REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 17 OF 2013

N B T..APPELLANT

VERSUS

REPUBLIC..........................RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 120 of 2012 of the Senior Resident Magistrate's Court at Kilifi – E. Kagoni, SRM)

JUDGEMENT

1. The Appellant, N B T was charged with the offence of defilement contrary to Section 8(1) as read together with Section 8(3) of the Sexual Offences Act, 2006. The particulars of the offence being that on 23rd January, 2017 within Kilifi County the Appellant unlawfully and intentionally committed an act which caused his penis to penetrate the vagina of T.K., a child aged 15 years.

2. The Appellant pleaded not guilty to the charge and at the conclusion of the trial he was convicted and sentenced to serve 30 years imprisonment. Being aggrieved by both the conviction and sentence he has appealed to this court on the grounds that:

> **"1. The learned Hon. Trial Magistrate erred in law and in fact by imposing 30 years imprisonment without considering that I was not furnished with witness statements to defend myself contrary to Section 50(2)(a), (b), (c) of the Constitution.**
>
> **2. The learned Hon. Trial Magistrate failed in law by not considering that the main charge was not proved to the required standard of law contrary to Section 134 of the C.P.C.**
>
> **3. The learned Hon. Trial Magistrate erred in law and in fact by not considering Section 200(4) of the C.P.C. was not complied with.**
>
> **4. The learned Hon. Trial Magistrate failed in rule of law by not noticing that the sentence of 30 years was harsh and excessive in unproved manner like the present one."**

3. The parties filed and exchanged written submissions which they entirely relied upon in disposing of the appeal.

4. The Appellant submitted in brief that to prove the offence of defilement the prosecution must establish that the victim was a child. The prosecution also needs to prove penetration and the suspect must be identified beyond reasonable doubt. According to the Appellant, the age of the victim was not proved to the required standard in that PW5 Dr. Hasmia Dabisi, the medical officer who examined the victim, testified that the victim was 16 years old whereas PW6 Corporal Dorcas Kauma, the investigating officer told the court that the victim was eleven years old having been born on 15th April, 1997 as per the clinic card which the witness produced as an exhibit. The Appellant asserted that since the charge sheet was not amended, the age of the victim was not proved to the required standard. To buttress his submission on this point, the Appellant relied on the decision in the case of **Jon Cardon Wagner v Republic [2011] eKLR**.

5. The Appellant challenged the admissibility of the clinic card contending that as per the requirements of Section 77(1) of the Evidence Act, the police officer was not the suitable witness to produce the card. He relied on the decision in **James Muriuki v Republic, Nyeri HCCRA No. 206 of 1993 ([1993] eKLR)** to emphasis the point that it is the maker of the document who ought to have produced the same. In the cited case, it was held that the maker of the P3 form ought to have produced it as the police officer was not in a position to answer medical questions that might be raised. According to the Appellant, the trial court therefore erred in admitting the clinic card as it was not produced by an expert.

6. The Appellant also submitted that although, being a layman, he did not raise the query at the trial, he was nonetheless never supplied with

witness statements to enable him prepare for the trial and this breached his fundamental right to a fair trial as provided by Articles 48 and 50(2)(c) of the Constitution.

7. On sentence, the Appellant submitted that the charge did not disclose proper information on the age of the complainant. Further, that there was also no proof of age hence the trial court could not reach a just decision. His view is that had the court taken all these factors into account, the prison sentence imposed would have been much shorter.

8. The Appellant did not expressly address the ground of appeal touching on non-compliance with Section 200(4) of the Criminal Procedure Code.

9. In concluding his submissions, the Appellant stated that the prosecution did not discharge its burden of proving beyond reasonable doubt the offence with which he was charged and the defence he had raised availed him an acquittal as he had raised reasonable doubt about the prosecution case. He prayed that the appeal be allowed.

10. The State, represented by the Director of Public Prosecutions (DPP), submitted that the issue of alleged failure to furnish the Appellant with witness statements ought to have been raised at the trial and that raising it now is simply an afterthought. It was also submitted that the charge was properly drafted in accordance with Section 134 of the Criminal Procedure Code and the particulars properly articulated.

11. In response to the ground of appeal touching on Section 200(4) of the Criminal Procedure Code, it was submitted that the evidence tendered was sufficient and the Appellant was not prejudiced in any way nor was there any evidence of any prejudice suffered by him.

