REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 47 OF 2016

BETWEEN

COLLINS OTIENO JOHN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and Sentence of P. GICHOI (MRS), CM, in Homa Bay CM's Court Criminal Case No.1015 of 2014 dated 31/08/2015)

JUDGMENT

1. **COLLINS OTIENO JOHN** (the appellant) was charged with the offence of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences act No.3 of 2006**. The charge against him being that on 2nd day of September 2014 in **HOMA BAY** County, he unlawfully and intentionally caused his penis to penetrate the vagina of **V.A.*[1]** a child aged 13 years.

2. The appellant denied the charge and after trial in which 6 witnesses testified for the prosecution, and the appellant was the only defence witness, he was convicted on a charge of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences act** on account of the victim's age.

3. The unsworn evidence of **V.A.** (PW1) a standard 5 student at **[particulars withheld] CADEMY** was that she had gone to fetch firewood on 02/09/2014 at **GOT KOBONGO** (**KOBONGO HILL**) which was near her home, being in the company of a woman whose name she could not recall, but they parted ways and she went to fetch the firewood alone.

On the way, she met the appellant (whom she had never known before), coming from the opposite direction. He got hold of her and dragged her to the bushes in the hill, and when she screamed for help, he slapped her and threatened her with dire consequences if she continued screaming.

4. The appellant removed her skirt and panty, knocked her down (even as she continued screaming). He then lowered his trouser and lay on her, putting his penis into her vagina. She felt a lot of pain and continued to scream – meanwhile he was touching her private parts.

5. PW1's screams attracted people who rushed to the scene and found the appellant still lying on her. One of them was **TOYI**, who got hold of the appellant and slapped him – and the appellant ran away. PW1's blouse, panty and shirt got torn during the struggle. **TOYI** took her to his house and gave her other clothes to wear. PW1 explained that she had known **TOYI** even before as he lived near the road. She identified the torn clothes which were produced in court as exhibit. Toyi made a phone call to her parents and informed them about the incident, and they found him and after reporting to police, she was taken to hospital. She stated:-

> **"I was able to see the accused well. It was during the day …"**

She explained in cross examination that she was able to identify the appellant to police at **NGEGU** where he was arrested.

6. **WILFRED CHRIS WAIYAKI** (PW2) a boda boda operator was clearing bushes within the compound on 2/9/2014 when he heard a child screaming about 40-50 m from his compound. He rushed there and found PW1 and the appellant on the ground. The appellant was lying on the ground, and he had his trousers lowered to his knees. He got hold of the appellant and dragged the child away from him – the appellant fled. He explained:-

> **"People were passing and staring at us but did nothing. The accused was therefore able to walk away."**

7. PW2 used to see the appellant although he did not know him very well. He took PW1 to his home – she was crying, and since he knew

her parents, he rang them and explained to them what had happened after they had gone to his house.

PW2 confirmed that he went by the nickname **TOYI** and he observed that the child's clothes were torn.

8. **C.O.O** (PW3) confirmed receiving a call on 02/09/2014 from PW2 who informed him that he had rescued his daughter **V.A**. as she was being defiled by a fisherman at about 1.00 p.m. He accompanied PW2 to the beach to look for the suspect and eventually they apprehended him at Ngegu. He stated that when she saw his daughter her clothes were torn and soiled and she had blood stains on her body.

9. **B.O.O** (PW4) the mother of **V.A.** stated that she had sent her daughter to fetch firewood near her house, and at about 1.30 p.m. she got a phone call from PW2 that he had rescued the girl as she was being defiled and she should go and collect her from his house. When she got to PW2's house she found **V.A.** crying and noticed that her clothes were torn and the panty was blood stained. She examined the girl's genitalia and noted that she was bleeding **V.A.** told her she had been defiled. On cross examination she stated:-

> **"… my daughter saw you well when you defiled her. You defiled her in a bush near [particulars withheld] home."**

She produced the baptismal chit showing the girl was 13 years old.

10. **DR. DAVID NYAWADE** (PW5) who examined **V.A.** stated that on examination he found there was laceration of the labia minor and the injuries were 14 hours old. He concluded that she had been defiled as there was evidence of penetration marked by laceration of the labia minora.

11. **PC VICTOR WAITHARA** (PW6) confirmed receiving a report about the incident from PW4. Later on the appellant was brought in to the police station by PW2 and PW3.

12. In his sworn defence, the appellant stated that while asleep inside his house at **NGEGU** beach, six men got there, apprehended him and forced him to admit that he had defiled a girl. The men who apprehended him kept saying that the defiler had dread locks and since the appellant had dread locks he decided to accompany them to the police station as they demanded. It was his contention that he did not commit the offence.

13. On cross examination, he stated that he first saw **V.A.** in court and the only person he was familiar with was PW3 whom he used to see at **NGEGU BEACH**.

14. In her judgment the trial magistrate noted that although no birth certificate was produced, the baptismal certificate indicated that **V.A.** was 13 years old, and her mother also gave her age as 13 years – she accepted that this adequately established the girl's age.

15. She was also satisfied that the evidence proved **V.A.** had been defiled and **V.A.** was able to positively identify her attacker as the incident took place in the daytime at about 1.00 p.m., and her evidence was **" unshaken, detailed, consistent and straight forward."**

Further the appellant was caught in the act by PW2 who knew and recognized him.

16. The appellant's defence was considered and rejected on ground that he only dwelt on events surrounding his arrest and only glossed over the incident when the same was put to him on cross examination. His alibi defence was rejected as coming too late in the day and that it was in any case rebutted by the prosecution's evidence.

17. The trial magistrate further found that the medical evidence and that of PW2 corroborated what PW1 narrated to the court. The trial magistrate cited a number of cases in pointing out that age is a key ingredient in the offence of defilement and in this instance the evidence showed V.A. fell in that age category contemplated by **section 8 (1) (3)** of the **Sexual Offences act** and thus convicted him.

18. The appellant challenged these findings on amended grounds that:-

> *1) The offence was not proved to the required standard especially with regard to the victim's age.*
>
> *2) The trial magistrate failed to comprehensively evaluate the evidence presented and the exhibits thereto.*
>
> *3) There were grave contradictions and inconsistencies in the evidence presented by prosecution witnesses, and the trial magistrate misdirected herself by relying on the baptismal card as proof of age instead of a birth certificate.*

19. The trial magistrate was also faulted for admitting evidence by the Clinical Officer and for rejecting the appellant's defence without due consideration.

20. At the hearing of the appeal, **MR. ONGOSO** who appeared on behalf of the appellant submitted that the conviction did not relate to the preferred change, and the trial magistrate did observe that the complainant had a big body which would make anyone think that she was mature although she was a minor.

He also lamented that the court should not have relied on the baptismal certificate as proof of age since the maker was not called to testify.

21. Counsel argued that there were glaring contradictions because despite the minor saying that no one sent her to fetch firewood, her mother

claimed she had sent her.

22. He further submitted that the medical evidence showed V.A.'s labia majora and cervix were normal, coupled with the fact that no vaginal swab or pubic ham was taken for examination to link the appellant (who in any event was not examined).

23. Counsel alluded to the need for an independent eye witness saying PW2 was lying and the state could not use **Section 124** of the **Evidence act** to file in the gaps left by prosecution. He urged the court to be guided by the decision in **GAILETH MUBARAK ELKANA –VS- R. CRIMINAL APPEAL NO.48 OF 2013** which held that before convicting on the uncorroborated evidence of the complainant alone, the court must be satisfied that the circumstantial evidence alluded to supports the evidence available, and the prosecution must not use provisions of **Section 124** of the **Evidence act** to fill in the gaps.

24. In opposing the appeal, **MR. OLUOCH** on behalf of the State submitted that the observation by the trial magistrate about the complainant's physical appearance which may have led the appellant to assume that she was 18 or above was not a defence open to the appellant because:-

> *1) He did not proper that line of defence, that he had been led to believe she was over 18 years.*
>
> *2) The sexual relation was not consensual so that even if she was an adult, it would not gave the appellant reason to drag and rape her.*
>
> 3) *The law under **Section 214 Criminal Procedure Code** permits a trial court to convict an accused person for an offence other than the one charged, if the evidence on record so establishes*.

In any event no prejudice was occasioned to the appellant.

25. It was further submitted that different documents including a birth certificate may be used to prove age, counsel also pointed out that although the medical evidence confirmed that the labia majora and cervix were normal, the labia minora had lacerations which led the medical officer to opine that there had been forceful penetration. He further pointed out that in any event the appellant had been caught red handed in broad daylight, and the appeal ought to be dismissed as having no merit.

26. I have re-evaluated the evidence, although PW1 and her mother contradicted each other as to whether she had been sent to collect firewood or she went on her own volition, my finding is that the issue is not a material fact which would affect the material particulars of the offence. Whatever the position – PW1 was not at home, and what is material is whether she was at the alleged scene at the said time and place, and whether she was defiled. That contradiction is not fatal to the prosecution case and the cited case of **R –v- PETER MBURU [2005] e KLR** does not apply as in that instance the contradictions materially affected the detailed material particulars.

27. Whereas it is true that there was no birth certificate produced, there was the evidence of the mother who said she was 14 years and the baptismal certificate which gave the age as 13 years.

28. In the case of **FRANCIS OMURONI –VS- UGANDA CC NO.1 OF 2000**, the court held that apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian, and by observation, and common sense.

29. The minor's mother gave her age within the range the baptismal certificate, and the minor stated. In any event for the offence the appellant was convicted the age range is between 12 years – 15 years and the slight discrepancy was not fatal – it did not alter the nature of the finding that she fell within the category contemplated under **Section 8 (1) (3)** of the **Sexual Offences Act**.

30. As to whether the complainant's physique made her look like an adult – that would not be a reason to drag her and forcefully have sexual intercourse with her – indeed there was no suggestion that the incident was consensual.

31. It is not clear to me why the appellant's counsel wishes PW2's evidence to be disregarded – the nickname he gave as TOYI is the same one. PW1 referred to. The incident occurred in broad daylight, the appellant was known to him as he was someone PW2 had seen before; and PW2's evidence corroborated that of PW1 in all material particulars. The issue of using **Section 124** of the **Evidence Act** to fill in the gaps does not arise as that would only be in a situation where the victim is a minor and is the sole witness.

32. My finding is that the trial magistrate duly considered the evidence, properly analysed it, and indeed pointed out reasons why she rejected the appellant's defence – I draw the same conclusion.

33. In the lower court **Section 179 (2)** of the **Criminal Procedure Code** provides as follows:-

> **"179(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."**

34. The trial magistrate cannot therefore be faulted for convicting appellant in an offence other than the one he was initially charged with. The upshot is that the conviction was safe and is upheld. The sentence is legal and is confirmed.

35. The appeal is dismissed.

Delivered and dated this 16th day of October, 2017 at Homa Bay

H.A. OMONDI

JUDGE

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[1] *Initials used to protect her privacy