IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (KIHARA KARIUKI (PCA), M'INOTI & MURGOR, JJ.A)

CRIMINAL APPEAL NO 2 OF 2014

BETWEEN

THOMAS ALUGA NDEGWA..............................APPELLANT

AND

REPUBLIC..RESPONDENT

(An appeal from the judgment of the High Court of

Kenya at Nairobi (Achode, J.) dated the 13th June 2013

in

H.C. Cr. A. No 116 of 2012)

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JUDGMENT OF THE COURT

(1) Thomas Aluga Ndegwa, the appellant herein, was charged before the Chief Magistrate?s Court at Thika with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars of the charge were that on the 31st July 2010, at [Particulars Withheld] Estate of Ruiru District, within the then Central Province, the appellant committed an act which caused penetration with IN, (the complaint) a child aged 5 $^{1}/_{2}$ years old.

(2) The evidence against the appellant as given to the trial court was as follows: on the 31st July 2017, the complainant was playing near her home when the appellant called her to his house. At the house, he asked her to undress and lie down on the bed after which he proceeded to defile her. That evening, the complainant was at home with her mother, VK (PW1) and informed her that the appellant had „done bad manners to her? and then gave her some money and asked her not to tell anyone what had transpired.

(3) V took the complainant to the Ruiru Sub-district Hospital where she was treated by Joan Munene (PW3), the clinical officer stationed at Ruiru Sub-district hospital. The examination revealed that the complainant?s hymen was torn and that she had been repeatedly defiled, with the last episode occurring on the 31st July 2010. After V reported the matter to the Ruiru Police Station, it was assigned to PC Mohamed Rono (PW6) who took a statement from the complainant and later arrested the appellant.

(4) When the appellant was put on his defence, he denied committing the offence. He stated that on the material day, he left his place of work at about 3:00 p.m. At around 7:00 p.m., while he was at home, two police officers came to his house, arrested him and took him to Ruiru Police Station where he stayed until he was taken to court and charged. In his view, he was charged because he and V had had a disagreement and she had threatened to take serious action against him.

(5) In its judgment, the trial court held that the evidence on record proved, beyond a reasonable doubt, that the complainant had been defiled and that the appellant had properly been identified as the assailant. On this basis, the court found the appellant was guilty, convicted him and sentenced him to serve a term of life imprisonment.

(6) Being aggrieved with the conviction and sentence, the appellant lodged an appeal to the High Court. In that appeal, he contended that the conviction and sentence were defective since they were based on a non-existent provision of law; that the evidence adduced against him was contradictory, uncorroborated and inconclusive; that vital witnesses were not availed during trial; and that as a result of these shortcomings, the case against him was not proved beyond a reasonable doubt. The state opposed the appeal, submitting that the charge was not defective, that the evidence was consistent and corroborated, and that it was conclusively proved that the appellant was the one responsible for the defilement of the complainant.

(7) The High Court considered the grounds of appeal raised by the appellant and reassessed the evidence on record. It agreed with the findings of the lower court and held that the conviction entered against the appellant was based on sound evidence. The appeal was therefore dismissed, the conviction of the appellant sustained and the sentence meted out against him upheld.

(8) The appellant is still aggrieved with the conviction and sentence. He filed grounds of appeal dated the 1st July 2013 as well as a supplementary memorandum of appeal on the 20th November 2017 in which he raised various grounds upon which this Court should set aside his conviction and quash the sentence. He later abandoned these grounds and at hearing of the appeal before us, argued only one ground which was: that the learned judge of the High Court erred in law in upholding the conviction on a defective charge sheet contrary to the provisions of Article 50(2)(b) of the Constitution of Kenya and sections 134, 137 (a)(1)(ii) and 214 of the Criminal Procedure Code.

(9) As this is a second appeal, the Court can address itself only on matters of law. It will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence or they are based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in reaching their findings. These principles have been restated in various decisions of this Court, such as ***D W M v Republic*** ***[2016] eKLR (Criminal Appeal No. 12 of 2014).***

(10) Mr. Robert Businge, learned counsel for the appellant, submitted that the charge sheet was defective as the statement of offence indicated that the appellant was charged under sections 8(1)(2) of the Sexual Offences Act, a provision of law that does not exist. In his view, the correct phrasing of the charge ought to have been "defilement of a child contrary to section 8(1) read together with section 8(2) of the Sexual Offences Act No 3 of 2006."

