IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MARAGA, MWERA & J. MOHAMMED JJ.A.

CRIMINAL APPEAL NO. 187 OF 2009

BETWEEN

ISAAC NYORO KIMITA.....1ST APPELLANT

MICHAEL RURUGI KIBARA.....2ND APPELLANT

AND

REPUBLIC …….....……..…… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Ojwang, J) dated 9th February, 2009

in

H.C.CR A. NOS. 319 & 320 OF 2005)

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JUDGMENT OF THE COURT

ISAAC NYORO KIMITA, the 1st appellant and ***MICHAEL RURIGI KIBARA***, the 2nd appellant were charged with the offence of defilement of a girl contrary to ***section 145 (1) of the Penal Code***. The particulars of the offence were that on diverse dates between 1st and 16th November, 2000, at Kawangware within Nairobi Area Province, the appellants jointly with others not before the court had carnal knowledge of *JW* a girl under the age of fourteen years. They also faced an alternative charge of indecent assault of a female contrary to ***section 144 (1) of the Penal Code*** particulars of which were that on diverse dates between 1st and 16th November, 2000 at Kawangware within Nairobi Area Province, the appellants jointly with others not before the court unlawfully and indecently assaulted *JW* a girl under the age of fourteen years by touching her private parts.

The appellants denied the charges but admitted prior knowledge of the complainant.

After considering the prosecution evidence and that of the defence, the learned Senior Principal

Magistrate (Hon Kasera) in her judgment dated 8th June, 2005, convicted the appellants and sentenced each of them to 18 years' imprisonment. The appellants appealed to the High Court against that conviction and sentence but their appeal was dismissed and their conviction as well as the sentence imposed upon them by the subordinate court were confirmed.

Aggrieved by that decision, the appellants have filed this second appeal raising four grounds of appeal that:

1. *the evidence of the prosecution was uncorroborated;*

2. *the charge was defective as it omitted essential elements of the charge namely the wording: "without the consent of JW";*

3. *the charge was defective as it indicated that the appellants jointly defiled JW; and that*

4. *the evidence adduced by JW was unreliable.*

In the appeal the appellants appeared in person. At the hearing before us, the 1st appellant was present in court and relied on the Memorandum of Appeal filed on 6th May, 2009. The court was informed that the 2nd appellant ***(MICHAEL RURIGI KIBARA)*** who was not in court had abandoned his appeal. The learned Senior Principal Prosecution Counsel from the Director of Public Prosecution's office, Mr. V.S Monda, conceded the appeal on the ground that the charge was defective as it is practically impossible for two men to *"jointly"* defile a girl or rape a woman.

This being a second appeal, ***Section 361 of the Criminal Procedure Code*** restricts this Court to matters of law only. As this Court stated in ***CHEMAGONG V R, [1984] KLR 611***. In ***KARINGO V R, (1982) KLR 219*** and in many other cases, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence on record, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. That being the case, the issues arising for our determination in this appeal are:

a) whether the charge was defective, and

b) whether the evidence of the complainant, a minor, needed corroboration and if so whether it was corroborated.

The 1st appellant, ***(ISAAC NYORO KIMITA)*** raised two aspects on the first ground of the defective charge: that the charge did not state that the defilement took place *"without the consent of JW"* and that the charge alleged that the appellants *"jointly"* defiled the complainant.

On the first aspect, we reiterate the statement of this Court in the case of ***JMA V R, [2009] KLR page 671 at 676*:**

> ***"Defilement is a charge which relates to having sexual intercourse with a girl who is under the age of 14 years. … Rape is an offence which involves adults who are able to consent, unlike in the present position where a child was involved, and the issue of consent or lack of it is wholly irrelevant."***

Accordingly, the complainant in this case, a minor, could not voluntarily have given her consent to the sexual intercourse with the appellant and that aspect of the first ground of appeal therefore fails.

On the second aspect, the particulars of the charge alleged that:

> ***"On diverse dates between 1st and 16th November, 2000 at Kawangware within Nairobi Area, the accused jointly with others not before the court had carnal knowledge of JW a girl under the age of fourteen years."*** [Emphasis added].

We agree with Mr. Monda that it is practically impossible for two men to *"jointly"* defile one girl or to

rape one woman.

Dealing with a similar issue in the case of ***PAUL MWANGI MURUNGA V R,*** ***[2008] eKLR,*** this Court found that the allegation of two or more men *"jointly"* raping one woman in the particulars of the charge made it fatally defective. It stated:

> ***"This Court has repeatedly said that two or three men or whatever may be their number cannot jointly at the same time rape one woman. Each one of the men commits the act of rape individually and is followed by the next man. We are unable to appreciate how two or three men can at the same time "jointly" enter or try to enter her genital organ.***
>
> ***The act is committed by each one of them alone and if there be two, three or four of them each must be charged on a separate count of rape."***

The issue we need to consider in this appeal is whether or not we should follow that decision or we should depart from it.

For consistency and to avoid confusion, this Court should follow its previous decisions. However, where it appears to it that its previous decision was either ***per incuriam*** or is no longer a sound statement of the law, this Court should depart from such previous decision.

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? If it did not, then we should depart from our decision in the ***Paul Murunga case supra.***

Dealing with the framing of a criminal charge in the case of ***WILLIE (WILLIAM) SLANEY V STATE OF MADHYA PRADESH, [A.I.R. 1956 Madras Weekly Notes 391],*** the Supreme Court of India held that:

> ***"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.***
>
> ***To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent."***

Their Lordships further held:

> ***"We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms that it must all be*** *"explained to him",* ***so that he really understands … but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and explaining that are the substance of the matter, is to base on fanciful theory wholly*** ***divorced from practical reality. … The essence of the matter is not a technical formula of words, but the reality. Was he told? Was it explained to him? Did he understand? Was it done in a fair way?"***

As regards irregularities in the framing of the charge, their Lordships opined 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."***

Other jurisdictions have also dealt with similar issues of defective charges.

In the case of ***R V FENWICK, [1953] 54 S.R [N.S.W. 147]***, where the Supreme Court of New South Wales was also confronted with a case where two men were charged in one count with raping the same woman, it held that:

> ***"It mattered not whether they acted in pursuit of a common purpose or each raped the woman independently of the other."***

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. That being our view of the matter, we are left with no option but to depart from the holding in the ***Paul Mwangi Murunga case (supra).*** We are fortified in this view by the English Case of ***R V GOULD, (1968) EWCA Crim 1*** where it was held that:

> ***"In its criminal jurisdiction, … the Court of Appeal does not apply the doctrine of*** *stare decisis* ***with the same rigidity as in its Civil Jurisdiction. If upon due consideration we were to be of opinion that the law had been either misapplied or misunderstood in an earlier decision of this Court or its predecessor, … we should be entitled to depart from the view as to the law expressed in the earlier decision. … A fortiori we are bound to give effect to the law as we think it is if the previous decision to the contrary effect is one of which the ratio*** *decidendi* ***conflicts with that of other decisions of this court or its predecessors of co-ordinate jurisdiction."***

On the issue of whether the evidence of the complainant, a minor, required corroboration, the law is quite clear: it does. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. ***Section 124 of the***

Evidence Act makes this quite clear:

> ***"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 of 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."***
>
> [Emphasis added]

Dealing with a similar issue in the case of ***MOHAMED V R, (2008) 1 KLR*** ***G&F 1175,*** this Court held that:

> ***"It is now well settled that the courts shall no longer be humstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."***

In this case, the trial court found that the complainant was indeed a witness of truth and her evidence was credible. In the appellant's first appeal, the learned Judge of the High Court conducted a thorough and exhaustive re-appraisal and re-evaluation of the evidence as a whole consistent with his duty as spelt out in a long list of authorities including ***OKENO V R, [1972] EA 32***. He stated:

> ***"I have considered the evidence as a whole, and found no fault with the manner in which the learned magistrate made her assessment of the same. The trial court had entertained no doubts at all as to the truthfulness of the complainant as a witness and her demeanour had commended itself as a demeanor of candour. The complainant did not go missing from the view of her parents for nothing, she had been abducted and detained by 2nd appellant who held her for some 16 days; during that period the appellants herein committed unrelenting defilement upon her particularly so, 2nd appellant; after the most severe sexual harm had been occasioned to the complainant, 2nd appellant dumped her near a clinic; the complainant very well saw her molesters, these are men she knew, and she gave their names to the police."*** [Emphasis added]

As we have stated, the appellant conceded that he knew the complainant and she also knew him. The issue of identification does not, therefore, arise.

We are, therefore, satisfied that the appellant ***ISAAC NYORO KIMITA,*** was convicted on sound evidence and the case against him was proved beyond any reasonable doubt. In the result, we find that his appeal has no merit and we accordingly dismiss it in its entirety.

Dated and delivered at Nairobi this 14th day of November, 2014.

D. K. MARAGA

JUDGE OF APPEAL

J. W. MWERA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR