REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE No. 69 of 2014

(Being an appeal arising from Kitale Chief Magistrate's court criminal case No. 2723 of 2012 delivered by C.N. Mugo Resident Magistrate on 4/7/2014)

DENNIS SIMIYU….....APPELLANT

VERSUS

REPUBLIC….....RESPONDENT

J U D G M E N T

1. **Dennis Simiyu** "the appellant" herein was charged with the offence of **defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006.** The particulars being that between the night of **3rd November 2012 and 4th November 2012 at [particulars withheld] trading Centre within Elgeyo-Marakwet County, intentionally caused his penis to penetrate the vagina of M.J. K. a child aged 12 years.**

2. The appellant was convicted after a full hearing and sentenced to serve 20 years imprisonment. Being aggrieved with the judgment he filed this appeal citing the following grounds:

> **i) That the trial magistrate erred in law and fact when he convicted the appellant ascertaining that the prosecution witnesses was not proved beyond reasonable doubt as per the dictates of the law.**
>
> **ii) That the learned trial magistrate erred in law and fact by relying on options rather than proved material facts and that the adduced testimonies of the prosecution were uncorroborated and contradictory.**
>
> **iii) That the honourable court refused to heed the defence adduced in the court of law.**
>
> **iv) That the honourable court led by Hon .C.N. Mugo, erred in law and fact by not ascertaining that the charges imposed against the appellant was defective.**

3. When the appeal came for hearing the appellant chose to rely on his written submissions. He submitted that in this case the burden of proof was shifted to the defence and this was contrary to the law.

Further he argued that in defilement cases medical evidence was paramount in determining the age of the victim. That the officer who examined the victim was never called to prove penetration. He cited the case of ***Omuroni V Uganda Court of Appeal No. 2 of 2000*** to support his argument.

4. He stated that failure to call two key witnesses **"Edwin and Koech"** was fatal to the prosecution case. That PW1's case was therefore not supported.

He further submitted that he was not identified as the perpetrator of this offence.

Finally he stated that his defence was not considered by the trial court.

5. The State through Mr. Kakoi opposed the appeal. He submitted that age was proved to be 14 years and penetration was proved to have occurred. That the evidence of PW1 and PW2 corroborated each other. The two girls had been carried by one rider who told them half way the journey that he had run out of fuel. He then called the appellant to bring fuel. The appellant appeared and together with the rider staffed leaves in the mouths of PW1 and PW2 and took them away.

6. The appellant was left with PW1 while the rider went with PW2. The two girls were defiled the whole night. He submitted that there was no medical evidence produced as the clinical officer who examined PW1 went underground. It was his argument that a P3 form was not mandatory based on authorities cited by the trial court. He further stated that the authority cited by the appellant only discussed the issue of penetration and did not hold that medical evidence was mandatory.

7. Finally he submitted that the appellant had been identified as the perpetrator of this crime.

8. The evidence of the prosecution from its five (5) witnesses was that **PW1** and **PW2** both minors boarded a bodaboda (motorbike) on 3rd November 2012 around 6 pm at [particulars withheld] trading Centre. They were to be dropped at their homes in K and C respectively. Some where midway the journey the motorbike rider stopped and told them he had run out of fuel.

9. He called another person to bring fuel. A man came but without fuel. When they inquired about the fuel the rider and the man who had come caught them and inserted leaves into their mouths and they placed them on the motorbike and rode backwards (towards (particulars withheld). The man who was supposed to have brought the fuel sat behind them.

10. The rider dropped PW1 and the other man at [particulars withheld] Moja while PW2 went with the rider. The fuel man took PW1 to a house and she slept with him until morning. During the night he had undressed her and had sexual intercourse with her. He inserted leaves into her mouth and she could not scream. This man slept with her the whole night.

11. The next morning Edwin and Koech came and took PW1 and the Man to Kapcherop police station. She was then taken to Kapcherop Health Centre for treatment. She identified the appellant as the man who had, had sexual intercourse with her.

PW2 also explained the ordeal she had gone through with motorbike rider.

12. **PW3 Edwin Kosgey** and **PW4 Peter Kiptarus** explained the efforts they made to reach to two men who had taken away the two minors (PW1 and PW2). Their evidence is that they coordinated and reached the appellant's house. They found pw1 and the appellant in the said house. They took them to the police station . PW2 was spotted on the way at the Centre.

13. **PW5 PC William Manyonge** was at the police station on 6th November 2012 when members of the public brought the appellant and PW1 to the station. The appellant was alleged to have defiled PW1. Both were escorted to Kapcherop hospital for examination. PW1's age was assessed at 14 years.

PW6 Dr Kiprop Jonathan assessed PW1's age to be 14 years. He produced the report as Exhibit 1.

14. The appellant in his unsworn defence denied the charges. He stated that he is a conductor at Kapcherop Centre. That on 4th November 2012 as he prepared to go to work some one approached him and asked for his name. He told him to wait for people who were looking for him. He went and returned

with four (4) people who took him to the police station. They were willing to release him if he parted with Shs 10,000/-. He did not have the money and that is how he was charged. He denied knowing PW1.

