REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 69 OF 2019

ALEX CHEMONGES KIPSANG.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Karanja SPM delivered on 1st July 2019 in Kibera CM Cr. Case (S/O) No.11 of 2018)

JUDGMENT

The Appellant, **ALEX CHEMONGES KIPSANG**, was charged 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 offence were that on 20th January 2017, at [Particulars Withheld] village within Trans Nzoia County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of NSW a child aged seventeen (17) years. In the alternative, he was charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on 20th January 2017, at [Particulars Withheld] village within Trans Nzoia County, the Appellant intentionally caused the contact between his genital organ namely the penis and the genital organ namely the vagina of NSW a child aged seventeen (17) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted of the main charge and sentenced to serve fifteen (15) years imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court erred in failing to find that the age of the alleged victim was not properly established. He was also aggrieved that there was violation of his constitutional rights as prescribed under **Article 49** of the **Constitution**. He complained that the trial court did not accord him a fair trial. He was aggrieved that the trial court's evidence was marred with inconsistencies and discrepancies. In the premises, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. He urged the court to allow his appeal. He submitted that PW1 and PW2 did not give any physical description of the two occupants of the motor cycle and neither did they give a description of the clothes worn by the two occupants or alleged assailants nor take note of the make, colour and the registration details of the motor cycle that carried them. The Appellant asserted that Sharon and her sister were not called as witnesses to give a clear indication on whether Sharon had a calculator belonging to PW1. The Appellant further contended that some other witnesses were also left out during trial including PW2's grandmother thus leaving out crucial evidence which would have aided the court in reaching a just determination.

The Appellant was of the view that PW1 was not able to tell the court the colour of the underwear, biker, skirt and blouse that she was wearing during the alleged incident. He was of the view that any material exhibit presented before the court can only be distinguished by its colours. The Appellant further maintained that PW1 misled the court when she testified that this was her first sexual encounter with the Appellant contrary to the clinical officer's findings that the hymen was torn and old looking drawing the conclusion that the complainant was sexually active prior to the incident.

It was further contended that that there was no proof of penetration and there was no indication as to whether the white discharge on the complainant's vagina was spermatozoa, an infection or the normal female discharge. It was thus submitted that there was no clear proof of penetration as per the vaginal examination conducted upon PW1.

The Appellant relied on the case of **Pappyton Mutuku Ngui Vs. Rep Cr Appeal No 296 Of 2010** where it was held that the prosecution must prove its case beyond reasonable doubts. He further cited the decision in **DPP Vs. Woolmington [1935] UKHL.**

The Appellant took issue with the age element and the assessment report produced in evidence. He submitted that age was not properly established as the same was just an estimation. The best way of determining the age of the complainant was by the production of a birth certificate. This was not produced thus the age of the complainant was not properly proved.

Mr. Omooria for the State opposed the appeal. He filed written submissions. He made submissions to the effect that the prosecution had established the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt. He set out the brief elements required in a charge of defilement as age, penetration and identity. In that regard he cited the case of **Daniel Wambugu Maina vs. Republic [2018] eKLR.** On the same note, he urged the court to apply the provisions of **Section 124** of the **Evidence Act** as regards when corroboration is required in the sexual offences.

Ms. Omooria for the State submitted that the complainant testified that she was seventeen (17) years of age. Her evidence on age was corroborated by that of PW3, who is the complainant's mother. PW6 had also examined the minor and estimated her age to be seventeen (17) years and produced an age assessment report marked as PExhibit P3.

Learned Prosecutor cited the case of **Mwalango Chichoro V. Republic Msa C. Appeal No. 24 of 2015(Ur)** where the Court of Appeal held that:

> **"The question of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as birth certificate, baptism card or by any evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardians or, medical evidence."**

It was urged that the age of the complainant was well established. Hence the ground that age was not proved must fail.

On the element of penetration, it was asserted that the law does not envisage absolute penetration into the genitals nor the release of spermatozoa or semen from the male organ for the act of penetration to be complete. (See **Daniel Wambugu Maina vs. Republic [2018] eKLR)**

The Learned Prosecutor submitted that PW1 in her evidence stated that the Appellant pushed her to bed, lay on her and put his penis into her vagina and pushed it in. He further asserted that PW2 placed the Appellant at the scene as the last person seen with the complainant. He submitted that PW5 produced the treatment notes and P3 form which established that the complainant had bruises on both labia and that the hymen was torn but old looking. He submitted that the injuries observed on both labia accompanied by a torn hymen demonstrated that there was penetration.

As regards identity of the perpetrator, the Learned Prosecutor maintained that the complainant met with the Appellant during daytime. They spent a considerable amount of time together. He stated that PW2 knew the Appellant by his name Alex. She identified and recognized the Appellant in court as a *boda boda* rider. On cross examination, she reiterated to that she knew the Appellant well and did not confuse him with anyone else. It was therefore urged that the chance of mistaken identity were remote as the Appellant was sufficiently recognized and identified. In that regard, the prosecution cited the case of **Roria Vs. Republic [1967] E.A 583** urging the court that the existing circumstances were suitable that enabled the complainant identify and recognize the Appellant.

On the ground that the prosecution's evidence was filled with inconsistencies and discrepancies, it was submitted that the Appellant's conviction was sound as all critical elements of the offence were proved. The court was invited to address itself to the case of **Twehangane Alfred V. Uganda Criminal Appeal No 139 Of 2001** where the court noted that it is not every contradiction that warrants rejection of evidence and the court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do affect the main substance of the prosecution case.

On the ground that there was violation of **Article 49** of the **Constitution** and there was no fair trial, it was submitted that that the trial was conducted fairly. There is no evidence that the rights of the Appellant had been prejudiced, noting that the Appellant was allowed to recall the complainant and was once represented by counsel of his choice.

In the premises, Learned Prosecutor urged the court to dismiss the Appellant's appeal on conviction and sentence. The sentence was merited due to the rampant and prevalence of cases of this nature in the area.

In the present appeal, it was the prosecution's case that on 20th January 2018, the Appellant sexually assaulted the complainant. PW1 testified that she was a Form 2 student. She was born in 2001 and was aged seventeen (17) years at the time of the trial. On the material date, she stated that she was in [Particulars Withheld] Centre to see her friend S and pick a calculator at about 1.00p.m. She was in company of her friend Z. They did not find S. On their way home, a motor cycle with two occupants stopped on reaching them. The occupants were not known to them. They told the motor cycle occupants' they were going to [Particulars Withheld]. They took a road leading to the forest. They were taken to [Particulars Withheld]. At [Particulars Withheld], they were left outside as the two men entered a video room. They were in the room for about an hour. The Complainant and PW2 remained outside during this time. They had promised to take them home by 5.00p.m. They then proceeded to [Particulars Withheld]. They said that the police were bad there. One of the men, and a girl alighted. The complainant remained with the rider. He said he wanted to get his jacket from his house. He went to his house. He stopped and entered the house. She also alighted and stopped there. He invited her in and but she refused. He pushed her inside and closed the door. He warned her not to spoil for him. He removed her underwear and biker. She had a skirt and a blouse. He pushed her to bed and lay on her. He put his penis into her vagina and pushed it in. It was 8.00 p.m. Some other boys came and spent the night in the other room. He kept her there till morning. This was her first sexual encounter with him. In the morning, the Appellant left with the boys. She remained there until 10.00 a.m.

She left to look for her friend and found her walking towards the direction with a village elder. They were looking for her. She was interrogated and taken to Macheo Police Post where the she reported what the Appellant had done to her. Her father called her. She was later taken to Kitale District Hospital for treatment. She was issued with a P3 form. On cross examination, she reiterated that the Appellant said he

was called Alekie. She confirmed that he was new to her and had promised to take them home with her friend.

PW2 ZNO, a friend to the complainant, testified that on the material day, the complainant asked her to accompany her to pick a calculator from a classmate in [Particulars Withheld]. They never found the classmate and returned home. On the way back, they met Alex (Appellant) and Dennis. Alex was riding a motor cycle. They were both new to them. They took a short cut to the nearby market. Dennis said he was picking a speaker at Priscilla's place. They stopped on the way for him but he didn't get it. They proceeded on with the ride but changed positions. Dennis took the motorbike to [Particulars Withheld]. At [Particulars Withheld], both Dennis and Alex entered a movie room. PW1 and PW2 sat at the veranda outside as it was raining. They took two hours at [Particulars Withheld]. They came and took them to a strange area. They said there was a problem ahead. Dennis alighted with PW2. The complainant remained with Alex on the motor bike. They agreed to meet ahead but they did not. PW2 and Dennis followed after them but they did not get them. They reached at 7.00 p.m. It was dark. Dennis took PW2 to his house. He went back to look for the complainant and Alex. He locked PW2 outside. She however escaped and left through the window. On the road, she saw Dennis. He was annoyed. He threatened her. She went to a nearby home where she was hosted for the night.

The following day she was interrogated by the man of the house. She described how her friend was dressed. The village elder confirmed that she has seen the complainant in a certain *boma*. The village elder took her there. They picked the complainant. They were later taken to Machweo Police Post where their statements were recorded. They were later taken to Kitale District Hospital where they were medically examined.

PW3, DWM, testified that he was the complainant's father. He received a call from the police station on 21st January 2018 at around 2.00 p.m requiring him to go to the police station where he learned that two *boda boda* men had hijacked his daughter and another girl. The girls were at the police station. The two men had shared the girls amongst themselves. Her daughter was defiled and the suspect was in police custody. The police at Kitale were called. They referred the complainant to hospital at 8.00 p.m. She was treated at Kitale District Hospital and a P3 form was filled. He recorded his statement the second day.

PW 4, CPL Moses Toiko Tumach, testified that he received a report from one K that a girl ran to his home and another one was at large. That two men had hijacked them and released them later but one was lucky to escape and the other one was still missing with Alex. He managed to get the other girl. He called the parents of both girls. They took the two girls for medical examination at Kitale District Hospital. Alex was a *boda boda* rider. He was arrested at the stage. The complainant was the first to be found. She had slept at Alex's home. PW2 escaped to K's home.

PW5, John Koima, produced the P3 and treatment notes from Kitale District Hospital. He testified that the same had been prepared by the late Kirwa Labatt who died in 2018. He had worked with him for over ten years. He knew his handwriting. He examined the complainant on 22nd January 2018. He filled the P3 form on the said date. From the medical findings, he found out that there were bruises on both labia and the hymen was torn but old looking. On laboratory examination, there were no significant findings and no conclusion was recorded on the findings. The treatment notes and P3 form were produced as prosecution exhibit 1 and 2.

PW6, Dr. Oyieke Mercy, produced the complainant's age assessment report. She assessed her age to be seventeen (17) years. She explained that she conducted a clinical examination and found that she had all her permanent teeth except the third upper molar. She did a vatiopaphic examination. All the permanent teeth were present except the third molars. A third of the roots were not formed and she estimated her age to be seventeen (17) years. She produced the assessment report as P exhibit 3.

PW 7, P.C Mary Umazi, testified that she was the Investigation Officer in the matter. She stated that the Appellant had been brought to custody by Administration Police officers from Macheo Police Post. The Appellant had allegedly defiled a minor. She interrogated him. It was alleged that he had threatened the minor. She received the minor in company of her father from Kitale District Hospital. An age assessment was done. The age assessment report indicated the minor's age was seventeen (17) years. She spoke to the minor who confirmed that the Appellant had sexually assaulted her on her way home. The Appellant had offered to give her a lift but instead took her to his house. She recorded statements of the witnesses and charged the Appellant for the disclosed offence.

The Appellant was placed on his defence. He stated that he was a farmer and was a resident of [Particulars Withheld] village. He stated that on the 21st January 2018, he was ploughing his farm at around 9.00 a.m. when he saw two people approaching him. They informed him he was required at the AP Camp. They took him to the AP camp but never informed him of what he had done. He was later escorted them to Kitale Police Station where he detained for three days. Later, they took his finger prints. He was charged with the offence which he denied ever committing.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comment regarding the demeanour of the witnesses **(See Okeno vs. Republic [1972] EA 32)**. In the present appeal, the issue for determination is whether the prosecution established the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** brought against the Appellant, to the required standard of proof beyond any reasonable doubt.

For the prosecution to sustain the charge of defilement, there are three elements that the prosecution must establish. The first element is penetration.

Section 2(1) of the **Sexual Offences Act** defines penetration as **'"the partial or complete insertion of the genital organ of a person into the genital organs of another person."**

In the present appeal, the complainant testified that she had gone to pick a calculator from her friend Sharon in the company of her other friend Zipporah. They did not get Sharon. On their way back, a motor cycle with two occupants who were unknown to them approached

them and stopped. They boarded the said motor cycle which took them to [Particulars Withheld]. Later, the rider took her to his house under the guise that he had detoured to pick his jacket. The rider invited her to his house but she declined. He pushed her into the house and closed the door. He warned her not to mess up with him. He removed her underwear and biker. He forcefully had sexual intercourse with her. She stayed in his house until 10.00 a.m. on the following day.

The Court Of Appeal in the case of ***A M L versus Republic [2012] eKLR*** held that**:-**

> **"The fact of rape or defilement is not proved by D.N.A test but by way of evidence."**

It is now settled law that sexual assault can be proved by evidence and not by medical examination despite the provisions of **Section 36** of the **Sexual Offences Act.**

Evidence of the victim or circumstantial evidence is sufficient to prove rape or defilement as the case may be. In the present appeal, proof of penetration was established by the testimony of the complainant. *The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence.* **(See *Kassim Ali versus Republic Criminal Appeal No. 84 of 2005***). There is no requirement under the **Sexual Offences Act** that penetration be proved by the presence of spermatozoa. What the court has to determine is whether there was complete or partial insertion of the male organ. The material evidence is the oral evidence of the complainant which is direct or circumstantial. It is dependent on whether the court believes the evidence. Upon evaluating the evidence, this court finds that the trial magistrate made a proper finding that penetration was proved. The court found the evidence adduced by the prosecution to be credible.

The Appellant took issue with the medical evidence that was adduced by the clinical officer. The Appellant was of the view that the medical report produced in evidence did not corroborate the testimony of the complainant to the effect that she had been sexually assaulted. On re-evaluation of this evidence, this court is of the view that indeed the prosecution established penetration. The P3 form produced as prosecution's exhibit No1 indicated she had bruises on both her labia, her hymen was torn and old looking with whitish discharge from her vagina. This court agrees with the trial court's findings that that anything else other than a sexual penetration could not have caused the bruise on the labia but from the evidence, there was evidence of sexual penetration consistent with defilement. This court therefore holds that penetration was established to the required standard of proof beyond any reasonable doubt.

The second element is the identification of the perpetrator of the offence. The complainant testified that it was the Appellant who had sexually assaulted her on the particular night. From the evidence, the Appellant and his friend Dennis had a motor cycle. They offered the girls a lift. They introduced themselves to them before the girls agreed to ride in the motorcycle. They stayed in their company from 1.00 p.m. that time to 5.00 p.m. when they split up. Dennis took PW2 and the Appellant took the complainant. The Appellant went with the complainant to his house where he had sexual intercourse with her. She spent the night with him. She left at 10.00 a.m. the following day. This court holds that the complainant had spent a substantial amount of time with the Appellant for there not to be a case of mistaken identity. This court therefore holds that it the identity of the perpetrator was established to the required standard of proof.

The third element is the age of the victim. In the present appeal, the complainant testified that she was seventeen (17) years old at the time of the sexual assault. She was a Form two student at the time she testified in court. PW6, Doctor Mercy Oyieke, assessed the complainant and found her to be aged seventeen (17) years. She produced the age assessment report as P exhibit No3. The Appellant took issue with the age assessment report asserting that production of a birth certificate was the most suitable way of determining the Complainant's age and since the same was not produced the age element remained unproved.

In **John Cardon Wagner –vs- Republic Nairobi High Court Criminal Appeal No.404 of 2009**, Warsame J (as he then was) held that:

> **"In defilement cases, the age of the complainant is proved by either medical evidence or through other evidence since the sexual offences act has different categories of ages and sentences of different ages…"**

Mutende J in **Musyoki Mwakavi –vs- Republic Machakos HC Criminal Appeal No.172 of 2012** held that:

> **"…apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense…".**

In the present appeal, this court is persuaded and finds that the complainant was indeed aged at least seventeen (17) years at the time of the sexual assault. This conclusion has been reached after the court considered the testimony of the complainant herself and the age assessment report produced in court by PW6 Dr. Mercy Oyieke.

The Appellant was also aggrieved that the prosecution failed to call some witnesses who according to him, were necessary witnesses. He pointed out that Sharon and her sister, PW2'S grandmother and the village elder who hosted PW2 on the material date of the incident should have also been called in as prosecution witnesses.

With regard to the calling of prosecution witnesses, the court addressed this issue in ***Julius Kalewa Mutunga v Republic, Criminal Appeal No.32 of 2005***, and stated:-

> **"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion, unless, for example, it is shown that the prosecution was influenced by some oblique motive."**

The Court of Appeal again addressed that issue in the case of ***Benjamin Mbugua Gitau v Republic*** **[2011] eKLR** thus:-

> **"This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 of the Evidence Act Cap 80 laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys"**

This court is of the view that that failure to call those witnesses neither caused any prejudice to the Appellant nor weakened the prosecution's case. The evidence led was sufficient to prove the offence the Appellant was charged with.

In light of the foregoing, the appeal lodged by the Appellant lacks merit and is hereby dismissed. The prosecution established to the required standard of proof that indeed the Appellant sexually assaulted the complainant. The custodial sentence meted on the Appellant is legal. The upshot of the above reasons is that the Appellant's appeal against conviction by the trial court on the charge of defilement **contrary to Section 8(1) and Section 8(3) of the Sexual Offences Act is dismissed.**

On sentence, the complainant was aged seventeen (17) years at the time of the incident. The Appellant was sentenced to the minimum prescribed sentence under **Section 8(4)** of the **Sexual Offences Act.** The sentence of imprisonment of 15-years is legal.

Since there is no reason to disturb both the conviction and sentence, the decision of the trial court is hereby affirmed and the appeal dismissed accordingly.

It is so ordered.

DATED AT KITALE THIS 26TH DAY OF JULY 2021

L. KIMARU

JUDGE