12. On the sentence imposed, the DPP submitted that having proved all the ingredients of the offence as stipulated in **Josphat Muoki v Republic [2016] eKLR**, the sentence imposed by the trial court was proper. It was the DPP's assertion that the age of the complainant was proved to be 15 years and Section 8(3) of the Sexual Offences Act provides for a sentence of not less than 20 years for the proved offence. The State concluded by stating that the trial court's finding was credible and the conviction and sentence were safe. It was thus urged that the conviction and sentence be confirmed.

13. This being a first appeal, the court is obligated to look into the evidence afresh, reconsider and reevaluate it in order to reach its own conclusion keeping in mind that the trial court had an opportunity to observe the demeanour of the witnesses – see **Okeno v Republic [1972] EA 32**. The court must also be guided by the principle that a finding of fact made by the trial court should not be interfered with unless it is based on no evidence or on a misapprehension of the evidence or the trial court acted on the wrong principles – see **Chemagong v Republic [1984] KLR 611** and **Gunga Baya &another v Republic [2015] eKLR**.

14. What was the evidence placed before the trial court? The prosecution called six witnesses in support of its case. The evidence that emerged from these witnesses is that on 23rd January, 2012 at about 8.30 p.m., PW1 Mwaka Anthony heard screams from the Appellant's house and proceeded there where he found the Appellant who is his uncle together with the complainant, T.K., and the complainant's mother, PW2 C K. The Appellant was in his briefs. The complainant told them that the Appellant had sent her for some snacks before grabbing and defiling her. They confirmed that he had indeed defiled her. The Appellant, whom PW1 identified in the dock as the grandfather of the complainant, was arrested and taken to the village elder who referred them to the chief who in turn referred them to the D.O. from where they landed in Kilifi police station. PW1 was not cross-examined by the Appellant.

15. The testimony of PW2 C K was that on the material day at about 8.00 p.m. she had dinner with T.K., who was aged 14 years, after which T.K. went out only to be found in the house of the Appellant with the door locked. They forced the door open upon which they found the complainant naked and the Appellant in his briefs. They raised alarm and the Appellant was arrested and escorted to the authorities together with the complainant. A P3 form was issued by the police and filled at Kilifi District Hospital. It was the testimony of PW2 that T.K. was not attending school.

16. PW2 was stood down so that she could avail T.K's birth certificate. She later testified that T.K. was between 14 and 16 years and that she was born on 26th March, 1993. She identified T.K.'s clinic card. In cross-examination, PW2 stated that she caught the Appellant in the act at 9.30 p.m. after T.K. raised alarm.

17. T.K.'s father J K testified as PW3 and told the trial court that on the material night at about 9.00 p.m. while at home he heard some screams from a neighbour's place. He rushed to investigate and found T.K. and the Appellant, who was his neighbour and a distant relative, having been brought outside the house. He also found PW1, the aunt to T.K., one C N and a crowd outside the house. PW1 informed him that T.K. had been defiled. The witness testified that T.K. was born on 26th March, 1993. He was not cross-examined and was not called upon to identify the Appellant.

18. T.K. who testified as PW4 told the court that she left formal schooling in class three and did not know her age. Her evidence was that on the material day she left her parents at home and went to visit with her grandfather, the Appellant, at his home nearby. It was her testimony that the Appellant grabbed and undressed her and threw her on the bed. According to T.K., the Appellant removed his **"thing"** and inserted it in hers where upon she screamed alerting people to her rescue. The Appellant was arrested and they were escorted to the village elder together from where they made their way to Kilifi police station and subsequently to Kilifi District Hospital where she was issued with a booklet. When cross-examined, T.K. stated that nobody had sent her to the Appellant's place.

19. Medical evidence was given by PW5 Dr. Hasmia Dabisi who produced a P3 form which had been filled on 27th January, 2012 by her colleague Dr. Suleiman whose signature and handwriting she was familiar with. According to the P3 form, there was no injury to the body recorded although it is again stated that the injuries were four days old. The P3 form indicated the age of the victim as 16 years with a history of defilement. The outer genitalia appeared normal with a smelly whitish discharge from her vagina. There was no infection noted and neither was spermatozoa seen. The Appellant did not cross-examine the witness.

