REPUBLIC OF KENYA

IN THE HIUGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CRIMINAL APPEAL NO.74 OF 2015

ALI ABDALLA WEKESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against conviction and sentence arising from the judgment Hon L.M. Nafula, SPM, in Mumias SPM Criminal Case No.823 of 2014 delivered on 29th June 2015)

JUDGMENT

1. The appellant herein was convicted of the offence of defilement contrary to ***section 8(1)(2)*** of the Sexual Offences Act No3 of 2006 and sentenced to serve life imprisonment. He was aggrieved by the judgment of the lower court and has appealed against both conviction and sentence.

2. The particulars of the offence against the appellant were that on the 24th August 2014 at around 7 pm at [particulars withheld] Village, Nabongo Location in Mumias sub-county within Kakamega County he intentionally caused his penis to penetrate the vagina of F.A. (herein referred to as the complainant), a child aged 6 years.

The appeal:

3. The grounds of appeal are that:-

> *"1. The sentence meted out was very harsh and excessive in the circumstances.*
>
> *2. The learned trial magistrate erred in law and facts in convicting the appellant on the evidence which did not prove the charges.*
>
> *3. The evidence produced before court by witness was fabricated.*
>
> *4. The trial court did not consider that the appellant was not medically tested to confirm if indeed it was him who committed the alleged offence.*
>
> *5. The trial court did not consider the doctor's report that there was no semen or injuries found on the complainant.*
>
> *6. The trial court did not consider the appellant's mitigation."*

The case for prosecution:

4. The case for the prosecution was that the complainant was living with her grandmother PW1. That the appellant was their neighbour. That on the 24th August 2014, the complainant's grandmother was out for work. That a neighbour to the complainant, Yusuf Okello Ben, PW3, received a report from a neighbour that there was a child who had entered into the house of the appellant and that the child had stayed there for long. That he, PW3, went to the house of the appellant. He found the door pushed back. He pushed it and it opened. The house was one-roomed partitioned with a curtain. He pulled the curtain and found the appellant lying on the complainant on a mattress on the floor. On seeing him the appellant hurriedly rose up with his trousers on his knees. The girls' dress had been pushed upwards to her chest. She had no pant on. He told the girl to get up. She did so. The appellant pulled up his trousers. He, PW3, took the girl to her grandmother's place. The complainant's grandmother had just returned home from work. PW3 told her that he had found the girl at a bad place and that if there was any problem with her he was willing to tell what had happened. The grandmother prepared beddings for the child. The child slept. On the following day, the grandmother went to work. She returned home at 1 pm. Her neighbours told her to take the girl to hospital as she had been defiled. She checked the girl's vagina and found it with some redness and puss oozing out. She took her to St. Mary's Mission Hospital. She

was admitted in the ward. She was released on the following day. They reported at Mumias Police station. The girl was issued with a P3 form. On 29th August, 2014 she was taken to Matungu Sub-county Hospital. A clinical officer, PW4 examined her. He found her with a broken hymen with reddish demarcation, bruised lower vagina and tender vaginal walls. The clinical officer completed the P3 form. Later on 6th January 2015 the Clinical Officer examined the girl for age assessment and arrived at the age of 6 years.

5. Corporal Julius Bett PW5 investigated the case and charged the appellant with the offence. The accused denied the charge. He was tried. During the hearing the treatment notes from Makunga Health Centre, the P3 form and age assessment report were produced as exhibits –Ex2, 3 and 4 respectively

The appellant's defence:

6. Upon being placed to his defence the appellant opted to remain silent and gave no defence.

Findings of the trial court:

7. The trial magistrate found that the evidence adduced against the appellant was over whelming. That PW3 found the appellant in the act of defiling the complainant. That PW3 had no personal differences with the appellant and therefore that he had no reason to lie against him. Further that the evidence on defilement was corroborated by the evidence of the clinical officer, PW4.

Submissions by the appellant:

8. The appellant submitted that the evidence against him was not watertight. That the complainant testified that he did bad manners to her. That it was not explained to the court what this meant. That if this was true the girl did not inform her grandmother about it. That the complainant's grandmother reported to the police that she did not witness the act yet she told he clinical officer that she found the complainant and the appellant in bed. That he, the appellant, was not tested to prove that he is the one who committed the offence. That the estimated age of the girl in the P3 form was recorded as 13 years. That therefore the age of the complainant was not proved. That the clinical officer who did the age assessment was not qualified to do such assessment.

Submissions by the State:

9. The prosecution counsel submitted that the case had been proved beyond all reasonable doubt. That the age of the girl was estimated by a clinical officer PW5 at 6 years. That the evidence of penetration was corroborated by Mr Okello PW3 who found the appellant in the act of defiling the complainant. That the girl knew the complainant before as he was their neighbour. Further that there was no need for the appellant being medically examined as he was found in the act.

DETERMINATION:

Duty of appellate court:

10. The duty of a first appellate court was set out in the case of ***Okeno vs R*** (1972) EA 32 at page 36 where the Court of Appeal said that:-

> ***"An appellant on a first appeal is entitled to expect evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

11. The accused is charged with the offence of defilement contrary to ***section 8(1)*** of the Sexual Offences Act that states that:-

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

The ingredients for the offence of defilement are:-

(1) Prove of the age of the victim of the offence

(2) Penetration of the victim

(3) Prove that the accused is the person who did the penetration.

The trial magistrate did not adequately address herself to all these issues. It is my duty now as an appellate court to analyse the evidence adduced at the lower court and draw my own conclusions.

12. The importance of proving the age of the complainant in a case of defilement was emphasized by the Court of Appeal in ***Kaingu Elias vs R*** (2016) eKLR where the court sitting at Malindi said that:

> ***"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim."***

In this case the complainant stated in her ***voire dire*** examination that she did not know her age. Her grandmother< PW1 stated that she did not know the age of the girl. The estimated age of the girl in part 1 of the P3 form that was completed by the police officer who issued the P3 form was 13 years. The clinical officer, PW4 did an age assessment report of the girl on 6th January 2015 and arrived at the age of 6 years.

13. The age of minors in defilement cases can be proved by various methods. In the case of ***Edwin Nyambaso Onsongo vs Republic*** (2016) eKLR, cited in the case of ***Mwolongo Chichoro Mwanyembe vs Republic, Mombasa Criminal Appeal No.24 of 2015*** (UR) where the Court of Appeal held that:-

> ***"… the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism 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." "… we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."***

14. In this case the complainant did not know her age. Her guardian also did not know her age. It is not on record whether the policeman who testified, PW5, is the one who issued the P3 form and recorded the age of the complainant as 13 years. The witness, PW5, was not questioned as to whether he is the one who recorded the age of the complainant as 13 years. It is not known on what basis the age of the girl was recorded in the P3 form as 13 years. The clinical officer who treated the complainant, PW4, later did an assessment on the age of the complainant and arrived at the age of 6 years. When the trial magistrate conducted a ***voir dire*** examination on the girl she said that she was in baby class and that she did not know her age. If the girl was aged 13 years it is incomprehensible that she would not be knowing her age or that she would be in baby class. The ***voir dire*** examination revealed that she was of very tender age. The clinical officer who did the age assessment was a trained medical personnel of 6 years experience. His report indicates that the girl did not have a complete dental formula as she had 12 upper and 12 lower teeth. I think his report was soundly based that the girl was aged 6 years. The trial magistrate did not make a clear finding of the age of the girl. However there was credible evidence that the girl was aged 6 years.

15. Penetration is defined in section 2 of the Sexual Offences Act No.3 of 2006 to mean:-

> *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

16. The complainant herein gave unsworn evidence and was not cross-examined by the appellant. It was a misdirection on the part of the magistrate not to allow the appellant to cross-examine the complainant. The right to challenge evidence is one of the cardinal rights enshrined under article 50 of the Constitution. It is also worthy to note the provisions of ***section 302*** of the Criminal Procedure Code provides that the witnesses called for the prosecution are subject to cross-examination by the accused person or his advocate, and to re-examination by the advocate for the prosecution. In the case of ***D.K.M. vs R*** (2016) eKLR, the Court of Appeal sitting at Nyeri stated that cross-examination of a child who has given evidence not on oath is permitted by law. Whether then the child in this case gave sworn or unsworn she was subject to cross-examination by the appellant.

17. However, the failure of the child to be cross-examined by the appellant did not occasion a miscarriage of justice. The evidence of the complainant was not the only evidence to prove the defilement. Yusuf Okello, PW3 stated that he found the appellant lying on the complainant inside the house of the appellant. Mr Okello testified that he took the girl to her grandmother, PW1, and told her that something had happened to her. The grandmother indeed confirmed the evidence of Mr Okello that he, Okello, took the child to her and told her that he had found her at a bad place. The appellant cross-examined Mr Okello and there was no suggestion of any grudge between the appellant and Mr Okello. There was thereby no reason for Mr Okello to lie against the appellant that he found him lying on top of the girl with his trousers down. The trial magistrate believed the evidence of the witness and there is no reason to differ with that finding.

The clinical officer PW4 saw the girl 5 days later on 29th August 2014 and observed that her hymen was broken with reddish demarcation, bruised lower vagina and had hyperemic tender vaginal walls at the entrance. It is clear from the medical evidence that the girl had been defiled.

18. The appellant argued that there was no medical evidence produced to link him with the defilement. However it is not mandatory that the prosecution has to adduce medical evidence to prove that the accused is the person who committed the offence. A court can convict an accused person of the offence of defilement even without medical evidence to link him with the offence. This was the holding of the Court of Appeal in ***Geoffrey Kieji vs Republic, Nyeri Criminal Appeal No.270 of 2010*** (as quoted in ***Dennis Osoro Obiri*** (2014) eKLR where the court stated that:-

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add thst 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 it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, act on conviction 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 the belief."***

19. In this case, Mr Okello, PW3, found the accused lying on the complainant on a mattress on the floor. His trousers were to his knees. The girl's dress was pulled upwards to her chest. She did not have a pant on. All this evidence coupled with the evidence of the clinical officer that the girl had been defiled, proved that the appellant had defiled the girl. The fact that the appellant was not examined did not mean that

he did not commit the offence. The fact tht there were no sperms in the genitalia of the girl did not mean that there was no defilement. I find that there was other sufficient credible evidence that proved that the appellant is the one who perpetrated the offence. There was no basis on which the court could say that the evidence was fabricated. The offence was proved beyond all reasonable doubt.

20. The appellant argued that the court did not consider his mitigation. The court record indicates that the appellant stated in mitigation that he was seeking for leniency. The court then sentenced him to life imprisonment as prescribed by the law.

21. The appellant was charged with defilement contrary to ***section 8(1)*** as read with ***section 8(2)*** of the Sexual Offences Act No.3 of 2006. Where an Act of Parliament prescribes a minimum sentence the court cannot impose a lesser sentence. In ***David Kundu Simiyu vs Reopublic, Criminal Appeal No.8 of 2008, Eldoret*** (as quoted in ***Fredrick Nzioki Wambua vs Republic*** (2015) eKLR) the Court of Appeal held, in respect to the minimum sentences provided under the Sexual Offences Act that;

> ***"Those are minimum sentences and Parliament appears to give no discretion to courts to impose sentences below those specified as the minimum. The provisions accord the prime objectives of the Act which is prevention and protection from harm and from unlawful sexual act."***

22. The child herein was aged 6 years. The appellant was sentenced to the minimum sentence for the offence committed. The court had no discretion to sentence the appellant to a lesser sentence.

23. On my own evaluation and analysis of the evidence I have come to the conclusion that the appellant was rightfully convicted for the offence of defilement contrary to ***section 8(1)*** as read with ***sub-section 8(2)***of the Sexual Offences Act. The sentence imposed for life imprisonment was lawful. The judgment of the lower court is thereby upheld and the appeal is accordingly dismissed.

Delivered, dated and signed at Kakamega this 3rd day of August, 2017.

J. NJAGI

JUDGE

In the presence of:

Appellant …… present in person

Ngetich …… for State

Okoit ……. court assistant

14 days right of appeal.