REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 517 of 2009.

KAAKA MASARA MARGETI.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 905 of 2008 delivered by Hon. U. P. Kidula, C.M on 29th October, 2009).

JUDGMENT.

Background.

1. Kaaka Masara Margeti, hereafter the Appellant was charged with the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act. The particulars of the offence were that on 17th April, 2008 in Kajiado District within the Rift Valley Province committed an act which caused penetration by inserting a male genital organ(penis) into the female genital organ(vagina) of S.M., a girl aged 15 years. In the alternative he was charged with an indecent act with a child contrary to Section 11(1) of the Sexual Offences Acts in that he committed an indecent act by touching a female genital organ (vagina) of S.M., a girl aged 15 years. He was found guilty of the main charge and sentenced to serve 25 years imprisonment. He was dissatisfied with the conviction and sentence against which he lodged the present appeal.

2. In an Amended Petition of Appeal filed on 1st October, 2012 , he was dissatisfied that the charge sheet was defective, that the ingredient of the charge were not proved beyond a reasonable doubt, that his defence was not adequately considered and that the prosecution evidence which was circumstantial was uncorroborated and could not sustain a conviction.

Submissions.

3. The appeal was canvassed by way of filing written submissions. Those of the Appellant were filed by M/S Wokabi Mathenge Advocates on 8th April, 2018 whilst of the Respondent were filed by M/S Jemimah Aluda, Senior Prosecution Counsel on 16th April, 2018. In the interests of not duplicating the submissions I shall refer to them in the analysis of my evidence. I however underscore the fact that the Respondent conceded to the appeal.

Evidence.

4. **S.M**, PW1, the complainant testified that on 17th April, 2008 she was selling milk to the Appellant as she usually did at his place of work which was the local AP Camp. At around 7.00 p.m. while she was on her way home she noticed the Appellant following her and he even tried to talk to her but she rebuffed his approaches. He got hold of her hands and pulled her into some bushes were he pushed her down and begun defiling her. She screamed and a boy, one Matipei, who testified as **PW2** responded but left after the Appellant told him to leave. That after the Appellant was done he left and PW1 went home where she found that the boy had already informed her mother of what he had witnessed and she was taken to Entosopia Clinic where she was examined and on the next day the matter was reported to the police.

5. PW2 entirely corroborated the evidence of PW1. He added that he was on his way from the shops when he heard a child crying besides the road and he ran to the scene where he found the Appellant defiling PW1. The Appellant told him not to go near and to get away. He went and informed PW1's mother what he had seen. He began organizing a bunch of young men to go and rescue PW1 but before they could do so they were informed that she had arrived home. He testified that he identified the Appellant with the aid of moonlight.

6. **PW3,** PW1's mother confirmed she received the report of the incident from PW2. He informed her that the assailant was a police officer and had prevented him from rescuing PW1. She took her to hospitals in Magadi and Kiserian. She testified that PW1's inner wear was taken by the police. She said she did not know PW1's age.

7. **PW4**, **Samuel Wendo** a medical officer at Magadi Soda Hospital examined PW1 on 19th April, 2008. She had already received treatment at Entasopia Health Center and Nairobi Women's hospital. Her inner wear had brownish stains and her general physical condition was normal. He found a scar consistent with female genital mutilation and her hymen was absent. Further, there was a brownish vaginal discharge which according to urine analysis from Nairobi Women's Hospital was due to a urinary tract infection. A vaginal swab was done but there was no spermatozoa seen. He formed an opinion that her injuries were consistent with sexual assault and filled a PW3 form to the effect.

8. **PW5, Stephen Matinde Joel Waithe** an analyst at the Government Chemist did an examination of PW1's biker and the Appellant's blood and saliva on 22nd April, 2008 at the request of PC Nzau. He found that the biker had seminal stains and a few degenerated spermatozoa. The Appellant's blood sample was found to be blood group B.

9. **PW6**, **Stephen Mutua** a community nurse at Endasopia Health Centre referred PW1 to Magadi Soda Hospital for tests. PW7, **Dr. Zephania Kamau** of Police Surgery, Nairobi examined the Appellant on 22nd April, 2008. He found no physical injuries. He also collected blood and saliva from him. He filled a P3 Form detailing his findings. **PW8, PC Moses Munga Njoroge of** Magadi Police Station accompanied the OCS to Nkuruman AP camp on 18th April, 2008 from where they escorted the Appellant to the police station. They later also escorted the complainant to Nairobi Women's Hospital where tests were conducted.

10. After the close of the prosecution case, the court ruled that a prima facie case had been established and accordingly put the **Appellant** on his defence. He denied committing the offence. He confirmed he used to work at Nguruman AP Post in Magadi and that on 18th April, 2008 at around 10.30 a.m. he was at the camp when two men and a woman arrived and took him aside where they informed him of the allegations of rape. Further, that the victim had been taken to hospital but that the lady wanted to settle the matter out of court for Kshs. 50,000/-. He refused to settle and later that evening the OCS arrived alongside the girl and asked whether he knew the girl. He admitted that she was the girl who sold him milk and the girl identified him as her attacker. He was disarmed and arrested. He was later taken to hospital before being charged accordingly.

Determination.

11. I considered the evidence on record and the submissions of the parties before arriving at the following issues for determination; whether the charge sheet was defective, whether PW1 and 2 were competent witnesses, whether the Appellant's defence was considered, whether crucial witnesses were never called and whether the offence was proved beyond a reasonable doubt.

12. The Appellant submitted that the charge sheet as drawn was defective in that Section 8(1) of the Sexual Offences Act does not outlaw the act complained of and that the provision must be read together with Section 43(1) of the Sexual Offences Act which defines what is intentional or unlawful. It is submitted that the failure to include the word "*unlawful"* in the particulars of the offence rendered the charge sheet fatally defective. The Respondent's submission was that Section 137 of the Criminal Procedure Code clearly set out the rules for framing a charge or information. M/s Aluda added that essential elements of the offence must not be reflected in the charge. Further, that the charge, where it is one created by a specific provision, should only include a reference to the Section creating the offence. That this notwithstanding, Section 90(2) of the Criminal Procedure Code provides that the validity of proceedings shall not be affected by a defect in the complaint or charge. Finally, that the Criminal Procedure Code at Section 382 provides that no finding passed by a court shall be reversed or altered on appeal on account of an error, omission or irregularity in the complaint unless such an error has occasioned a failure of justice.

13. It is clear that the particulars of the offence did not include the words *'intentionally'* or "*unlawfully"*, the heart of the contention that the charge sheet was defective. Section 8(1) of the Sexual Offences Act states:

'A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.''

14. From the provision, three elements emerge, namely; (i)the identity of the perpetrator, (ii)the presence of penetration and (iii)that the act was committed to a child. The proof of consent is not a prerequisite requirement. Consent is replaced by the proof of age of the victim. The rationale to this is obvious; that a child cannot consent to a sexual intercourse unlike an adult. This means that the need to include the words "*unlawfully*" or "*intentionally"* in the particulars to the offence may be dispensed with as legally, there can never exist a set of facts that would lend legality or mistake acts of carnal knowledge with a child.

15. In reaching this conclusion, the court is alive to the provisions of Section 8(5) of the Sexual Offences Act which does not accord any legality to a child giving consent in offences under Section 8 of the Act. Rather, it absolves an accused who has been duped, having taken reasonable steps, into believing that the complainant was an adult and therefore capable of giving consent. The sum total of my observation is the mere omission of either the word "*intentionally"* or "*unlawfully"* does not render the charge sheet defective.

16. The next issue relates to the competence of PW1 and PW2 as witnesses. The Respondent in conceding to the appeal submitted that both witnesses were not competent to adduce evidence. This related to the inadequacy of the *voire dire* examination on the part of PW1 and the failure to carry out one on PW2. The contention relating to PW2 was echoed by the Appellant. It relates to PW1 referring to PW2 as a boy during her testimony. The Appellant submits that this points to PW2 as being a minor and therefore incapable of giving evidence without being subjected to a *voire dire* examination. Counsel for the Appellant cited the case of **David Ochieng Aketch *v.* Republic[2015]Eklr, Gabriel *v.* Republic[1960] EA 159** and **John Otieno Oloo *v.* Republic [2009] eKLR** to buttress this submission.

17. PW2 gave sworn evidence as a male adult. It must be noted that PW1's evidence was interpreted and certain issues may have gotten lost in the translation. Further, looking at the testimony of PW2, it clearly points to him being an adult male particularly when you take into account his occupation as a businessman. I find that the reference to the witness as a boy is not conclusive evidence of the witness' age and may just have been pointing towards a young man.

18. With regards to the contention by the Respondent that an inadequate *voire dire* examination was carried out on the complainant, I did not find such an examination on the record. Whether a child is of tender years and therefore must be subjected to a *voire dire* examination to ascertain whether they appreciate the meaning of an oath is an issue to be left to the trial court and in this case the magistrate did not deem the child to be of tender years. Furthermore, as I shall point out, PW1 was aged 15 years which as was held in the case of **Kibageny arap Klil v Reginam(1959) EA,92.**, a child of 14 years and above is not a child of tender years on whom a *voire dire* examination must be conducted. The then East African Court Appeal delivered itself as follows;

> ***"There is no definition in the Oaths and Statutory Declaration Ordinance of the expression 'child of tender years' for the purpose of section 19. But we take it to mean, in the absence of special circumstances, any child of any age, or apparent ages or under (14) years."***

19. The court cited **Lord Goddard, CJ., in R V Campbell(1), [1956]2 All ER. 272** as follows;

> ***"Whether a child is of tender years is a matter of the good sense of the court……..''.***

20. The Appellant did also contend that the learned trial magistrate erred in the application of Section 124 of the Evidence Act, particularly with regards to the reliance on the evidence of the complainant alone to found a conviction. He submitted that it was a grave error her failure to rely on the medical evidence adduced. In my view, the learned trial magistrate did not rely on uncorroborated evidence of PW1 alone to found a conviction as she also considered the evidence of PW2 and PW3 which corroborated that of PW1 before reaching her conclusion.

21. The Appellant submitted that there was a failure to call a crucial witness, namely a doctor from Nairobi Women's Hospital who examined PW1. The case of **Bukenya & others *v.* Uganda[1972] EA 549** was cited by counsel for the Appellant in emphasizing that the failure to call the doctor gave the inference that had the witness been called his evidence would have been adverse to the prosecution case**.** It is true that no doctor from Nairobi Women's Hospital gave evidence. I would agree that the failure to call the doctor was fatal only if his/her evidence created a void in the medical evidence in the proof of penetration. In the present case though, medical evidence was sufficiently adduced by PW4, PW5 and PW6. And therefore, the failure to call the said doctor did not render the prosecution case fatal. See **Keter *v.* Republic[2007] 1 EA 135**, that:

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses [as] are sufficient to establish the charge beyond reasonable doubt."***

22. On proof of the case, the ingredients of the offence have been set out above. With respect to the identity of the Appellant it was not an issue in contention that the complainant recognized him as she used to sell him milk a fact that he acknowledged.

23. With regard to penetration, while the medical evidence adduced by the witnesses was not conclusive as to recent sexual activity it did indicate that there was the presence of seminal fluid and spermatozoa on her biker and that her hymen was missing. Further, that her genitalia was mutilated. Even if the medical report did not indicate that the seminal fluid and spermatozoa on PW1's biker belonged to the Appellant, PW1 detailed the whole affair and how the Appellant pulled her to a bush and started raping her. This was corroborated by PW2 who testified that he responded to her screams only to be sent away by the Appellant who was defiling her. PW2 caught the Appellant red handed defiling PW1. That consequently when PW1 got home PW3 checked her and was sure she had been defiled as she found the discharge flowing on her legs. All the evidence crystalized together points to recent sexual activity particularly the presence of the seminal fluid on the biker. Just as the learned trial magistrate found, I have no reason to doubt the testimonies of PW2 and 3 which corroborated that of PW1.

24. On proof of age, the Appellant whilst citing the case of **Kepha Odhiambo Akoth *v.* Republic[2017] eKLR** submitted that the failure to sufficiently prove the age of a victim in a defilement case was fatal to the prosecution case. The Court of Appeal dealt with the issue of age in **Bakari Ndoro *v.* Republic[2016] eKLR,** citing **Mwalongo Chichoro Mwanjembe *v.* Republic(MSA Cr. App. No. 24 of 2015),** 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… We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victin since in a criminal trial the threshold is beyond reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Crim. 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…"***

25. The test in the case is therefore whether the evidence presented was **credible** and **reliable** in establishing the age of PW1. She testified she was 14 years old but she was not sure when she was born. Her mother did not also know when her daughter was born. This was not surprising given that the mother was illiterate. Further evidence came from PW4 who testified that he estimated the complainant's age at 15 years from her development particularly her sexual features, namely; breasts and pubic hair. I consider that the latter is the evidence of a medical officer and should therefore be treated as credible and reliable estimate pointing to the complainant's apparent age. The Court of Appeal also held in **P.O.M *v.* Republic[2016]eKLR,** that, ***"...the actual age does not have to be proved. It is sufficient if the apparent age is proved."*** I am in agreement with this finding which accords with the definition of age under the Children's Act. I then arrive at the conclusion that the complainant's apparent age was proved beyond reasonable doubt to be 15 years.

26. In the upshot, after reevaluating the evidence on record, I find that the offence was proved beyond all reasonable doubt. The Appellant's conviction was safe. I dismiss the appeal. I uphold the conviction accordingly.

27. On sentence, the Appellant was sentenced to serve 25 years imprisonment while the sentence set out by the law is a minimum of 20 years

imprisonment. Whilst the sentence is not inherently illegal, I take into account that it is intended to serve as a deterrent rather than harden an offender. I agree with the trial magistrate that the aggravating factor, being that the Appellant was a law enforcer necessitated the enhancement of the sentence but I feel that 20 years shall be sufficient sentence that will deter him from re-offending. I do accordingly set aside the 25 years imprisonment and order that the Appellant shall serve 20 years imprisonment. It is so ordered.

DATED and **DELIVERED** this 30th day of **May, 2018.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. ***Mr. Mathenge for the Appellant***

2. ***Miss Aluda for the Respondent.***