20. PW6 Corporal Dorcas Kauma investigated the alleged incident. She stated that she was on duty on 24th January, 2012 when the Appellant was taken in by some officers on account of having defiled the complainant who was said to be mentally retarded. The officer issued a P3 form to the complainant and referred her to hospital. Investigations revealed that the Appellant had repeatedly defiled the eleven year old who was born on 15th April, 1997 as per the clinic card produced as an exhibit by the investigating officer. It was the evidence of PW6 that the Appellant ambushed T.K. as she went to answer a call of nature and took her to his house where they were caught in the act. The Appellant did not cross-examine PW6.

21. When the Appellant was placed on his defence, he opted to give sworn testimony stating that on that particular day when he arrived home from harvesting coconuts and attending a funeral, T.K. passed by as she headed to the market. She greeted him and informed him that she was going to visit her friend. Ten minutes later C and K N came enquiring about T.K. and he relayed to them the information T.K. had given him. They however beat him up claiming he was known for defiling young girls. T.K. found him being beaten and even after his assailants asked her where she had been they never believed her answer and beat her too.

22. A crowd that swelled as a result of the commotion decided to take up the matter with the chief. T.K.'s parents were called. It was said the complainant had been left at home with her younger siblings. It was the Appellant's case that he was escorted to the D.O.'s office from where he was taken to the police station the next day. T.K. and the other witnesses had their statements recorded but his was not taken. He denied committing the crime but was arraigned in court the following day.

23. In answer to questions put to him during cross-examination, the Appellant stated that he arrived home at 7.30 p.m. and T.K. passed by then. Shortly thereafter C came by. He was taken to the chief at 8.00 p.m. He stated that their relationship as neighbours was cordial.

24. In order to obtain a conviction in a case of defilement, the prosecution must prove beyond reasonable doubt that the victim was a child, that there was penetration and the nexus between the act and the accused.

25. The Appellant has challenged the admission of the clinic card as exhibit, stating that PW6 could not produce the same as she did not fall in the category envisaged under Section 77(1) of the Evidence Act.

26. What was the age of the victim at the time of the alleged offence? A copy of the clinic card produced as an exhibit in court has the date 22nd January, 1995 handwritten on it with a stamp for Kilifi District Hospital dated 27th November, 1996. On the graph on the card there is reference to **"birth-1 year 93 March"** and at the place indicated as 2-3 years there is reference to 95 March and in the Section for 3-4 years the date appears as 96 March. There is therefore the likelihood that the card belonged to someone born in 1993 and the offence having been committed in 2012, the victim would have been nineteen years at that time.

27. In **Stephen Nguli Mulili v Republic [2014] eKLR**, the Court of Appeal held that:

> **"In the case of KAINGU ELIAS KASOMO V R, MALINDI CR. NO. 504 of k2014, the Court of Appeal stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amount to failing to prove the offence. However, as the court clarified in TUMAINI MAASAI MWANYA V REPUBLIC, MSA CR.A. NO. 364 OF 2010, proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment of the offence in respect of victims of defilement of various statutory categories of age."**

28. The parents of T.K. both stated that she was born on 26th March, 1993 though the mother, PW2, could not tell the exact age. PW6, the investigating officer gave a different date of birth being 15th April, 1997 and the age as eleven years. If indeed PW6 was correct on the date of birth then the age at the time of the alleged offence ought to have been about fifteen years and not eleven years as she stated.

29. There was no age assessment carried out but it was indicated in the P3 form that T.K. was 16 years of age. The Court of Appeal in the case of **Dennis Abuya v Republic [2010] eKLR** dealt with the issue of age as indicated in a P3 form and held that:

> **"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."**

30. In other words, the P3 form approximated the age of the victim as sixteen years or above or below sixteen years. This information however contradicted the evidence of the parents of the victim and the evidence gleaned from the clinic card. The overwhelming evidence on record would show that the victim was born in 1993 and was thus over eighteen years at the time the offence was allegedly committed in 2012.

