REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 78 OF 2014

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 2724 of 2013 of the Chief Magistrate's Court at Naivasha – S. Mwinzi, SRM)

TOM OSIRI ESIKETI……...…….....APPELLANT

-VERSUS-

REPUBLIC…….....RESPONDENT

J U D G M E N T

1. The Appellant herein was convicted and sentenced to 20 years imprisonment upon a full trial, for the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. The particulars stated that on the 16th day of November 2013 at County Council Estate in Naivasha Sub-county within Nakuru County, he intentionally caused his penis to penetrate the vagina of **J.W.A**., a child aged 13 years.

2. The prosecution evidence at the trial was that the Appellant was a neighbour and workmate of **D.H.** (**PW2**). **PW2's** daughter **J.O.A.** (**PW1**) was 13 years old in 2013 and resided with her parents. It seems that **PW1** failed to return home from school on 15th November, 2015. She ended up in the Appellant's house where the Appellant had sexual intercourse with her as he had previously done. Meanwhile her parents mounted a search for **PW1** which brought them at the Appellant's door. He denied her presence but when the parents got inside, **PW1** was found hiding behind a curtain. Police were called and the complainant referred for examination at Naivasha District Hospital. The Appellant was eventually charged.

3. In his unsworn defence, the Appellant stated that on 16th November, 2013 he was arrested after he returned home from work. He claims that the charges arose from a dispute between him and **PW2** who had refused to pay his loan debt amounting to Shs 15,000/=. That instead, **PW2** had threatened to make him suffer.

4. His appeal to this court raises three grounds, the first and second being a challenge to the adequacy of the prosecution evidence adduced at the trial, and the third, a complaint that his defence did not receive proper consideration.

5. On the first and second grounds, the Appellant submitted that penetration by himself on the material night was not proven, on grounds *inter alia*, that the complainant admitted she had previous sexual encounters and that the medical evidence did not support penetration. The Appellant also takes issue with the age of the complainant as set out in the charge sheet and the respective testimonies of **PW1** and **PW2**. In supporting his third ground the Appellant has argued that the prosecution evidence did not dislodge his defence and that the trial court failed to consider the defence.

6. The appeal was opposed by the Director of Public Prosecutions through Mr. Mutinda. He submitted that the Appellant was convicted on credible evidence by the prosecution witnesses, particularly **PW1** and that penetration was confirmed through medical evidence. On the question of age, he pointed to the birth certificate. His view was that the Appellant's defence was properly dismissed. He urged the court to find no merit and dismiss the appeal.

7. The court has considered the evidence at the trial and submissions on the appeal. The duty of the first appellate court was succinctly set out in **Pandya -Vs- Republic [1957] EA 336.** The Court of Appeal for Eastern Africa stated in that case that:-

> ***"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but***

there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

8. There is no dispute from the trial evidence that the Appellant was well known to the complainant and her father, **PW2**, in the material period. The twin issues contested on this appeal are whether age of the complainant and penetration were proved.

9. On the first issue, the charge sheet states that the complainant was aged 13 years at the time of the offence in 2013. In her evidence at the trial, about one year later she stated that she was 14 years old. Her father gave the estimated age of 15 years stating that she was born in 1998. The doctor who examined the complainant on 7th January, 2014 estimated her age to be 13 years. The certificate of birth **[Exhibit 3]** obtained after the date of the offence gave the date of birth as 8th August, 1998 which means that, she was almost 15 years in 2013. This approximates to the **PW2's** evidence, even though the birth certificate having been obtained after the date of offence, and further not identified by **PW1** or **PW2** in my view cannot solely be dependable upon for those reasons. There is however no doubt that the complainant was a minor and aged between 13 and 15 years at time of the offence.

10. Concerning proof of age, the Court of Appeal stated in **Mwalongo Chichoro Mwajembe -Vs- Republic, Msa Cr.App. No. 24 of 2015 (UR)** that:

"……the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa -Vs- Republic, Criminal Appeal No.19 of 2014 and Omar Uche -Vs- Republic, Criminal Appeal No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda, Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable…"

11. The trial court did not advert to this issue in its judgment at all. For my part, having reviewed the evidence on record, I am satisfied that the evidence on age established beyond doubt that the complainant was aged between 13 to 15 years at the time of offence.

12. Although the charge sheet citation of the Sexual Offence refers to Section 8 of the Sexual Offences Act, the sub-section is not too clear due to the alteration of the same by overwriting. However the judgment of the court clearly indicates that the offence charged was under Section 8(3) of the Sexual Offences Act, which is the appropriate one in this case. Nothing therefore turns on the question of age.

13. Regarding the issue of penetration and the defence offered, the court in its judgment the closely reviewed the relevant evidence and appraised itself with the law before stating that:

"In determining if the Accused caused his penis to penetrate the vagina of the victim, I have evaluated her evidence. In William Simba & Another -Vs- Republic [2013] eKLR, Sitati J. upheld the use of the evidence of a child to convict without any other corroboration noting that the evidence was consistent and detailed. From the evidence of PW1, I see consistency and a detailed narrative that would not be easily fabricated. In his defence, the Accused raises the issue of an existing grudge. However, I note that he never raised this at any time of cross-examination. It is clearly an afterthought. Based on the doctor's evidence that the hymen was missing; as well as the detailed evidence by PW1, I find there is sufficient evidence to make a finding that the Accused penetrated the vagina of the victim with his penis."

14. Reviewing the evidence of **PW1** and **PW2**, I find it consistent. Furthermore medical evidence indicated that the complainant had previously had sexual intercourse and the hymen had breached and healed. The above, and the fact that no discharge was noted at the material date, does not mean that sexual intercourse could not have taken place. Besides, **PW1** admitted a previous sexual encounter with the Appellant. Evidence by **PW1** was that she had gone to his house at 7.30pm and by 10.00pm when her parents came looking for her, the Appellant had inserted his male organ in her genitalia. The evidence by **PW2** corroborates **PW1's** evidence indirectly; he found **PW1** in the Appellant's house.

15. Regarding the definition of penetration the Court of Appeal in ***Erick Onyango Ondeng' -Vs-Republic*** **NAI CR. Appeal No. 5 of 2013 [2014] eKLR** cited **Twehangane Alfred -Vs- Uganda Criminal Appeal No. 139 of 2001, (2003) UGCA 6** where the Court of Appeal of Uganda observed regarding penetration that:

"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

16. I agree with the trial magistrate's finding that indeed penetration was proved. Further, that there was good reason to dismiss the Appellant's defence. There could have been no plausible reason for **PW1** to get entangled in the matter if indeed **PW2** and the Appellant only had a dispute over an unpaid debt. As the trial court correctly observed, the complainant's narrative of the events of the material date sounds convincing and unlikely to be a fabricated story. All in all, I find no reason to interfere with the findings of the lower court. The appeal is devoid of merit and is hereby dismissed in its entirety.

Delivered and signed at Naivasha, this **20th** day of **February, 2018.**

In the presence of:-

Miss Gikonyo for the DPP

Appellant – present

C/C – Quinter

C. MEOLI

JUDGE