15. This is a first appeal and this court has a duty which has been set out in various authorities. In ***Koech & Another V Republic [2004] 2 KLR 322*** it was held:

> ***" 1. As this was a first appeal, the High Court was mandated to look at the evidence adduced before the trial court afresh, re-evaluate and re-assess it and reach its own independent decision on whether or not to uphold the conviction of the appellants. The court had to bear in mind the fact that it did not see the witnesses as they testified and therefore it could not be expected to make any findings as to the demeanour of the witnesses. The Court is further mandated to consider the grounds of appeal put forward by the appellant."***

16. I have considered the evidence on record , grounds of appeal and the submissions by both parties. The issues I find falling for determination are as follows;-

I) Age of PW1.

II) Whether there as sexual penetration.

Iii) Whether it is the appellant who performed the penetration

Issue No. i) Age of PW1.

17. This issue was raised by the appellant who relied on the case of ***Francis Omuroni V Uganda (Supra)*** to submit that age could not be proved without medical evidence. In the present case PW1 stated that she was aged 14 years then. The evidence by Dr Kiprop Jonathan who examined PW1 was that she was 14 years of age . This was indeed medical evidence by a doctor.

18. From our own jurisdiction the court of appeal in the case of ***Mwalongo Chichoro Mwanyembe V Republic Mombasa Criminal Appeal No. 24 of 2015 (UR)*** stated thus:

> ***" the question of proof of age has been finally settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as a Birth certificate, Baptismal 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.***
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> ***It has been held in a long line of decisions from the High court that age can also be proved by observation and common sense. (See Denis Kinywa Vs Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher Vs Republic Criminal Appeal No. 11 of 2015). we doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in criminal trials the threshhold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal Uganda in Francis Omuroni Vs Uganda Criminal Appeal No. 2 of 2000.***
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> ***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.....".**

19. This case from the court of Appeal of Kenya guides us on how to deal with the issue of age of minors. My finding on this issue therefore is that age was established by the evidence of PW1 and PW6 to be 14 years.

Issue No. ii) Whether there as sexual penetration.

20. The appellant still relying on the **Omuroni case** argued that penetration could only be proved by medical evidence. It is true that the clinical officer who examined PW1 refused to come to give evidence

in this case. It is not clear why the provisions of section 33 Evidence Act were never applied. Be it as it may the issue is whether penetration can not be proved by any other credible evidence, save by medical evidence.

In the case of ***Kassim Ali V Republic Criminal Appeal NO. 84 of 2005 (Mombasa)*** the Court of Appeal held:

> ***"[1].....the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence."***
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> ***The principle in the Kassim Ali case was later applied by the court of Appeal in the case of Geoffrey Kionyi Vs Republic Criminal Appeal No. 270 of 2010 where the court stated interalia;***
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> ***" where available medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however lasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if the defilement was perpetrated by the accused person. Indeed under the proviso of Section 124 of the Evidence Act, Cap 80 Laws of Kenya a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."***

21. The two cases above plus the proviso to Section 124 of the Evidence Act confirm that the court shall convict based on the evidence of a victim a sexual offence if it believes him /her and gives reasons. In this case the learned trial magistrate believed the evidence of PW1. She stated this in her judgment at page 76 lines 21-29 of the Record of Appeal as follows:

> ***" PW1 laid out the sequence of events before the commission of the offence alleged. The act of penetration comes from what PW1 said. It was a private affair for which only the accused ands her were privy to. He confirmed that the accused did as she called it, rape her by inserting his penis into her vagina. I certainly did believe the evidence of PW1 and I did find it to the truthful. She had no ill motive to incriminate the accused that I could see and in my opinion what she said was corroborated by circumstantial evidence outlined herein below notwithstanding the absence of the P3 form".***

On this issue I find that there was penetration.

Issue No. (iii) Whether it is the appellant who performed the penetration

22. PW1 stated that the person she was left with at [particulars withheld] Moja was the appellant. PW2 who was with her confirmed this evidence. PW1 went further to explain that it is the appellant who took her to his house where he penetrated her the whole night.

23. PW3 and PW4 and others followed leads on who was seen with PW1 and PW2 the previous evening until they traced the appellant's house. PW4 was the first to get to the house. He pushed the door and entered, and found PW1 and the appellant . He called PW3 on his mobile phone as him and his team were not far. They came immediately and they caught PW1 and appellant whom they took to the police station.

24. All this evidence gives credence to the evidence by PW1. She had spent the night at the appellant's. PW3, PW4 and others found her and appellant in the appellant's house.

The appellant in his defence does not even in the face of this overwhelming evidence explain what he was doing with PW1 in his house that early morning. He only explained how he was arrested. The prosecution case was not dislodged.

25. I am satisfied that the prosecution proved its case beyond reasonable doubt. The sentence meted out

by the trial court is lawful and is the minimum provided for under Section 8(3) of Sexual Offences Act No. 3 of 2006.

26. I find the appeal to lack merit and I dismiss it.

The conviction and sentence are upheld.

Orders accordingly.

Delivered, signed and dated on 30th day of August 2017 at Kitale.

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H. ONG'UDI

JUDGE

<u>In the presence of ;</u>

Ms Kagai for Mr Kakoi for State

Appellant - present

Kirong - Court Assistant

Court: Judgment delivered in open court.

Right of Appeal explained.

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H. ONG'UDI

JUDGE

30/8/2017