REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO. 11 OF 2018

GALGALO GALMA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the original conviction and sentence in criminal case(SOA) No. 15 of 2017 of the S.M. KIMANI Senior Resident Magistrate's court at Moyale)

JUDGMENT

The appellant was charged with the offence of defilement Contrary to Section 8(1)(3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that the appellant on the 16th day of June 2017 within Marsabit County intentionally caused his penis to penetrate the vagina of NW a child aged 12 years.

The appellant was also charged with an alternative Count of 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 are that the appellant on the 16th day of June 2017 within Marsabit County intentionally touched the vagina of NW a child aged 12 years with his penis.

The trial court convicted the appellant on the alternative Count of indecent act with a child and sentenced him to serve 10 years imprisonment. The grounds of appeal are:-

1. That the learned trial Magistrate erred in law and in fact in convicting and sentencing the appellant without

sufficient and independent evidence.

2. That the learned trial Magistrate erred in law by failing to note that the prosecution side failed to summon vital witnesses mentioned during the trial for a just decision not be reached.

3. That the exact complainant's age was to known as at the alledged material date, kindly noting there is no evidence on record to the effect that any legal document was ever produced to prove her age. Even the said medical officer never did age medical assessment test to establish her age.

4. That the prosecution medical evidence on record is not conclusive.

5. That the complainant was taken to hospital to ascertain or prove the charge. The evidence on record is clear the medical examination (report) has clearly indicated that there is no case of defilement seen.

6. That prior to the said allegation plotted on the appellant he had not been in good terms with the complainant's mother one RA who is also a witness in this case.

7. That since the appellant was arrested and prosecuted and brought before the court, only the complaint's mother whom he had differed and investigation officer testified none of the witnesses appeared before the court. Thus the allegation of defilement is sheer lies intended to tarnish his name.

The appellant submitted that he did not commit the offence. The medical report shows that there was no defilement. The whole matter was fabricated as the complainant's mother initially reported the matter to the elders. Essential witnesses were

not summoned including the said village elders. It was up to the prosecution to avail the elders and shade light on the matter. Only the mother and the investigating officer kept attending Court.

The state opposed the appeal. Mr. Mwangangi submitted that the appellant confirmed that he was with the victim. He was found in the house. The victim was 12 years old and a class 4 pupil. There is a huge age disconnection between the complainant and the appellant which renders the defence as an afterthought. The issue of existing grudge is an afterthought. The appellant had previously asked the victim for sexual favours. The case had been reported to the elders but since they were not solving the problem it was reported to the police. Given the nature of the offence, it could not have been resolved by the elders. The victim's mother linked the appellant to the offence.

Being a first appeal this court is required to evaluate the evidence afresh and make its own conclusion. Four witnesses testified for the prosecution. **PW1 EW** was the complainant. She was 12 years old. The trial court conducted voire dire examination and allowed her to testify under oath. She was a class four pupil. On 16.6.2017, a Friday, she was sick and was at home. Her mother had gone to work. The appellant went there at about 11.00am and asked her for sex. She declined. The appellant pulled up her dress, removed his pantie and put his penis in her vagina and pushed it in. She had never done it before and felt pain. The appellant did it for five minutes and she was screaming and crying. Her mother went in and found the appellant. The appellant took off. Her mother started beating her. She was taken to hospital after one week and the matter was reported to the police. She was later issued with a P3 form. It is her evidence that she had differed with the appellant because he had previously tried to get sexual favours from her and she had declined. This earlier matter had been reported to the elders and the appellant was forgiven.

PW2 BAG is the complainant's mother. On the 16.6.2017 she went home early from work and saw the appellant seated on her bed. The appellant run away but left his shirt. PW1 tried to run away but she held her and started beating her. She went to talk to the appellant's father who told her that he will report to the elders. After six days the elders met and talked about the matter. The appellant's father told her to report the matter to the Police which she did. She knew the appellant as he is a neighbour. She had not differed with him. It is her evidence that the appellant defiled PW1. It was on a Friday when the incident occurred.
PW3 Somo Galma is a clinical officer. He filled the P3 form at Ramata health centre in Moyale Sub county. The complainant was seen one week after the incident. He examined her genitalia and found it to be normal. There were no lacerations. No discharge on the walls but the hymen was broken. He concluded that probably there was an attempted defilement. The delay in reporting the incident could not give him justified results.

PW4 Cpl Sammy Yaa was based at the Sololo Police station. On 22.6.2017 PW2 reported the matter at the station. PW2 told him that the matter had been reported to the village elders. He booked the report and referred PW1 to Ramata dispensary. The appellant was later arrested on 17.8.2017 and charged with the offence.

The appellant gave sworn defence. He testified that he is a bodaboda operator in Sololo. On the material day PW1 went to his house at 11.00am. They were just talking when her mother went there and asked why they were talking. Before asking him anything she took him to the Police. He was arrested on 17.8.2017. PW1 alledged that she had been defiled. The doctor examined her and said that he could not see anything since her hymen had been broken. He was just talking to PW1 as a friend and he had no bad intentions. He denied going to the complainant's house on the material day. They live in the same plot.

