REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.26 OF 2017

DISMAS ODHIAMBO NDEGE .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Mbita SRM's Court Criminal Case NO.623 of 2014 - Hon. S. O. Ongeri SRM, dated 21st July, 2015)

JUDGMENT

[1] The appellant, **DISMAS ODHIAMBO NDEGE**, was charged with defilement, contrary to **Section 8 (1) (3)** of the **Sexual Offences Act**, in that on diverse dates between 30th August 2014 and 2nd September 2014 in Mbita – Homa Bay County, he defiled **E A O**, a child aged fifteen (15) years. In the alternative, he committed an indecent act with the said child, contrary to **Section 11(1)** of the **Sexual Offences Act**.

[2] On appearing before the Senior Resident Magistrate at Mbita, the appellant denied the offence. He was thereafter tried, convicted and sentenced to fifteen (15) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds in his petition of appeal filed herein on 3rd August 2015 and amended in December 2017.

[3] At the hearing of the appeal, the appellant appeared in person and argued his case by way of written submissions.

The State/Respondent was represented by the learned prosecution counsel, **MR. OLUOCH**, who opposed the appeal and orally submitted that the complaint that the appellant was tried on the date of plea is unwarranted as he did not raise any objection nor did he apply for an adjournment. That, in any event, the trial court and the prosecution ought to be commended for the expeditious trial of the case.

[4] On the age of the complainant, the learned prosecution counsel submitted that sufficient evidence was led by the prosecution to establish the fact and on the alleged defect of the charge, learned counsel submitted that there was no defect and if any existed, it was curable under **Section 382** of the **Criminal Procedure Code**.

The learned prosecution counsel contended that the appellant's defence indicated that he was with the complainant at the material time and that this appeal should be dismissed.

[5] In response to the learned prosecution counsel, the appellant contended that the age of the complainant was not proved and that her father stated that she was eighteen (18) years. That, there was no evidence of the alleged defilement of the complainant and even if she was defiled, there was no evidence of when the incident occurred given that she had on previous occasions engaged in sexual acts. That, since her hymen was found intact, the fact of penetration was not established.

[6] After having considered the appeal as well as the submissions by both the appellant and the respondent, the duty of this court was to reconsider the evidence and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **R. –VS- OKENO [1972] KLR 32)**.

[7] In that regard, this court considered this evidence adduced by the prosecution against the appellant through the complainant, **E A O** (PW1), her father, **J O O** (PW2), a song writer, **BONFACE OKETCH NYAKUNDI** (PW3), a Clinical officer, **DAVID KIHARA MATHERI** (PW4) and the investigating officer, **PC ROSEMARY AWINO** (PW5).

Also considered was the appellant's evidence in defence.

[8] The issue arising from all that evidence was whether the complainant (PW1) was defiled and if so, whether the appellant was the person responsible for the offence.

The defence raised by the appellant was a denial and an indication that he was implicated without good cause by the complainant's father after he had assisted the complainant by taking her to his sister's house, after she told him that she had been chased away from home.

[9] However, evidence from the complainant suggested that the appellant was her boyfriend and that on several occasions the two had engaged in sexual intercourse without disapproval from the complainant.

In his defence, the appellant implied that he was with the complainant at the material time but was only assisting her without necessarily engaging in sexual intercourse with her. He thus implied that he was a **"good Samaritan"** but for his kind gesture, he was maliciously implicated by the complainant's father.

[10] The trial court believed the complainant's evidence and found it credible enough to disprove the appellant's denial of the offence.

On matters of credibility, the trial court was in a better position to make proper findings than this court because it had the advantage of seeing the witnesses and gauging their credibility.

[11] In the circumstances, this court would also find that the complainant's evidence was sufficient and credible enough to discredit the defence offered by the appellant and prove that he actually sexually

assaulted the complainant at the time the two were together. Notwithstanding the complainant's consent to the sexual act or acts, the offence of defilement was complete as a minor is deemed to be incapable of giving consent.

[12] The birth certificate (**P. Exhibit 1**) produced by the complainant's father (PW2) indicated that the complainant was born in 1999, thereby placing her age at the material time of the offence at fifteen (15) years, hence a minor.

The medical evidence availed by the Clinical Officer (PW4) established that the complainant had been repeatedly defiled. It showed that the complainant's hymen was broken but not recent to the time she was medically examined.

[13] The complainant's evidence coupled with that of her father (PW2) and the song writer (PW3) strongly pointed at the appellant as the person responsible for defiling the complainant.

The appellant's defence was thus discredited and disproved by the prosecution. It was apparent that he took advantage of the complainant and prevailed upon her to engage in unlawful sexual intercourse with her. His grounds of appeal are in the circumstances unsustainable and insufficient for this court to interfere with his conviction by the trial court on basis of the evidence availed.

[14] With regard to the failure by the trial court to conduct a voire-dire examination on the minor complainant (PW1), the record is silent on the fact thereby implying that such examination was not conducted as lawfully required. However, such omission did not water down the prosecution case against the appellant since, other than the complainant, there was the evidence of the complainant's father, the song writer, and the clinical officer which was capable of establishing the appellant's culpability in the offence. In any event, he did not deny that he lived with the complainant in one house at the material time. It is also doubtful whether a minor aged 15 years is a child of tender years.

[15] Under **Section 19 (1)** of the **Oaths and statutory Declaration Act (Cap 15 Laws of Kenya)**, if a child of tender years who is called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may nevertheless be received though not given on oath, if in the opinion of the court, the child is possessed of sufficient intelligence to justify the recognition of such evidence and understands the duty of speaking the truth.

[16] The procedure to be followed at this trial before reception of the evidence of a child was explained by the Court of Appeal in the case of **JOHNSON MWIRERI –VS- REPUBLIC [1983] KLOR 445)**.

In **NYASANI $^{s/}_{o}$ BICHANA –VS- REPUBLIC [1958] EA 190**, the Court of Appeal stated that:-

> **"This is a condition precedent to the proper reception of the unsworn evidence from the child, and it should appear upon the face of the record that there has been due compliance with the section. In the instant case we did not consider it necessary to call for a report from the learned judge as to whether or not there had in fact been compliance with the requirements of**
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> **Section 19, since we were of the opinion that there was ample evidence of the commission of the offence apart from the evidence given by the complainant herself. We do, however, emphasize the necessity for strict compliance with provisions of the section. Non-compliance might well result in the quashing of the conviction in a case where the other evidence before the court was insufficient in itself to sustain the conviction."**

Even where there has been failure to strictly comply with **Section 19 (1)** of the **Oaths and Statutory Declaration Act**, hence failure to conduct a voire dire examination, the trial court has a discretion to consider other evidence for purposes of a conviction.

[17] With regard to the sentence of fifteen (15) years imprisonment imposed upon the appellant, the same was unlawful and not in accordance with **section 8 (3)** of the **Sexual Offences act** which provides that:-

> **"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."**

The complainant was aged fifteen (15) years at the material time, yet sentence imposed upon the appellant by the trial court was that provided for under **Section 8 (4)** of the **Sexual Offences Act** instead of **Section 8 (3)** of the **Act**.

Accordingly, this court now sets aside the sentence imposed by the trial court and substitutes it for a sentence of twenty (20) years imprisonment.

[18] Otherwise, this appeal is lacking in merit and is hereby dismissed.

J.R. KARANJAH

JUDGE

26.07.2018

[Delivered and signed this **26th** day of **July, 2018**]