REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO 192 OF 2014

PHILEMON SIMOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence in Criminal case no 726 of 2013, Republic Versus Philemon Simoi at Shanzu SRM'S court delivered by Hon A Ndung'u on 24th September, 2014)

JUDGEMENT

1. The Appellant, PHILEMON SIMOI was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act in the main count. The particulars of the charge were that;

> **"On the diverse date between 1st July, 2013 and 30th September, 2013 at [Particulars withheld] village within Kilifi county, the appellant intentionally caused his penis to penetrate the vagina of JM, a girl aged 12 years".**

2. In the alternative charge, the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars were that;

> **"On the diverse dates between month of 1st July, 2013 and 30th September, 2013 at [Particulars withheld] village within Kilifi county the appellant intentionally touched the vagina of JM, a girl aged 12 years with his penis."**

3. The Appellant pleaded NOT GUILTY to the charges and the case proceeded to full trial. After a full trial, the appellant was convicted of the offence of defilement and sentenced to serve twenty (20) years imprisonment.

4. Aggrieved by the conviction and sentence, the appellant filed an appeal in which he set out three(3) grounds, which he later amended to five (5) grounds as herein below (verbatim);

> **a. THAT the learned trial magistrate failed in both law and fact in convicting me and considering that voire dire examination was not conducted properly to the minor (PW1) contrary to Section 19(1) of the Oaths and Statutory Declarations Act, hence the resulted trial was nullity.**
>
> **b. THAT, the learned trial magistrate failed in both law and fact in consider no formal age assession out report or a copy of birth certificate was prepared, processed and produced as an exhibit in court to prove the exact age of the complainant.**
>
> **c. THAT, the learned trial magistrate failed in both law and fact in convicting me while relying on contradicting evidence given by PW1's and brought prosecution evidence amount to inconsistencies.**
>
> **d. THAT, the learned trial magistrate failed in both law and fact in convicting me while key witnesses named in this case were not summoned to give evidence and shed light in this alleged offence (contrary to Section 150 and 144 of the Evidence Act).**
>
> **e. THAT the learned trial magistrate failed in both law and fact in convicting me while prosecution's side did not provide any exhibit to support defilement case e.g clothes or torn pant.**
>
> **f. THAT, the learned trial magistrate failed in both law and fact in convicting me and yet he failed to look at the defence I**

gave out was reasonable enough to create doubt in this alleged offence.

His prayer thus, is for the appeal to be allowed, conviction quashed and sentence of twenty (20) years imprisonment set aside.

5. The appellant appeared in person and filed written submissions which he opted to rely on in canvassing the appeal. He submitted that voire-dire examination was not properly conducted as per the required standards provided for under section 19(1) of the Oaths and Statutory Declaration Act. That it was therefore difficult to determine whether PW1 was telling the truth and was possessed of sufficient intelligence to understand the meaning of giving evidence while on oath or not. The appellant stated was prejudicial to him and occasioned failure of justice.

6. Secondly, the appellant submitted that the prosecution failed to produce a proper document to prove the age of the victim, such as a birth certificate, but produced an age assessment report which did not indicate the date of birth of the complainant except that she was 12 years old. He said that this contradicted what the complainant and some of the witnesses said in their evidence with regard to the age. He said it is a birth certificate which is the proper document that defines one's exact age.

7. Thirdly, the appellant stated that the prosecution's witnesses' evidence had alot of contradictions and hearsay. He pointed out the contradiction in the evidence of the complainant herself and in the evidence amongst the other witnesses.

8. Fourthly, according to the appellant, the prosecution did not call evidence of key witnesses such as Sidi; Neema and the bodaboda rider who were like god samaritans and would have shed light on the alleged offence and clear any doubt.

9. Fifthly, the appellant submitted that the prosecution failed by not having him subjected to a DNA test to ascertain whether he committed the act. They also failed to avail any clothes to confirm any discharge.

10. Lastly, the appellant submitted that he gave a defence that was so reasonable and sufficient to create a doubt in the evidence of the prosecution. He said that his family and that of the complainant had disagreed about a shamba and so there was so much going on. He said he was set up by the complainant's family.

