REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 171 OF 2016

ALEX CHEMWOTEI SAKONG…….APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

JUDGMENT

1. Alex Chemwotei Sakong, the Appellant herein was charged and convicted with the offence of defilement contrary to **section 8(1)** as read with **section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the main count are that on diverse dates between the 7th to the 16th day of December, 2015 at Banandega village, Emia location Cheptais District within Bungoma County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of S.N.W a child aged 15 years. (Initials substituted for her name to protect the identity of the minor).

2. The Appellant had faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. It had been alleged that on the same date and place he intentionally and unlawfully touched the vagina of the said S.N.W.

3. In brief, the prosecution's case before the trial court was that the Appellant eloped with the Complainant a 15 year old minor, on the night of 7th December, 2015. They cohabited in different places as husband and wife and engaged in sexual intercourse for one week and some three days before the minor returned home on 16th December, 2015. She was taken to the Police and thereafter to the hospital for examination. The Appellant was arrested by members of the public on 18th December, 2015 and presented to the police who charged him as set out above.

4. The Appellant denied the offence in an unsworn testimony upon being placed on his defence. He averred that he was arrested on suspicion of theft and was surprised to be charged with defilement, an offence he knew nothing about.

5. At the conclusion of the trial, the Appellant was convicted on the main count and sentenced to serve fifteen (15) years imprisonment as by law prescribed. Being disgruntled with the outcome, the Appellant filed an appeal on 12th August, 2016 grounded on arguments that the trial court did not properly assess the evidence before it and ignored the evidence of the defence altogether.

6. The State opposed the appeal through learned state counsel Mrs. Njeru. The learned state counsel argued that the discrepancy in the date of arrest, as stated by PW4 is minor and not detrimental to the Appellant because the charge sheet agreed with the date of the arrest that he himself gave being the 20th of December, 2015. That in any case, it is curable under **section 382** of the **Criminal Procedure Code**.

7. The learned state counsel submitted that all the ingredients of defilement were proved and the Appellant's defence was considered. She urged the court to find that the appeal lacked merit and dismiss it.

8. I have analyzed and re-evaluated the evidence on record afresh to reach my own conclusion in line with **Boru & Anor vs. Republic Criminal Appeal No. 19 of 2001 [2005] 1 KLR**. In the foregoing case, the learned judges of the Court of Appeal held *inter alia* that:

> **"A duty is imposed on a court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as to deal with any question of law raised on appeal."**

9. The critical ingredients forming the offence of defilement are: the age of the complainant, proof of penetration and positive identification of the assailant. (See – **Dominic Kibet Mwareng vs. Republic [2013] eKLR**).

10. On the question of the Complainant's age the Complainant's mother gave her date of birth as 12th December, 2001. The age assessment report and the Complainant in her own testimony were in agreement that she was aged 15 years at the time. There being no evidence to the

contrary, I find that the age of the complainant is not in dispute and that in fact she was a minor at the time of the offence.

11. On identification, the Appellant argued that the prosecution failed to call crucial witnesses in the matter who would have shed light on the case at hand. In the case of **Erick Onyango Ondeng' vs. Republic Criminal Appeal No. 5 of 2013 [2014] eKLR**, the court of appeal (Githinji, Musinga & M'inoti JJ.A) observed that, whereas the prosecution has a duty to call all the witnesses necessary to establish the truth of a matter, in the absence of any requirement by the provision of the law, no particular number of witnesses shall be required for the proof of any fact. This is in line with **section 143** of the **Evidence Act** which provides thus:

> **"No particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact."**

12. Besides the evidence of the minor stating that she cohabited with the Appellant as husband and wife, there was the evidence of the minor's mother PW2 who testified that the Appellant's wife had informed her that the Appellant left in the company of the Complainant, a statement which was later confirmed to her by the Complainant upon her return. There was also the evidence of the minor's sister PW3 who stated that she left the Complainant with the Appellant and his wife at the Appellant's house and that the Appellant is one of their neighbors.

13. This court notes that the Appellant chose to give unsworn evidence in his defence during which he only gave details of the events surrounding his arrest. His defence was reviewed by the trial court and found to be weak and not sufficient to cast any doubt on the prosecution's case, and was consequently dismissed. Further, the Appellant and the Complainant were well acquainted with each other and it was therefore a matter of recognition as opposed to identification. The Appellant was thus positively identified.

14. The Appellant argued that the prosecution only satisfied the requirement of age and failed to satisfactorily prove that there was penetration. As such the prosecution did not prove their case.

15. Penetration is defined under **section 2** of the **Sexual Offences Act** to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJ A) in the case of **Mark Oiruri vs. Republic Criminal Appeal 295 of 2012 [2013] eKLR** in which they opined thus:

> **"…and the effect that the medical examination was carried out on her on 16th November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ…"**

16. The circumstances of the case cited above lend themselves to the present case. The record states that the Complainant herein was defiled on diverse dates between 7th December, 2015 and 16th December, 2015. She was however presented to Kopsiro Health Centre for examination and treatment on 19th December, 2015, three days after her return home. From section C of the P3 form, it is clear that whereas the Complainant had no bruises or lacerations, her hymen was missing. The court cannot however jump to the conclusion that the hymen went missing when she was with the Appellant or that he was responsible for the missing hymen.

17. Be that as it may, it is noteworthy that the Complainant had been in the company of the Appellant for a period of about one week. In her own testimony, the Complainant had this to say:

> "….*I started staying with the accused as my husband. At the time I was sleeping with the accused. We engaged in sexual intercourse once during that period…* "
>
> The term "sleeping with the accused" is ambiguous. The prosecution did not lead evidence to show that there was penetration.

18. In the case of **Badi Hamadi Hamisi vs. Republic Criminal Appeal No. 19 of 2017 [2018] eKLR** Nyamweya J deliberated on the importance of proving penetration in a defilement case and stated thus:

> **"It is my view that the evidence by PW1 was insufficient to sustain a conviction of the Appellant. In particular, no evidence was given as to any penetration by the Appellant of his genital organ in any part of the complainant's genital organ, which is key to a determination as to whether defilement occurred or not. Black's Law Dictionary, Ninth Edition at pages 1498-1499 defines sex as the structures and functions that distinguish a male from a female; sexual intercourse; or sexual relations. In addition, sexual relations is defined either to be sexual intercourse or physical sexual activity that does not necessarily culminate in sexual intercourse. Therefore, it is not always the case that sex is synonymous with penetration, hence the definition of penetration that is set by section 2 of the Sexual Offences Act, which is required to be proved beyond reasonable doubt.**
>
> **This court in Julius Kioko Kivuva vs. Republic [2015] eKLR held as follows as regards specificity required in the proof of penetration:**
>
> **"*Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness' testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal "***

19. PW1's testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened. In this respect, the medical evidence by PW6, the Clinical officer at Kopsiro Health Centre, that the Complainant's hymen was broken at the time of her medical examination was corroboration of penetration. However, the evidence did not identify the person responsible and was therefore not corroborative of penetration by the Appellant.

20. In the case of **Republic vs. Stephen Kiprotich Leting & 3 others Criminal case 34 of 2008 [2009] eKLR**, Maraga J (as he then was), captured the purpose of the requirement of proof of beyond reasonable doubt and opined thus:

> **"Given the importance of this case and for the benefit of the public, I wish to state a truism in our criminal jurisprudence: out of 100 suspects, it is better to acquit 99 criminals than to convict one innocent person. Because of that our law requires that for a conviction to result, the prosecution must prove beyond reasonable doubt the case against an accused person. That is why many suspects are released. Courts therefore decide cases on evidence as by law required. If they fail to do that the critics will be the first ones to lambaste them with allegations of incompetence."**

21. As the first appellate court, I have treated the evidence as a whole to that fresh and exhaustive scrutiny which the Appellant is entitled to expect. From my own analysis, I have come to the conclusion that the prosecution did not prove its case against the Appellant beyond reasonable doubt. I find that the evidence adduced before the trial court was insufficient as it failed to prove the element of penetration, which is an essential ingredient of the offence of defilement.

22. The upshot is that the appeal is therefore found to be meritorious and is consequently allowed. The conviction is quashed, the sentence set aside and the Appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF OCTOBER 2018.

L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 22ND DAY OF NOVEMBER 2018.

S. N. RIECHI

HIGH COURT JUDGE