31. The parents' testimony in view of the lack of a proper age assessment and birth certificate is the best evidence in the circumstances of this case. That evidence, which was supported by the clinic card, indicates that the victim was born on 26th March, 1993. The offence allegedly took place on 23rd January, 2012. The victim was therefore above eighteen years thus taking her out of the bracket of a child as defined by the Children Act, 2001 to mean **"any human being under the age of eighteen years."** In the circumstances, the victim was ripe for consensual sexual engagement thus taking her out of the protection of Section 8 of the Sexual Offences Act. There was an allusion by the investigating officer that the victim was mentally retarded but this evidence never came from her parents or the medical officer and neither was such an observation made by the trial court. In light of the evidence placed before the court, it would be difficult to reach a conclusion that an offence was committed based on the victim's mental status

32. As for the Appellant's claim that the clinic card was not produced in compliance with Section 77 of the Evidence Act, I find the same

untenable. The purpose of producing the clinic card was to establish the age of the complainant. In the circumstances of this case the clinic card was equivalent to a birth certificate, a baptismal card or a school record on the age of the victim. The investigating officer was the proper person to produce the same as Section 77 of the Evidence Act was not applicable to it.

33. Was there penetration? Section 2 of the Sexual Offences Act, 2006 defines penetration as **"the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

34. T.K. stated that the Appellant inserted his thing in hers. It is not clear what this meant and there are no notes by the trial court showing that T.K. expounded further or pointed out or demonstrated what she meant. Nonetheless, the court should note that in the Kenyan society a sexual organ is not openly mentioned and is more often than not referred to by use of euphemism perhaps to conceal the embarrassment or to exhibit politeness by refraining from using the proper term in civil conversation. That said, it would have been better had the prosecution prodded the witness to at least give demonstration or clarification for avoidance of doubt.

35. A perusal of the evidence of PW1 and PW4 shows that their claim that they caught the duo in the act is not correct. PW1 talked of finding the Appellant in his briefs. PW2 stated that the complainant was naked and the Appellant was in his briefs. The complainant and the Appellant were thus not found in the act.

36. Section 124 of the Evidence Act requires corroboration before conviction in a criminal case with a proviso that where the only evidence is that of the alleged victim in a sexual offence and the court, for reasons to be recorded in the proceedings, is satisfied that the alleged victim is telling the truth, the court shall receive the evidence of the alleged victim and proceed to convict the accused person.

37. Although the trial court stated that the P3 form showed that the victim had an intimate encounter with a man, the truth of the matter is that the P3 form did not indicate that the victim was penetrated. The evidence of the doctor who produced the P3 form as an exhibit was of no use either. The witness was not the one who examined the victim and filled the P3 form.

38. Having said the foregoing, I find that the complainant's testimony indicated that there was a sexual encounter between her and the Appellant. The fact that the medical examination did not make a definite finding of penetration is not by itself a sufficient reason for dismissing the complainant's testimony.

39. In **Fappyton Mutuku Ngui v Republic [2014] eKLR**, the Court of Appeal held that:

> **"28. In <u>Ami v Republic</u> [2012] eKLR (Mombasa), this Court upheld the view that:**
>
> **"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."**

This was further affirmed in the case of Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa) where the court stated:

> **"... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."**

The evidence of the minor witnesses squarely placed the appellant as the one who defiled PW2."

40. The evidence of the complainant and that of PW1 and PW2 clearly points to penetration of the complainant by the Appellant and I find no reason to reach a different conclusion from that reached by the trial court on this issue. The evidence on record also points to the Appellant as the person who had sex with the complainant.

41. On the Appellant's claim that his rights as protected by Articles 48 and 50(2)(a), (b) and (c) of the Constitution were breached, I note from the record that the Appellant requested for and was allowed to obtain copies of the statements of witnesses on 13th August, 2012. I am thus not convinced that his rights were tampered with or infringed.

42. There was the allegation by the Appellant that there was failure to comply with Section 200(4) of the Penal Code. That sub-section provides that:

> **"Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."**

The duty of enforcing Section 200(4) belongs to this court in its appellate capacity. I have perused the file and I find no reason to make me reach the conclusion that the Appellant was prejudiced when he was convicted based on the evidence not wholly recorded by the convicting magistrate. I note from the record that the magistrate who succeeded the one who started the trial complied with the necessary provisions of Section 200 of the Criminal Procedure Code.

43. As the for sentence, I concur with the Appellant that the same was indeed unjustifiably excessive as the trial court never indicated in the record why the Appellant who was said to be a first offender was not entitled to benefit from the minimum sentence which is twenty years imprisonment.

44. I have already stated that the prosecution failed to establish that the victim of the alleged crime was below eighteen years at the time of

the alleged offence. The offence of defilement as defined by Section 8(1) of the Sexual Offences Act, 2006 was therefore not committed by the Appellant. The consequence is that the appeal succeeds. The conviction is quashed, the sentence set aside and the Appellant set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 16th day of April, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT