REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 43 OF 2015

PATRICK MUTWIRI GIKONYO……...…..….APPELLANT

VERSUS

REPUBLIC…….……...RESPONDENT

(Appeal from conviction in Nyeri Chief Magistrates Court Criminal Case No. 45 of 2012 (Hon. Nyakundi, R.M.) on 2nd September, 2013)

JUDGMENT

The appellant was charged with the offence of defilement of a child contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 9th day of November 2012 at [particulars withheld] village in Nyeri County, he unlawfully and intentionally committed an act which caused his genital organ, namely penis, to penetrate the genital organ, namely vagina, of C W N a child aged 10.

The appellant also faced the alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 and here the particulars were that on the 9th day of November 2012 at [particulars withheld] village in Nyeri County, he unlawfully and intentionally committed an indecent act by causing his genital organ, namely penis, to touch the genital organ, namely vagina, of C W N a child aged 10.

The appellant entered a plea of not guilty to both the principal and the alternative counts. He was, however, convicted of the principal count and sentenced to 30 years imprisonment. It is against this conviction and sentence that he has now appealed to this court. According to his amended petition of appeal which he filed on 3rd May, 2017, the appellant raised five grounds of appeal; as I understand them they are as follows:

1. The learned trial magistrate erred in convicting the appellant yet the complainant did not report the complaint against him promptly.

2. The learned trial magistrate erred in convicting the appellant yet crucial prosecution witnesses did not testify.

3. The learned trial magistrate erred in law and in fact in failing to find that the medical evidence was not satisfactory and further that no medical notes were produced to demonstrate that the complainant had been defiled and treated as alleged.

4. The learned trial magistrate erred in law in failing to find that the age of the complainant was not proved beyond all reasonable doubt.

5. The learned trial magistrate erred in law in failing to consider the defence case alongside that of the prosecution contrary to section 169(1) of the Criminal Procedure Code, cap.75.

This being the 1st appeal, the appellant is entitled to a fresh consideration and evaluation of the evidence and in doing so, this court is entitled to come to its own conclusions which may deviate from those that the trial court came to. This court is, however, cautious that as much as it may defer from the factual findings of the trial court, this latter court had the advantage of seeing and hearing the witnesses. (See Okeno versus Republic 1972 EA page 35).

The complainant testified under oath after the learned trial magistrate was satisfied that she understood the nature of an oath and the importance of telling the truth. It was her evidence that she was aged 9 and was in class 2. She testified further that on 9th November, 2012, the appellant came to their house where he found her together with her brother I (Pw2). He then dispatched I to buy bread and remained with her alone in the house. It is then that he defiled her. It was also her evidence that when I called her out the appellant refused to open the door; he also stuffed her mouth with a piece of cloth and therefore she couldn't respond. Somehow, she managed to free herself, removed the piece of cloth from her mouth and opened the door for her brother I. For the second time, the appellant sent I to go and buy a matchbox and

insisted on remaining in the house with the complainant. According to the complainant, one N was all along in the house while the appellant defiled her and that at one point, she (N) even threatened to report what the appellant had done; the appellant threatened to beat her if she did. The complainant eventually reported to her aunt **A M W (PW3)** what the appellant had done when she went home. **W (PW3)** took the complainant to Belle Vue hospital where she was treated and later taken to Nyeri Provincial General Hospital where, according to the complainant, 'some substance was removed' from her private parts.

Later in her testimony the complainant stated that, in fact, the accused called then from their house to his own house and it is from there that he sent **I (PW2)** to the shop.

I M M (PW2) himself testified he was 13 years old and that he knew the appellant. On 9th November, 2012 he was at home when the accused called them to lead him to his house with their torch. He went to the appellant's house together with the complainant and that when they arrived he sent him to buy bread while the complainant remained in the house.

He did not however go to the shop but stood at the door and peeped through some space to see what was happening in the house; he testified that he saw the complainant lying on the floor naked but that he couldn't see where the appellant was. He then went to tell his mother (PW3) what he had witnessed. He also testified that as soon as he informed his mother, she went to report to the police the same evening but did not find the police; she therefore returned to the police station the following day.

Although the witness initially said that he saw the complainant lying in the appellant's house he changed his story during cross-examination and stated "I did not witness anything since PW1 was nowhere inside your house". He also stated that the appellant sold three chicken to his mother (PW3) on 10th November, 2012 but that his mother appeared to have complained that one of the chicken which the appellant sold him was not his.

The complainant's Aunt, **A M W (PW3)** testified that the complainant was her sister's daughter (niece) and that she was 10 years old. On 11th November, 2011 she was on her way back home, apparently from a trip, when she met the appellant who told her that he had had a quarrel with his wife. He also told her that his wife was alleging that he sexually assaulted the complainant.

When she arrived home she enquired from the complainant whether the appellant had sexually assaulted her; the complainant told her that indeed the appellant had defiled her. She then called a police officer from Bellevue and together they went to the Officer in Charge at Mweiga police station.

They then went to Bellevue health centre where the complainant was treated. The appellant was left at that centre. During cross-examination she denied having bought chicken from the appellant. She insisted also that she called the police immediately the complainant reported that the appellant had defiled her.

The officer whom **W (PW3)** called was police constable Emmanuel Esemi (PW4); he testified that he received the call on 11th November, 2012 at about 12.30 on allegations of having defiled the complainant. He arrested him and hand him over to the Officer in Charge of Mweiga police station.

One **Consolata Kinuthia** produced the P3 form on behalf of a Dr Peter Murimi who was stated in that form as having examined the complainant. Her qualifications are not on record and although she stated that she worked at the Nyeri Provincial General hospital with Dr Murimi she did not state the capacity in which she worked at the hospital.

The investigations officer police constable Ben Kongani testified that he received the complainant's complaint on 11th November, 2013. The officer testified that he escorted the complainant to Nyeri provincial general hospital for medical examination.

In his sworn testimony, the appellant testified that he was not at the scene of crime at the time it is alleged to have occurred; his evidence was that on the material evening, he closed his business at 8PM and went back to his house. It is only on the following day that he met **W (PW3)** who enquired from him whether he was selling chicken; he told her that he did and they agreed that she meets him at his home where he could sell the poultry to her. They did meet and in fact he did sell her three chicken at Kshs. 2,500/=. She paid Kshs 1000 and promised to pay the balance of Kshs 1500/= later on that day; she, however, did not pay; she instead came with complainant and alleged that the appellant had defiled her. She also threatened him for terminating an affair the two of them had previously nurtured. She even assaulted the appellant but members of the public came to his rescue. He was then arrested and taken to Mweiga police station. He denied having defiled the complainant.

This is all there was as far as the evidence at the trial is concerned. My assessment of this evidence leaves me with the conclusion that there are several inconsistencies and gaps in case against the appellant whose net effect is that prosecution did not prove its case beyond all reasonable doubt.

In her evidence, the complainant mentioned one N whom she described as the daughter to 'Mama N' as having been present when the appellant allegedly defiled her. This obviously implies that the said N was an eyewitness. However, she was not called to testify. I am aware that according to the proviso to **section 124** of the **Evidence Act, cap.85**, in a criminal case involving a sexual offence, a trial court can convict on the evidence of the victim only if it is satisfied, for reasons which must be recorded, that the victim is telling the truth. That sections states:

> ***124. Corroboration required in criminal cases***
>
> ***Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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.

In my humble view, this proviso presupposes a situation where there is either no eyewitness to the offence in issue or if such a witness exists, he cannot be procured without undue delay or expense. The rationale for this proviso, in my opinion, is that more often than not, sexual offences are clouded in secrecy and committed in covert circumstances and therefore if the law was to insist on corroboration of the evidence in sexual offences, many of them would go unpunished.

However, the proviso does not necessarily imply that corroborative evidence in sexual offences is unnecessary irrespective of the fact that it is available or can easily be obtained. It follows that in a situation where there is an eye witness to a sexual offence, such as was the case in the trial against the appellant, there was no reason why the prosecution should not have called her, if not for anything else, to dispel any doubt on the complaint against the appellant. It is for this reason that I am of the view that the omission to call N who is alleged to have seen the complainant being sexually assaulted cast doubt on the complainant's evidence.

I am also aware that according to section 143 of the **Evidence Act "**no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"; in the same breath, the prosecution should strive to procure what, in the circumstances of any particular case, are vital witnesses whose evidence is likely to shed more light on the prosecution case and more importantly, to prove it beyond any reasonable doubt. In this regard I respectfully disagree with the learned trial magistrate that the evidence of N would not have made any difference. Her omission from the list of prosecution witnesses leaves it open for the possibility that either she 'N' did not exist or that the complainant was lying about her allegations against the appellant.

Again, although the complainant together with her aunt (PW3) testified that the complainant was treated at Bellevue health centre, there was no the evidence that she either visited that health facility or that she was treated there; as a matter of fact, there was no evidence that she was treated in any hospital for any sort of ailment.

To compound this issue even further, the record shows that the appellant applied for production of the treatment notes from Bellevue health centre on at least two occasions; although his application was granted and the court ordered that he be furnished with the documents, none was ever produced.

I have also noted that the medical report prepared by Dr Peter Murimi but which was produced in court by Consolata Kinuthia (PW5) does not state whether the complainant had received any treatment prior to examination. If the prosecution evidence was that the complainant was examined on 12th November, 2012 after the treatment, there is no reason why the sort of treatment the complainant received was not indicated in the medical form. All that is shown in the space provided in the form for details of the nature of treatment, if any, that the complainant may have received prior to examination are the initials 'N/A'.

The non-production of medical notes of the alleged treatment of the complainant after the trial court ordered that they be produced and the clear evidence by the doctor that the complainant was not treated prior to her examination on 12th November, 2012 casts doubt on the evidence of the complainant and her aunt that she was sexually assaulted and subsequently treated of that assault.

I must not be mistaken to be saying that whenever there is an offence of sexual assault there must be evidence of treatment before examination for purposes compiling the medical report or the P3 form; all I am saying is that the credibility of a witness or witnesses and their truthfulness is cast in doubt when their evidence on the alleged assault is inconsistent with the expert medical report.

This issue of credibility and lack of truthfulness on the part of the prosecution witnesses is also clear from the testimony of I (PW2) and that of W (PW3). While Isaac testified that he was aware that the appellant sold W (PW3) three chicken, the latter denied having bought any chicken from him.

It is regrettable that though the appellant brought up this issue during his cross-examination of I (PW2) and W (PW3) and even pursued it in his defence, the court did not consider it. I am of the view that considering W's (PW3's) conduct, there is some merit in the appellant's allegations that the charges against him may well have been ill-motivated.

The final aspect of the prosecution case that left it in limbo is lack of proof of the complainant's age. The complainant testified that she was nine years old while her aunt's (PW3's) evidence was that she was aged 10. There was no documentary proof of the complainant's age.

The learned trial magistrate considered this issue in his judgment and noted as follows:

Regarding whether the age of PW1 was proved, PW1 said she was 9 years old and in class two while PW3 and PW5 said she was 10 years old. PW3 was aunt to the PW1 therefore she must have known when PW1 was born. The doctor also indicated in the P3 and in her evidence the age of PW1 as 10 years old. This page must have been given to the doctor by PW1 and PW3. The doctor was also satisfied that PW1 was 10 years old. I too saw PW1 in court and I am satisfied that the finding of PW5 respecting PW1's age.

There is no doubt that age is a crucial component in sexual offences under section 8 of the sexual Offences Act; it is necessary that I reproduce that entire section here lest we forget the importance the law attaches to this aspect of the offence; it states as follows:

.8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this section if -

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

It is clear that the age factor reverberates in every provision in section 8 of the Act. In almost every criminal appeal I have heard concerning convictions under this provision of the law no other issue has been litigated upon so repeatedly and vigorously so as the question of the age of the victim. Whether the age of the victim was proved to the required standard has been a recurrent question in appeals such as the present one. My consistent answer has always been that proof of age must be must be subjected to the same standard of proof as any other component of a sexual offence under section 8 of the Sexual offences Act; that it must be proved beyond reasonable doubt. This standard of proof is, of course, the general and mandatory standard of proof in all criminal cases; however, when one considers the severity of the sentences prescribed in section 8 of the Act, the requirement that age, as a component of any of the offences under this provision of the law, must be proved beyond reasonable doubt need not be over-emphasised.

Take the appellant's case for instance; he faced a mandatory life sentence if it was proved that the complainant was 11 years or less. I hasten to note that although the learned magistrate found as a fact that she was aged 10, he still sentenced him to 30 years imprisonment. Assuming that the appellant was properly convicted, the sentence is obviously illegal because it is not the prescribed sentence. The point however is, if one has to spend the rest of his life in prison, there should be no doubt that the victim was aged 11 or less and therefore the accused person deserves the sentence meted out against him.

If I have to say anything more about this I can only reiterate, at the risk of repeating myself, what I have said in my previous decisions on this particular question.

My position has been that the age of the victim of a sexual offence under section 8 of the Act is material because defilement is not defilement as understood in law unless it involves an act that causes penetration ***"with a child***". When the Act makes reference to a "child", it necessarily invites the trial court to consider the age factor in its determination of whether an offence has been committed. I say so because the age component defines whether one is a child and therefore whether he or she is susceptible or vulnerable to being a victim of the offence of defilement.

As noted before, proof of age is important because punishment for an offence of defilement under **section 8(1)** is intricately intertwined with the age of the victim of a sexual assault. The severity of the sentence is inversely proportional to the age of the victim; the younger the victim the more time one is bound to spend in prison.

It is logical and safe to conclude that proof of age in a charge of defilement under **section 8** of the Act is as necessary and as much important as proof of the ingredient of penetration; just as penetration has to be proved beyond reasonable doubt, so is the age of the victim.

The question that courts have had to contend with is the proof that meets the threshold of 'proof beyond reasonable doubt' in matters of age in sexual offences.

There does not seem to be any unanimity on the appropriate answer to this question but in at least two decisions that I have come across, and where this issue has arisen, the Court of Appeal has been of the view that the word of mouth alone irrespective of whether it is that of the complainant or the mother is insufficient. According to these decisions proof of age demands some sort of documentary proof. This Honurable Court, sitting at Kisumu in **Criminal Appeal No. 164 of 2009**, **Dennis Abuya versus Republic** held that an **"estimated age"** indicated by a clinical officer in a P3 form cannot be held to be sufficient proof of one's age. The learned judges (R.S.C. Omolo, J.W. Onyango Otieno, J.G. Nyamu JJA, as they then were) said:

> ***There is a P3 form in the record before us and it shows that on 26th June, 2007, the appellant's "Estimated age" was eighteen years. By "estimated age" we understand the clinical officer who examined the appellant at Kima Mission Hospital, was saying the appellant could be eighteen years and above or below eighteen years. There was, however, no medical report or evidence produced by the prosecution to conclusively show that the appellant was eighteen years as at that date he was said to have committed the offence.***

In that appeal, the appellant had been convicted of the offence of defilement contrary to **section 8(1)** and **(2)** of the **Sexual Offences Act** and the issue that arose in the appeal was whether having been so convicted the appellant ought to have been committed to a borstal institution rather than imprisoned for life. For reasons given in the Court's judgment, an excerpt of which has been reproduced above, the learned judges allowed the appeal and remitted the case to the High Court with the direction that the Court calls for evidence establishing the appellant's age.

The point here is that the age indicated in a P3 form as "the estimated" age of either the victim or the complainant of a sexual offence is not a conclusive proof of that particular person's age; there is need for evidence ascertaining *conclusively* a person's age whenever the question of his or her age arises.

The importance of ascertainment of age in sexual offences was also alluded to by the **same Court in Criminal Appeal No. 504 of 2010, Kaingu Elias Kasomo versus Republic.** At page 7 and 8 of its decision, the Court of Appeal had this to say:-

> **Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.**

The Court quoted with approval its own decision in **Alfayo Gombe Okello versus Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault; in that case it said:-

> **In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find.**

The court concluded that ***"prove of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars***".

Looking at the prosecution evidence from the perspective of these decisions, it cannot be concluded with any sense of certainty that the age of the complainant was proved beyond reasonable doubt. Although the learned trial magistrate appeared to place much emphasis on the doctor's statement while referring to the complainant that "she was 10 years old" the doctor was simply referring to the estimated age indicated in the P3 form; as noted before, the Court of Appeal has held in **Dennis Abuya versus Republic (supra)** that this sort of evidence is not by any means conclusive proof of one's age.

My conclusion is that conviction of the appellant without establishing the age of the complainant to the required standard was unsafe and such conviction cannot be sustained.

I must add that like the Court of Appeal did in **Dennis Abuya versus Republic(supra)** I would have been prepared to remit this case back to the trial court to establish the age of the complainant if that was the only question vitiating the appellant's conviction. However, for reasons I have given, there was more to his conviction than the question of the complainant's age. For these reasons, I would allow his appeal. Accordingly, his conviction is quashed and the sentence set aside. The appellant is set at liberty unless he is lawfully held.

Signed, dated and delivered in open court this 21st day of March, 2018

Ngaah Jairus

JUDGE