11.The appeal was opposed by M/s Ocholla, learned state counsel, she submitted that from the evidence of all the prosecution's, it was not in doubt that the appellant was the perpetrator and he was identified by recognition. Since he was a neighbor to the complainant's family, a fact he confirmed in the defence.

12. On the issue of the complainant's age, the learned state counsel submitted this that was proved by the production of an age assessment report (EX. P4) which cleared her age as 12 years. That this was then supported by the complainant's mother (PW7) and PW1 herself. M/s Ocholla, however, urged the court, that if it finds that the age assessment report was not properly admitted, to apply the holding in a court of appeal case, of DENNIS KINYUA NJERU –VERSUS- REPUBLIC (2015) eKLR, where faced with a similar situation, the court _____ the appeal and held that there are many ways of proving age.

13. She went on to submit that there was evidence that the victim had been penetrated when her hymen was found missing two days after she had gone missing.

14. M/s Ocholla in submitting that the court can convict on the evidence of the child alone, relied on the provisions of Section 124 of the Criminal Procedure Code which allows this as long as the court is convinced that the child is a truthful witness.

15. As for the appellant's grounds of appeal that section 19(1) of the Oaths and Statutory Declarations Act was not complied with in respect of PW1 who was a child aged 12 years, M/s Ocholla submitted that at page 8 of the proceedings in the record of appeal clearly shows the trial magistrate recorded the questions which she put forth, to the minor and the answers the minor gave. That she went on to record reasons as to why she was convinced the witness was telling the truth and her evidence to be taken on oath.

16. Finally, M/s Ocholla stated that the prosecution's evidence was corroborated and that the court was right in dismissing the appellants defence. She also prayed that if the court found that the complainant's age was not proved, then it should find the alternative charge proved.

17. To determine this appeal as the first appellate court, my duty is to examine and re-evaluate the evidence that was adduced before the trial court so as to arrive at my own conclusion, while bearing in mind that I did not have the advantage of seeing and hearing the witnesses as did the trial magistrate (See **Okeno –v- Republic (1972) E.A 32**).

18. The prosecution called seven (7) witnesses, PW1 JM told court that she was 13 years old, in class 3 at [Particulars withheld] Primary school and lived with her parents and siblings. She told court that on a date she could not remember in the month of July, 2013, she was sent to fetch water by her mother but she instead ran away from home and went to play with her friends S and N. That on that night she spent at S's home.

19. She said that the following day, while playing with her friends, at around 4:00pm, the appellant called her to go and eat ugali at his house. She said that when she went there, there was no ugali and the appellant was alone in a one roomed house with a veranda. That he asked her to remove her clothes, that is, the school shirt and home skirt but refused. That the appellant then removed her clothes, put her on the bed and lay on top of her, and then removed his penis which he inserted into her vagina.

20. It was PW1's further evidence that the appellant did that to her every night for two weeks until the day she escaped through an opening between the wall and roof one day after he had left. She said that the appellant used to leave her inside the house where he would lock the door from outside with a padlock.

21. PW1 said she went to Cross Road Primary School, from where she was taken to the Chief's office where she narrated what had happened, then to Vipingo Central Primary School and hospital at Vipingo. She also said that the matter was reported to Kijipwa police station.

22. PW2, SNB, a teacher at [Particulars withheld] Primary School gave evidence to confirm that the complainant who had not attended school from 20.6.2013, returned on 2nd September, 2013 which was after two weeks. PW2 said that PW1 was wearing a lesso, school shirt, home skirt and was very dirty. On enquiring she told me that she had been at a man's house where he had made her his wife. They told her to remove her under garments and on examining her, saw her private parts were swollen. They called PW1's parents to school and she took her to Vipingo Health Centre. PW2 produced the class register for class 2 in the year 2013 as an exhibit to confirm the days PW1 attended school.

23. PW3, MDM, gave evidence that on the 3rd September, 2013 he was informed by the teacher that his daughter, JM (hereinafter referred to as "PW1" or the "complainant") had not been going to [Particulars withheld] Primary School which she was attending in class 3. He inquired about it from his wife (hereinafter referred to as PW7) and she told him that she would usually come in the morning, wear her school uniform and then leave. He said that the girl was living with the appellant who he identified by pointing at him in court. That he then started looking for his daughter, passed information that the issue should be announced at the mosque that whoever was with his daughter to release her so she could go to school. He said that he also reported the matter to the Assistant Chief and informed the public to detain the daughter if they saw her.

24. PW3 went on to state that his daughter, PW1 stopped coming home after the friends asked her what he was looking for but was detained by a woman from members of public who took her to the Assistant Chief, from where she took her to the teacher. He went to school, took PW1 to Vipingo for treatment then to Kijipwa police station where they recorded their statements. They then went to Kilifi District Hospital where the P3 form was filled.

25. According to PW4, SALOME TANGAI, the assistant Chief of Vipingo Sub location, on 11th September, 2013 a child aged 13 years old was taken to her by a bodaboda man who said he had seen her outside Crossroad Academy and had heard that her parents were looking for her. She said that JM was wearing school uniform and holding a lesso. That she tried talking to her but the girl was shaking as she seemed afraid of her PW4 told PW1 not to be afraid and that is when she told her that she was not living at her house but was living with a man known as "mzee mmoja" in the neighbourhood. PW4 went on to say that PW1 told her that she was sleeping with the said "mzee mmoja" but would hide to go and play in the morning. She said that PW1 said that Mzee mmoja would give her kshs10/= to buy fried potatoes. PW4 who knew the girl's parents searched for them and they took PW1 to Vipingo Health Centre for treatment and proceeded to report the matter at Kijipwa police station where she recorded her statement.

26. Upon an application under section 77(1) of the Evidence Act, the P3 form was produced by PW5, Dr Busra Ahmed on behalf of his colleague Dr Rukia who was said to be on annual leave but was known to the said doctor as they had worked together for one and half years. According to the P3 form, the complainant had dirty clothes when she was presented for examination on 12th September, 2013. On examination PW1's hymen was found broken but had signs no report of discharge from the genitalia. She tested negative cor VDRL, pregnancy and HIV but had pus cells in her urine. He produced the P3 form and PRC form which was filled and signed on 12.9.2013 and 11.9.2013 respectively.

27. No. 92701, PC DOUGLAS MUREITHI is the investigating officer attached to Kijipwa police station and he testified that on 11th September, 2013 he was there when he received the complainant in the company of her father and mother with a letter from assistant Chief, SALOME TANGAI (PW4herein). He said that the Assistant Chief had written to inform him that the complainant had been found loitering in the streets and handed over to her and she had in turn informed her parents.

28. On investigating the complainant, PW6 said that he estimated that PW1 was 13 years old, attending [Particulars withheld] Primary School and complained of having been defiled of one "mzee mmoja" at the village. He also interogated her parents and they told him that she was defiled in July, 2013, without specifying the date.

29. PW6, after recording the statements, took her to Vipingo Health Centre where it was confirmed that she had had sex and referred to Kilifi District Hospital. It was established that PW1 had not been going later to school.

30. PW7, MMM, mother to the complainant (PW1) testified that between July – September, 2013 she asked PW1 to prepare and to school as she left for work. That PW1 was not at home when she returned. She inquired from her twin sister of PW1's whereabouts and she told her that she had left PW1 at home when she went to school. PW7 looked for PW1 at the neighbours but none had seen her. She then asked her father (PW3) to look for her. PW7 said that they looked for PW1 from July-September, 2013 when someone informed her that she had been found at the Crossroad Academy grounds hanging her lesso and taken to the Assistant Chief.

31. The appellant PHILEMON SIMOI BENSON was placed on defence. He opted to give unsworn statement in defence and called no witnesses. He said that on 28th July 2013 he was cleaning outside his house after returning from work when his neighbor, MDM (PW3) appeared and started urinating 3 steps from his house. That on asking him why he was doing this, PW3 told him that he was not in his home area and could not tell him where to urinate. He also said that PW3 told him that he was breaking his house since he was having an affair with his wife. That their landlord came and on hearing what had happened, he left with PW3. The appellant said that before PW3 left he told him that he would show him before the end of year. That the landlord threatened to evict PW3 from his house and they stopped greeting each other. And on 17th September, 2013 he was having lunch at his house when he was arrested by the people after being fetched out by PW3 and taken to the police station. He was later arraigned in court where denied the charge and continues to deny the same to date.

DETERMINATION

32. In determining this appeal, I have considered the grounds of the appeal, the arguments made by the appellant and the prosecutions

counsel in their respective submissions, the evidence that was adduced before and judgment of the trial court. The following issues have emerged for determination;

> **a. Whether the voire-dire examination was concluded properly as per the provisions of Section 19(1) of the Oaths and Statutory Declarations act;**
>
> **b. Whether the complainant's age was proved by a formal age assessment such as the report or a copy of birth certificate;**
>
> **c. Whether the appellant was convicted on contradictory or inconsistent evidence and whether he was property identified as the culprit;**
>
> **d. Whether the appellant was convicted without evidence of key prosecution witnesses who were named;**
>
> **e. Whether the appellant was convicted without the prosecution avail of any exhibit such as clothes or torn pants;**
>
> **f. Whether the trial magistrate found to look at the appellant reasonable defence.**

33. With regard to the issue of whether voire-dire examination was properly conducted, it is the appellant's contention that it was not conducted as per the requirements provided for under section 19 of the Oaths and Statutory Declarations Act so that it was difficult to determine whether PW1 was telling the truth and was possession of sufficient intelligence.

Section 19 of the Oaths and Statutory Declarations Act provides that;

> **1. Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if in the opinion of the court or such person, he is in possession of sufficient intelligence to justify the receptor of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given an oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap 75) shall be deemed to be a deposition within the meaning of that section.**

34. From these provisions of Section 19, two things must be severally satisfied by the trial court when a child of tender age is called as a witness. In the instant case, the trial magistrate before receiving the evidence of the complainant, put forth questions and the child responded and both were duly record. The trial magistrate then went on to record reasons why she thought the complainant (child) was telling the truth and proceeded to receive the evidence on oath. The record clearly shows this at page 8 and 9 of the record of appeal.

> What is your name?
>
> JM
>
> How old are you?
>
> 13 years old.
>
> Which year were you born?
>
> I don't know.
>
> …..
>
> …..

From this, it is evident that the trial magistrate complied with the requirements of Section 19 Cap 75 of the Laws of Kenya.

And even if the trial magistrate had not compiled with this requirement, the provisions of Section 19 of Cap 75 of the Laws of Kenya talks of a child of tender years (age). According to the children's Act, a child of tender years is defined as;

> "a child under the age of ten years";

In this case, the complainant was said to be 13 years of age and therefore did not fall under the bracket of a child of tender years as per the Children's' Act. This ground of appeal has therefore failed.

35. On the second issue of whether the complainant's age was proved by a formal document such as a birth certificate or age assessment report, I have read through the evidence that was adduced before the trial court and established that PW6, a doctor at Kilifi District Hospital produced an age assessment report as exhibit P4 which placed the complainants age at 12 years. And even though PW6 was not the maker of the said document (exhibit P4), the evidence therein was confirmed by PW7, the complainants mother. The age assessment report, it has been

held by courts that it is sufficient proof of age.

36. I find that grounds 3, 4 and 5 deal with whether the evidence that was adduced before the trial court was sufficient and satisfactory to warrant the finding of the appellant guilty for the offences he had been charged with.

According to the appellant, there were inconsistencies and contradictions in the evidence of the prosecution's witnesses, which the trial magistrate found were immaterial as they did not affect material ingredients of the offence.

37. From the evidence of PW1, there was contradiction as to the period she had been missing, that is, whether it was two weeks or two months or even three months as evidenced by the PW2, the teacher at her school. However, I find and agree with the trial magistrate that the variances in the evidence as to when and for how long the complainant had gone missing does not negate the fact that she was defiled.

38. There was also noted contradiction in the witnesses' evidence as to where and how the complainant was found and by who. Then there was contradiction in her evidence and that of PW4, the chief as to whether or not she ever left the house where the appellant had locked her up.

According to the complainant, the man who took her to his house and defiled her used to buy her food and would lock the door with a padlock so she would never leave the house until the day she escaped through the space in the iron sheets. PW4, on the other, told court that the complainant told her that during her stay at the house, she would hide and go playing in morning since she did not want her parents to see her and the so called "mzee mmoja" would give her kshs10 to buy fried potatoes. PW7, her mother said that he would give her kshs5/=. PW6 said he would give her Kshs10/= and would play with other children and return to the house in the evening.

39. Then there is the issue of whether it was confirmed that the appellant is the person who defiled the complainant. It was PW1's evidence that she went to a man's house where she stayed for a period of time and in court she identified the appellant as "that man". It is worth noting that she did not identify the man by any name or nickname as indicated by PW3 and PW4. She also does not tell court that she led those who arrested the appellant to the house where she allegedly had stayed with this man.

40. PW3 told court that the appellant is commonly known as Mzee mmoja in the village but this it's not supported by the evidence of PW1, who did not give the name or nickname of the man in whose house she had stayed from the period she went missing from her home.

41. PW4, the chief testified to court that the complainant told her that she had been staying with a man known as mzee mmoja in their neighbourhood and who she had been sleeping with. The issue of identifying the said man by name or nickname is not confirmed from the evidence of the complainant. PW7, mother to complainant also told court that the complainant, who had been reluctant to say where she had been staying on inquiry, said that she had been staying at "mzee mmoja's" house.

42. The investigating officer, PW6 said that it is upon interrogation that the complainant told him that she had been defiled by "mzee mmoja", as known in the village and that the parents (PW3 & PW7 herein) confirmed that. He however, does not tell court how be established that the so called "mzee mmoja" was also Philemon Simoi, the appellant herein. This is because none of the witnesses testified as to the other name of the appellant or the appellant being known by a nickname. And when he charged him, he did not indicate in the charge sheet that the appellant, Philemon Simoi is also known as "Mzee mmoja" since this is what is evidenced by PW3, PW4 & PW7 when they said that the man the complainant was staying with, and who had also defiled her was known as "mzee mmoja" at the village.

43. From the above analysis, I find that the evidence with regard to the identification of the appellant as to the person who defiled the complainant is insufficient. It does not even clearly inform how he was identified for arrest or confirm that indeed, he Philemon Simoi is the same person as "Mzee mmoja" in the village where they were staying.

44. On the issue of whether the prosecution failed to call crucial witnesses, the appellant submitted that the people mentioned by the complainant and other witnesses such as S, N and the alleged bodaboda rider were crucial witnesses who needed to be called as such to shed light in this case. From the evidence of the complainant, S and N, were the children she was playing with when the "man" called her to his house PW1, PW3, PW4 & PW7 testified as to how the complainant was found by a bodaboda man or a good Samaritan and taken to the chief's office. (PW4). The children who I believe were neighbours to the family of PW1 would have been called to confirm that she was called by a man, and more so, the appellant.

45. And while under the provisions of section 143 of the Evidence Act, the state is only obligated to call only the number of witnesses that it thinks is sufficient to prove its case, the evidence of the said S, N and bodaboda rider would have been crucial as it would have shed light on whether the appellant was indeed the man who called the complainant from where they were playing and the bodaboda rider is the one who found her loitering or in a school compound. I believe the trial court ought to have considered invoking the provisions of section 150 of the criminal procedure code, which provides as follows;

> **"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:**
>
> > **Provided that the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."**

46. By failing to call the said S, N and boba boda rider, the prosecution's evidence had a void which only led to a doubt being crated in its evidence.

47. And with the defence by the appellant which raised the issue of a grudge between him and the appellant, which issue he also raised when cross-examining PW1 & PW3, the doubt ought to have been resolved during the hearing of the prosecution's case.

48. In view of my above finding, the prosecution's evidence against the appellant had inconsistencies and gaps which reward it incredible and insufficient to support the conviction of the appellant.

49. Accordingly, I find that the appeal succeeds with regard to grounds 3, 4, 5 & 6 and the same is hereby allowed. The appellant conviction is quashed and sentence of twenty (20) years imprisonment set aside.

50. The appellant to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 31st day of October, 2018.

D.O CHEPKWONY

JUDGE.