IN THE COURT OF APPEAL

AT NAKURU

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

CRIMINAL APPEAL NO. 113 OF 2011

BETWEEN

AMO……...……APPELLANT

AND

REPUBLIC ……..……RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru

(Emukule, J.) dated 3rd June, 2011

in

H.C.CR.A NO. 277 OF 2009)

JUDGMENT OF THE COURT

1. The particulars of the offence of defilement were that on the night of 25th and 26th December, 2006 in Narok District within the Rift Valley Province, the appellant unlawfully and intentionally committed an act which caused penetration with a child namely, NN a child aged 10 years. The p
2. ***AMO,*** the appellant, was charged with the offence of defilement contrary to ***Section 8 (2)*** of the ***Sexual Offences Act No. 3 of 2006*** and an alternative charge of indecent assault on a child contrary to ***Section 5 (1)(b)*** of the ***Sexual Offences Act*** in the Principal Magistrate's Court at Narok.
3. articulars of the alternative charge were that on the above mentioned date and place the appellant unlawfully and indecently assaulted NN, a girl aged 10 years by touching her private parts.
4. The appellant pleaded not guilty to the charges against him. The prosecution called a total of six witnesses. It was the prosecution's evidence that PW1, EK (E), lived at [Particulars Withheld] with her husband, PW5, GMO (G) and their five children. PW4, NN (N), was their eldest daughter and was 10 years old at the material time. The appellant was E's cousin and was staying with her family during the Christmas holiday. On 25th December, 2006 after having dinner at around 7:00 p.m the appellant led the family in prayer; thereafter, the appellant and the children went to bed in the kitchen which was separate from the main house. The Kitchen had two rooms and the appellant slept in one while the children slept in the other. The main house had two rooms, the sitting room and E and G's bedroom. G and E went to bed an hour later at around 8:00p.m. At around 9:00 p.m E heard N screaming saying that her uncle had entered her bed. E and G went to the kitchen to find out what had happened. E testified that they found N standing next to the door

of the children's room; she noticed that N was scared and shaking.

5. N told her parents that the appellant who she referred to as her uncle, went into their room and put on the lamp, removed his trouser and went to where she was sleeping; he held her mouth and put off the lamp; the appellant laid on top of her and proceeded to defile her. N testified that she screamed because she felt pain when the appellant penetrated her. Immediately N screamed the appellant woke up quickly and went to his room and pretended to be asleep.
6. G gave evidence that when he and E went to the appellant's room they found him in bed; he had covered himself with a blanket; they woke him up and inquired if he had defiled N; the appellant denied doing anything to N. The following morning they questioned the appellant again concerning the incident and he stated that he was drunk and could not remember what he did on the material night. G testified that the appellant ran away from their home. G and E called G's sister, PW2, RK (R), who lived a kilometre away. Upon arriving at G's home, on the morning of 26th December, 2006, R was informed about what had transpired. She testified that E and herself examined N and noticed that her genitalia on one side was reddish. N was taken to Kojonga clinic the same day and subsequently to Narok District Hospital on 27th December, 2006.
7. PW3, Enock Kotikoti (Enock), a clinical officer, testified that after he examined N he found that her hymen had been broken and a whitish discharge from her vagina. He gave evidence that after conducting tests he was able to establish that N had gonorrhoea. The incident was reported to the police station. Subsequently, the appellant was arrested on 29th December, 2006.
8. The appellant in his defence gave a sworn statement. He testified that in December, 2006 he was hired to uproot tree stumps by G and was living in his house. He stated that it was agreed between himself and G that he would be paid Kshs. 150/= per day; he worked for G for three months and was not paid a total of Kshs. 9,000/=. On 27th December, 2012 the appellant demanded payment of the money owed to him by G ; G promised to pay him the following day. The following day, G left the house and came back with the police men at around 4:00 p.m.; the policemen arrested the appellant; he was placed in police custody until 11th January, 2007 and was arraigned in court on 12th January, 2007. The appellant denied defiling N and maintained that the charges against him were framed by G so that he could avoid paying him the amount he owed.
9. The trial court convicted the appellant for the offence of defilement and sentenced him to 18 years imprisonment. Aggrieved with the trial court's decision, the appellant preferred an appeal in the High Court. The High Court (Emukule, J.) in judgment dated 3rd June, 2011 dismissed the appeal and enhanced the appellant's sentence to life imprisonment. It is that decision which has instigated this second appeal based on the following grounds:-

- ***The learned Judge erred in law and fact when he relied on a fatally defective charge sheet to convict the appellant.***

- ***The learned Judge erred n law and facts when he upheld the conviction and sentence yet he failed to consider that there was no charge against the appellant which could have sustained the conviction.***

- ***The learned Judge erred in law and facts when he relied on the evidence adduced by incompetent witnesses contrary to section 48 of the Evidence Act.***

- ***The learned Judge erred in law and fact by rejecting the appellant's defence.***

9. The appellant appeared in person and relied on his written submissions. He submitted that the charge sheet as drawn was defective because he was charged with the offence of defilement under ***Section 8 (1)*** of the ***Sexual offences Act***, yet the evidence led by the prosecution was to the effect that he was the complainant's uncle. He argued that he ought to have been charged for the offence of defilement under ***Section 20*** of the ***Sexual offences Act***.
10. The appellant contended that the prosecution's evidence was full of contradictions and did not warrant his conviction. He submitted that PW1, E, testified that N was examined and found not to have any infection while PW3, Enock, the clinical officer, testified that upon examining N he found that she had gonorrhoea. He further contended that he had demonstrated that the charges

against him were based on a grudge that the complainant's family had over him and that the two lower courts erred by failing to consider his defence. He urged us to allow the appeal.

11. Mr. Mutahi, Senior Prosecution Counsel, in opposing the appeal, submitted that this being a second appeal, only issues of law could be considered by this Court. He argued that the appeal did not raise any substantial question of law and the sentence was enhanced to life imprisonment under ***Section 8(2)*** of the ***Sexual Offences Act.*** He maintained that the prosecution had proved its case beyond reasonable doubt. The prosecution established that the complainant was 10 years old at the material time; the complainant's evidence was credible and was corroborated by the medical evidence.

12. By dint of ***Section 361*** of the ***Criminal Procedure Code***, the jurisdiction of this Court is confined to matters of law only. In In ***Kaingo -vs- R*** **(1982) KLR 213 at p. 219** this Court held:-

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"

13. We have considered the record, submissions by the appellant and learned counsel and the law. On the issue of the defective charge sheet, we note that the appellant was charged under ***Section 8(1)*** of the ***Sexual Offences Act*** for defiling a child. We also cannot help but note that the evidence tendered at the trial court was that the appellant is a cousin to N's parents and an uncle to N. The appellant ought to have been charged for incest under ***Section 20*** of the ***Sexual Offences Act***. ***Section 20*** provides:-

" 1) Any male person who commits an indecent act or an act persons which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:-

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

Therefore, does the above mentioned defect in the charge sheet warrant the acquittal of the appellant? This court has decided that discrepancy as to an offence in a charge sheet is not considered material in a case if it does not cause prejudice to the appellant or if it is inconsequential to the conviction and or sentence. See this Court's decision in ***Simon Ngiri Thiongo -vs- Republic- Criminal Appeal No. 20 of 2012.*** It is also considered curable under ***Section 382*** of the ***Criminal Procedure Code*** which provides;

"Subject to the provisions herein-before 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:

Provided that in determining whether an 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."

14. We are of the considered view that the charge sheet is curable under ***Section 382*** and no prejudice was occasioned to the appellant on account of the said defect. This is because from the evidence adduced the appellant was aware of the nature of the offence he was charged with, that is, the defilement of his niece. Further, the sentence issued under ***Section 20*** of the ***Sexual Offence Act***

for incest of a girl below 11 years is life imprisonment and is similar to the sentence issued for an offence of defilement of a girl below 11 years. We also find the discrepancies in the evidence of E and Enock on whether N was infected with any sexual transmitted disease, is also curable under ***Section 382*** of the ***Criminal Procedure Code***. In ***Joseph Maina Mwangi -vs- Republic Criminal Appeal No. 73 of 1993*** **Tunoi, Lakha** and **Bosire JJA**, held:-

"***In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences."***

15. The appellant also contended that the prosecution did not prove its case against him. E testified that on the material night she heard N screaming and she and her husband, G, went and found her standing next to the door looking scared and shaking. N testified that the appellant went to their room, lit a lamp, removed his trousers and went to where she was sleeping. The appellant removed her underpants and proceeded to defile her. She felt pain and screamed. It was R's uncontroverted evidence that when she examined N the following morning she noticed that her genitalia was swollen. Enock, a clinical officer, tendered evidence that N's hymen had been broken confirming penetration. From the evidence aforementioned it is not in dispute that N was defiled. It is also not in dispute that she was 10 years old.
16. The issue in contention is whether the prosecution proved that it was the appellant that had penetrated N. The appellant contended that no medical evidence was adduced that he was the one who penetrated N. The proviso to ***Section 124*** of the ***Evidence Act***, Chapter 80, Laws of Kenya provides:-

"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."

17. We find that despite the fact that no medical evidence was produced to connect the appellant to the sexual assault on N, the evidence on record satisfactorily pointed to his guilt. Why do we say so? The trial court examined N's demeanour and found her to be a truthful witness. We see no reason to interfere with the finding by the trial court that N was a truthful witness . Further, N gave a detailed account first to her parents on the material night and to the court on what had transpired. Therefore, N's evidence proved that it was the appellant who had sexually assaulted her.
18. On the issue of sentence, we find the sentence of life imprisonment meted to the appellant is legal. The proviso of ***Section 20*** as set out herein above provides a mandatory sentence of life imprisonment.
19. The upshot of the foregoing is that we find that the appeal has no merit and the same is dismissed.

Dated and delivered at Nakuru this 20th day of March, 2014.

ALNASHIR VISRAM

….....

JUDGE OF APPEAL

MARTHA KOOME

….....

JUDGE OF APPEAL

J. OTIENO-ODEK

….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR