IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL NO. 1 OF 2015

BETWEEN

FELIX MUHANDA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J. Ong'ondo, PM dated 23rd December 2014 at Chief Magistrate's Court at Kakamega in Criminal Case S.O. No. 23 of 2014)

JUDGMENT

1. The appellant, **FELIX MUHANGA**, was charged with the offence of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act***. The particulars of the charge were that on the night of 22nd February 2014 at [particulars withheld], Kakamega East of Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of SM, a child aged 15 years old. He denied the charges but after trial he was convicted and sentenced to 15 years' imprisonment. He now appeals against conviction and sentence.

2. In his petition of appeal, the appellant challenges his conviction on several grounds. He contends that the prosecution failed to prove its case which was fabricated and the evidence was not corroborated. He submitted that the child's evidence was admitted unprocedurally and that the age of the child was not proved. He contended that he was not medically tested to confirm whether he was involved in the act and that his defence was not considered. The respondent's position was that the prosecution proved all the elements of the offence of defilement.

3. In order to prove the offence of defilement the prosecution must prove that the accused did an act which amounted to penetration to a child. *"Penetration"* under **section 2** of the ***Sexual Offences Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

4. As regards the element of penetration, the complainant, SM (PW 1) told the court she was aged 15 years. She testified that she knew the appellant as he used to operate a posho mill at the local market. On 22nd February 2014 at about 7.00pm, she was at the roadside waiting for her father when the appellant came with another boy, S, and offered mandazi and soda. They went to a shop and after finishing the refreshments, she thought she was being escorted home but the appellant took her to the posho mill and locked her up. He returned at 9.00pm where upon he proceeded to have sexual intercourse that night. In the morning he left her in the house, came back at 11.00pm and took her to his grandmother's home where she spent the day. Later that evening, they went to a S's place, where, once again, the appellant proceeded to have sexual intercourse by force. The village elders came to take her away after the appellant had left that morning.

5. PW 2, a clan elder, recalled that PW1's mother informed him that PW 1 had disappeared. He began searching for her at the market where he was informed that she had been seen by the appellant. He continued to investigate until he found PW 1 at S's place. PW 5, another elder, confirmed that he was with PW 2 when they began the search for PW 1 and found her at S's place after being taken there by the appellant who had been found at his grandfather's home.

6. PW 1's father, PW 4 testified that when he returned home on the evening on 22nd February, 2014, PW 1 was not at home. He further testified that when the elders found PW 1, he took her for examination and treatment. PW 6, a clinical officer at Ileho Health centre, examined PW 1 and noted that the labia, vagina and cervix were normal.

7. In his sworn defence, the appellant denied the offence. He told the court that he was operating a posho mill and on the material day, he had gone to Kapsabet to buy diesel. He came back and continued to work. He stated that he was at home on 22nd January, 2014 when he was arrested by a clan elder.

8. The testimony of PW 1 was clear how the appellant lured her to his posho mill and proceeded to have sexual intercourse with her. The appellant was not a stranger to her. He held her captive until the elders came to rescue her.

9. Under **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, this evidence need not be corroborated if the trial magistrate believed that PW 1 was telling the truth. The trial magistrate noted that her testimony was, *"sincere, candid and truthful."* From the record, I also find that the testimony was straight forward and was not shaken on cross examination. As I have shown, the evidence was clear and it pointed to the appellant as the perpetrator.

10. If any corroborative evidence was required, it was to be found in the testimony of PW 4 who confirmed that she was missing when he returned home on the material day. The clan elders, PW 2 and PW 5, who had been informed of her absence and proceeded to look for her and were shown where she was by the appellant. All this evidence puts paid to his defence that he had nothing to do with the offence.

11. The appellant submitted hat PW1's testimony was improperly admitted. Under **section 19** of the ***Oaths and Statutory Declaration Act***, a *voire dire* must be conducted before admission of the evidence of a child of tender years to confirm the child is intelligent enough to give evidence and that he or she understands the nature of the oath. A child of tender years has been held to be a child aged 14 years or under. In the case of ***Kibageny arap Kolil v R*** **[1959] EA 92**, the Court of Appeal for Eastern Africa observed that:

> *There is no definition in the Oaths and Statutory Declaration Ordinance of the explanation "child of tender years" for the purposes of section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age of under fourteen years."*

12. The age of the child was proved by production of the birth certificate which showed she was 15 years old. Since the evidence established that PW 1 was aged 15 years, she was not a child of tender years hence she was properly sworn.

13. Finally, I find not merit in the appellant's submission that his rights under **Article 50** of the Constitution were violated. The record shows clearly that when he requested for witness statements, the trial magistrate made an order to that effect. He never raised the issue again and participated fully in the proceedings.

14. Nor was his right to counsel violated. Whether the right is violated depends on whether substantial injustice would result. In ***Karisa Chengo and Others v R*** **[2015]eKLR**. the Court of Appeal held as follows;

> *Substantial injustice only arises in situations where a person is charged with an offence whose*

penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.

15. For an accused to qualify for legal representation under **Article 50**, it must be evident that such a person charged with a capital offence cannot afford legal representation thereby compromising the trial in one way or another. In the instant case, the appellant was charged with the offence of defilement which is not a capital offence.

16. This appeal lacks merit, the conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at KAKAMEGA this 31st day of August 2017.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Ng'etich, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.