of the prosecution evidence. The complainant's evidence in chief was very brief about ten typed lines. She testified that she had sex with the appellant severally between April and September, 2012. She did not give evidence relating to any particular date, but it is evident that sexual encounter was consensual as the complainant referred to the appellant as her boyfriend. However, the complainant (being under 18 years) was a child who was a standard 6 pupil and therefore had no capacity to consent to sexual intercourse. The charge sheet stated that the appellant penetrated the complainant on diverse days between April and September, 2012. The appellant maintained that the charge was bad for duplicity as the date for each specific act of defilement should have been specified and each set out as a specific offence in a separate count.

[16] It is true that **section 135(1)** of the Criminal Procedure Code, provides that any offences may be charged together in the same charge sheet if the offences are founded on the same facts or form or are part of a series of offences of the same or similar character. Section 135(2) of the CPC stipulates, that each such offence should be set out in a separate count. The question is whether it was proper to charge the appellant with acts of defilements committed over a period of six months in one count. The complainant testified that the appellant often used to pick her during the night, sleep with her and return her the following morning and this was a regular occurrence that went on for a while. Given the nature of the offence, and the regular occurrence, it was difficult to identify the specific dates that the offence was committed. Identification of such dates would only have been possible if one was maintaining a diary and this would not be practical or normal for a 15-year-old standard six pupil. It suffices that the complainant's evidence that she engaged regularly in sex with the appellant was consistent with that of

her mother and the clinical officer who examined the complainant and found evidence of sexual activity including a pregnancy.

[17] Moreover, even assuming that the charge was defective section 382 of the Criminal Procedure Code Provides as follows:

> **"…. 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] In **BND v Republic [2015] eKLR** Ngugi, J. set out the test to be followed in determining whether a charge sheet is fatally defective as follows:

> ***"29. The answer from our decisional law is this: 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" If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective. In this case, the Appellant was charged under section 8(1)(3) of the Sexual Offences Act. No such section exists in the Act. The question is: did this prejudice the Appellant and occasion a miscarriage of justice" I do not think so. There is no question in my mind that the Accused Person clearly understood the charges facing him well enough to understand the ingredients of the crime charged so that he could fashion his defence. In this case, he understood it well enough to offer an explanation when the facts were read out to him.***
>
> ***30. Hence, as our case law has established, the test for a defective charge sheet is a substantive one, not a formalistic one and when it is used here it establishes that the charges gave fair notice to the Accused Person to the charges he was facing, and the trial was fair in a substantive sense."***

[19] In **ISAAC NYORO KIMITA vs R [2014] eKLR**, this Court considering a similar issue and referring to appropriate authority stated:

> *"In **THE STATE V MATLHOGONOLO MASOLE, 1982 (1) Blr 202 (HC)** the HighCourt of Botswana, citing with approval **(R V GREENFIELD, (1973) 57 CR. APP.REP. 849)** while handling a similar situation, the court opined thus:*
>
> > ***".... there is, however, one over-riding matter to be considered and that is whether or not the accused was prejudiced by the duplicity in the charge, as duplicity in a count is a matter of form, not a matter of evidence** (R v Greenfield, (1973) 57 Cr. App.Rep. 849)."*
>
> *We endorse these statements fully. As a court of law, we should not be hyper technical. We should strive to do substantive justice in each case. That is the command to us from **Article 159 of the Constitution**.*
>
> *We should, however, not ignore the requirements of the law. With regard to the issue before us, **Section 134 of the Criminal Procedure Code** requires in mandatory terms that every charge should be precise and abundantly clear to the appellant. It provides that:*
>
> > ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

*Interpreting this provision in the case of **ISAAC OMAMBIA V R**, **[1995] eKLR** this Court held that:*

> ***"the particulars of a charge [form] an integral part of the charge."***
>
> *In this case, we have no doubt in our minds that the appellant knew that it was practically impossible for him and others to have "jointly" defiled the complainant. He therefore understood the charge against him to have been that on the material date, while together, with others, engaged in an illegal enterprise, they successively defiled the complaint. This is confirmed by the fact that in the trial, the appellant extensively cross-examined prosecution witnesses and defended himself.*
>
> *In the circumstances, we find that the defects in the charge were minor and did not prejudice the appellant. They did not occasion any miscarriage of justice or violate the appellants' constitutional right to a fair trial."*

[20] In this case the charge did not give the specific dates that the acts of defilement were allegedly committed. However, the complainant who was a child (that is under 18 years), testified that the appellant repeatedly violated her as he used to take her during many nights and "sleep" with her. This leaves no imagination on the description of the alleged acts of defilement committed within the six months period. In addition, the appellant who was represented by counsel both in the trial court and the High Court, did not at any stage complain about the defect in the charge sheet. It is apparent that the appellant was not embarrassed or prejudiced in his defence by the defect, as he understood clearly what he was alleged to have done. In the circumstances the defect was in mere form and not fatal as it did not cause any miscarriage of justice. It is a defect that can be cured under section 382 of the Criminal Procedure Code. We come to the conclusion that the appeal against conviction has no substance.

[21] As concerns the sentence, the evidence showed that the complainant was over 15 years old as she was said to have been born on 30th September, 1997. Indeed, the trial magistrate made a finding that she was slightly above 15 years. By dint of **section 8(3)** of the Sexual Offences Act, a minimum sentence of 20 years applies where the child is between the age of twelve and fifteen years. As the complainant was found to be slightly above 15 years, and the sentence of 20 years imposed on the appellant was rather excessive. The appellant should have been given the benefit of doubt and sentenced to fifteen years' imprisonment in accordance with the provisions of **section 8(4)** of the Sexual Offences Act that provided for a minimum sentence of 15 years.

[22] In addition, the trial magistrate does not appear to have considered the appellant's mitigation or exercised any discretion in sentencing. There is no doubt that the offence was serious, however, as the appellant claimed he was a secondary school pupil, the trial magistrate ought to have inquired into the appellant's age and established his circumstances before imposing the sentence.

[23] For the foregoing reasons, we dismiss the appeal against conviction, but allow the appeal against sentence to the extent of setting aside the sentence of 20 years, and substituting thereto a sentence of 5 years imprisonment effective from the date of the appellant's conviction. Those shall be the orders of the Court.

This judgment has been signed by two judges in accordance with **section 32(2)** of the Court Rules.

DATED and Delivered at Eldoret this 28th day of November, 2019.

HANNAH OKWENGU

……..

JUDGE OF APPEAL

J. MOHAMMED

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.