The appeal raises the issue as to whether the prosecution proved its case beyond reasonable doubt against the appellant. The trial court found the appellant guilty of the alternative count because the medical evidence did not prove that there was penetration. The evidence on record shows that the appellant was with the complainant on the material day at about 11.00am. The two knew each other and they are neighbours. According to PW1 the appellant had previously asked her for sex but she declined. This matter was reported to the elders and the appellant was forgiven. The incident which occurred on the 16.6.2017 was a second encounter. PW1 testified that the appellant went to their house and defiled her. PW2 went into the house and found the two sitting on her bed. The appellant took off. The medical evidence shows that PW1's hymen was broken. It took about one week for PW1 to be seen by the clinical officer. The broken hymen could not have conclusively proved that there was penetration. I do agree with the findings of the trial court that the prosecution did not prove the main count of defilement to the required standard.

In his defence the appellant stated that indeed he was with the complainant on the material day at about 11.00am. However, his defence indicate that the two were inside the appellant's home and not at PW2's house. According to him PW2 simply took the matter to the Police without asking him anything. According to PW2 she reported the matter to the appellant's father who in turn informed the village elders. Why would PW2 refer a matter to the village elders and subsequently to the police if there was no such incident. I do find that indeed the appellant tried to defile PW1 and the alternative count was proved as charged. The evidence of the complainant is believable. She had no reason to implicate the appellant. She knew the appellant very well.

PW2 was a crucial witness as she found PW1 and the appellant together. The evidence on record sufficiently proved the case. The appellant

contends that there was no independent evidence. PW3 and PW4 are independent witnesses who confirmed that the incident took place. The village elders were not crucial witnesses as they were merely intermeddling with a criminal matter. The appellant also contends that the exact complainant's age was not proved. The evidence shows that a birth certificate was produced in court. According to the evidence PW1 was 12 years old and a class four pupil. A birth certificate was the 2nd exhibit for the prosecution. Although the birth certificate is not part of the record. The evidence proves that indeed PW1 was 12 years old. PW2 also told the court that PW1 was 12 years old and she too made reference to the birth certificate that had been produced by PW1. The offence against the appellant which lead to his conviction is indecent act with a child Contrary to Section 11 of the Sexual Offences Act. Under the children Act No.8 of 2001, Section 2 defines a child as ***any human being under the age of 18 years.*** There is no evidence that PW1 was an adult. Therefore the appellant's contention that the complainant's age was not established must fail. PW1 was a class four pupil and her apparent age was proved to be that of a child.

The appellant also contends that the medical evidence is not conclusive. The particulars of the offence for the alternative count is that the appellant touched the complainant's vagina with his penis. Section 2 of the Sexual Offences Act defines indecent act as follows:

> ***(a) Any contact between any part of the body of a person with the genital organs, breast or buttocks of another, but does not include an act that causes penetration.***
>
> ***(b) Exposure or display of any phornographic material to any person against his or her will.***

Under the above section so long as it is proved that any part of the accused's body came into contact with the complainant's genital organs or breasts or buttocks then the offence of indecent act is established. The medical evidence will not be necessary to prove that there was such a contact.

The complainant testified that the appellant pulled up her dress and he inserted his penis into her vagina. It is therefore proved that the appellant's private part came into contact with

PW1's genital organs. Even though the medical evidence is not conclusive on the issue of defilement, the prosecution evidence in totality proved the alternative charge of indecent act. The appellant in his ground 6 of the appeal maintain that he was not in good terms with the complainant's mother. That issue did not come up during the hearing. PW2 testified that she had no grudge against the appellant. Given the prosecution evidence, I am satisfied that the prosecution proved the alternative count of indecent act with a child against the appellant beyond reasonable doubt.

During the hearing of the appeal the appellant told the court that he was 17 years old having been born in June 2001.

He left school while in class 6. This court referred him for age assessment. The report dated 14.12.2018 by Dr. Francis Mutua indicate that the appellant is above 18 years old. The offence occurred on the 16.6.2017 and I do find that by that time the appellant was already an adult. This is about one and half years before his age was assessed. There is no medical record to establish that the appellant was born in June 2001. He could not recall his date of birth as he left school in class 6. His contention that he was born in 2001 is just an afterthought. He told the trial court that he is a boda boda operator. The presumption is that he has a licence to ride a motor cycle. Such a licence can only be given to somebody who is above 18 years old. I am satisfied that the appellant was over 18 years old when he committed the offence as the age assessment report indicate that he has full dentures. Section 14 of the Penal Code provides for immature age. It states as follows:-

> ***(1) Any person under the age of eight years is not criminally responsible for any act or omission.***
>
> ***(2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.***
>
> ***(3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.***

The appellant does not fall within the above age bracket. He was an adult when he committed the offence.

In the end, I do find that the appeal lacks merit and is hereby dismissed.

Dated, Signed and Delivered at Marsabit this 20th day of February, 2019

S. CHITEMBWE

JUDGE