(11) The appellant takes issue with the framing of the charge; he claims that it violated Article 50(2)(b) of the Constitution of Kenya which provides that:

> ***"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***
>
> ***(2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(b) to be informed of the charge, with sufficient detail to answer it"***

(12) Moreover, the appellant contends that the charge sheet violated the provisions of sections 134, 137 (a)(1)(ii) and 214(1) of the Criminal Procedure Code. Section 134 of the Criminal Procedure Code requires that

> ***"every charge… shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged…."***

(13) The appeal was opposed on behalf of the state by Ms Maina, Senior Public Prosecution Counsel. Learned counsel for the State conceded that the charge was erroneously drafted. She however argued that the evidence before the Court was sufficient to warrant a conviction and therefore urged the Court to dismiss the appeal and uphold the conviction and sentence.

(14) The appellant argues that the purpose of these provisions of law is twofold. The first is to ensure that a person charged with a criminal offence is provided with sufficient information in order to prepare an appropriate defence. The second reason is to enable the court properly consider the evidence adduced *vis a vis* the charge against the accused person in order to make an appropriate judgment.

(15) We have duly considered the appellant?s submissions as well as the provisions of the law that he relies on, which we have cited hereinabove. The appellant has invited us to find that his trial was a nullity because the charge against him as drafted failed to conform to section 137(a) of the Criminal Procedure Code which provides that:

> ***"Mode in which offences are to be charged.***
>
> ***(i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;***
>
> ***(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence"***

(16) This section requires that a charge or information contain a statement of the offence which describes the offence, and where the offence is created by an enactment, the charge shall have a reference to the relevant section of the enactment. Did the charge as drafted conform to section 137 above? We think so. The charge refers to the offence of defilement as created under section 8(1)(2) of the Sexual Offences Act. Section 8(1) creates the offence of defilement, while section 8(2) provides for the penalty of the offence of defilement where the victim is a child under the age of eleven years. While it is clear that the drafter of the charge erred in the framing of the charge, we do not however consider this to be sufficient reason to set aside the conviction of the appellant.

(17) In ***John Irungu v Republic [2016] eKLR (Criminal Appeal No. 20 of 2016)*** this Court observed that:

> ***"The Code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein section 382 of the Code focuses, not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice."***

(18) We are of the opinion that the error in the charge did not occasion a failure of justice and are of the view that such error is curable under section 382 of the Criminal Procedure Code which provides in part that:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation,***

order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

(19) In this finding we are fortified by the decision of this Court in ***Samuel Kilonzo Musau v Republic [2014] eKLR Criminal Appeal No. 153 of 2013)*** where the Court considered an appeal on a similar ground and held that:

"As will be readily apparent, section 8(1)is the offence section; it creates the offence of defilement constituted by committing an act which causes penetration with a child. Section 8(2) is the punishment section and prescribes life imprisonment when the child defiled is aged eleven years or less. The charge would have been properly framed if it charged the appellant with defilement contrary to section (8) (1) as read with sections 8(2) because section 137 of the Criminal Procedure Code requires the statement of the offence to describe the offence in ordinary language and if the offence is one created by enactment, it shall contain a reference to the section of the enactment creating the offence.

In this case, the statement of offence, though lumping section 8(1) and (2) together, contained the ingredients of the offence and the prescribed punishment. The irregularity was one that was, in our view, curable under section 382 of the Criminal Procedure Code. That provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice."

The appellant?s claim that the error resulted in a miscarriage of justice is therefore baseless, and we reject it.

(20) Turning to section 214 of the Criminal Procedure Code, we cannot see that it serves to advance the appellant?s case. The section provides for a situation where the court finds that a charge is defective, either in form or substance, and opts, on its own motion, to alter the charge. That section provides that:

"Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: …"

(21) In the first appeal, the High Court had considered whether or not the charge as framed was defective and rendered itself thus:

"on the question of the defect in the charge sheet for indicating that the appellant was charged under section 8(1)(2) of the Sexual Offences Act, it is a fact that no such section exists…

For some inexplicable reason however, the prosecution seem (sic) to be finding it increasingly tedious to insert the words "read together with" which would indicate as it should, that these are two different sections of the law

… ***which are to be read together…. The omission however, although depicting slovenliness on the part of the prosecution cannot be said to have prejudiced the appellant. The offence with which he was faced, the particulars thereof, and the punishment in the event of conviction were clear."***

(22) We respectfully agree with the reasoning of the first appellate court. While the charge sheet may not have been drafted in the most elegant of terms, it is clear that the appellant understood the charge against him and participated in the trial. For similar reasons, we find that the appellant?s right to a fair hearing under Article 50 (2)(b) of the Constitution was not violated, and this challenge to the conviction and sentence also fails and is rejected accordingly.

(23) Ultimately, we find that we cannot interfere with the conviction and sentence of the appellant as any error in the drafting of the charge is cured under section 382 of the Criminal Procedure Code. This appeal therefore has no merit, and we order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 26th day of January, 2018.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR