REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 130 OF 2016

S K M …….....……..... APPELLANT

VERSUS

REPUBLIC…… PROSECUTOR

JUDGMENT

1. The appellant herein S K M was charged with the offence of defilement contrary to section 8(1) as read with 8(3) of the Sexual Offences Act of 2006. The particulars of the charge were that on diverse dates between 20th day of January, 2012 and 20th day of September, 2014 in Kilifi County within Coast region, intentionally caused his penis to penetrate the vagina of MMN [name withheld] a child aged 15 years.

2. He also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the said charge were that on diverse dates between 20th day of January, 2012 and 20th day of September, 2014 in Kilifi County, within Coast region he intentionally touched the vagina of MM [name withheld] a girl aged 15 years.

3. The Hon. Magistrate after hearing the prosecution witnesses and the defence put forth by the appellant, found him guilty of the charge of defilement and sentenced him to 20 years imprisonment on 21st October, 2016. The appellant being dissatisfied with the conviction and sentence filed his grounds of appeal on 1st November, 2016 raising the following grounds of appeal:-

> (i) That the Learned Trial Magistrate erred in law and fact in finding his conviction and sentence without considering that the charge of defilement was not proved beyond any reasonable doubt hence the sentence imposed upon him by the trial court was unsafe;
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> (ii) That the Learned Trial Magistrate erred in law and fact by finding his conviction and sentence (sic) without considering that by convicting him without seeing that the prosecution did not prove their case to the required standard of law;
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> (iii) That the Learned Trial Magistrate erred in law and fact by finding his conviction and sentence (sic) without considering that the prosecution case was governed by mass contradictions;
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> (iv) That the Learned Trial Magistrate erred in law and fact by finding his conviction and sentence without considering his reasonable defence statement.

4. The duty of the 1st appellate court is to re-evaluate the evidence adduced at the court below and reach

its own decision taking into account that it neither saw nor heard the witnesses testify. In the case of **David Njuguna Wairimu vs. Republic [2010] eKLR** the Court of Appeal reiterated this duty as follows:-

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

The Prosecution's case

5. The complainant MM [name withheld] testified as PW1. The Hon. Magistrate conducted a voire dire examination and was satisfied that she understood the difference between truths and falsehoods and the nature of an oath. She therefore gave sworn evidence.

6. She testified that she was born on 6th April, 1996 but does not have a birth certificate. Her uncle, A K told her that was her birth date. She informed the court that she lived in Majengo, K with her parents S L and M C. She was a pupil in class 4 at [pariculars withheld] Primary School. She gave her age as 16 years as at the time she testified on 11th February, 2015.

7. It was her evidence that on diverse dates between 20th January, 2012 and 20th September, 2014, she was at their home in Ndonya, Mtwapa and she had no relationship with anyone. She had no boyfriend. She indicated that she had a 3 year old child, who as borne of the appellant, S K, whom she had a relationship with in the year 2011. She stated that she became pregnant in November, 2011 and the appellant was her boyfriend. They had sex many times which she explicitly explained in her evidence. She lived with the accused for one month. Her parents found her at the appellant's house in Maweni and took her to Kijipwa Police Station. She was then examined and treated at Nyungo Health Center. She indicated that she gave birth on 17th July, 2012 and the relationship ended. She moved to Giriama and stayed at home. She went back to school in January, 2013 after getting funding from donors. She indicated that the appellant then went to her home and took her and the baby to his uncle in Bomani but her parents were not aware of that fact. She had left the child's clinic card at their home which necessitated her to go back to take her child to the clinic. Her parents refused to allow her to leave.

8. It was her evidence that she started having sex with the appellant at Bomani. Her parents took her to Kijipwa Police Station and reported they had found her. She was taken to hospital and resumed school. She did not see the appellant until September, 2014 when he went to see the child. He was arrested the same month. She indicated that she went to Coast Provincial General Hospital for age assessment, the report thereof dated 28th March, 2014 was marked as MFI-1. She informed the court that she was 17 years old in the year 2014.

9. On cross-examination, PW1 stated that the appellant was her boyfriend for 3 years. Her parents knew he was her boyfriend. She indicated that when the appellant took her to Giriama she was pregnant. Her parents did not give her permission to go there. In November, 2013 she became pregnant a second time when she was living with the appellant but she had a miscarriage. She stated that W K is her father and the appellant's parents paid dowry to him.

10. PW2, C E M testified of how on 26th January, 2012 he was awoken by his wife M who asked him if he had seen PW1, his step daughter, who was supposed to prepare for school. They looked for her in the compound and in the neighbour's compound to no avail. He asked his neighbour Chengo who had visited his home the previous night with the appellant, to assist in looking for PW1.

11. At midday of the same day, a Village Elder called and told him that PW1 had been stopped in his

village with a man. He proceeded to the Village Elder's home where he found Chengo, the Village Elder, his colleagues and PW1. He was told that she was waiting for the appellant. When the appellant approached the scene, he noted their presence and ran away. PW2 reported the matter to Kijipwa Police Station. When interrogated, PW1 stated that she was waiting for the appellant to buy a ticket for them to travel to his home in Bamba. She further said she had a sexual relationship with the appellant and she suspected she was pregnant. PW2 testified that PW1 had run away from home before that date. She was taken to Vipingo Health Center and treated. She was 3 months pregnant.

12. He further testified that at a later date, the appellant made PW1 run away from home again. She went missing for a long time. PW2 reported the matter to the Village Elder. When she returned to their home, her pregnancy was visible. It was his evidence that when PW1 returned home the second time she delivered. The appellant resurfaced after PW1 gave birth when he went to see the child. PW2 and his wife made plans for PW1 to go back to school. FIDA took up the matter and PW1 was examined again.

13. PW2 stated that he was given warrants by the OCS Kijipwa Police Station which he took to the DO's office, Kanamai. The appellant was thereafter arrested. It was PW2's evidence that he had known the appellant since the year 2009 and he was a palm tapper in the village but later became a boda boda rider. He had never differed with him.

14. On cross- examination, PW2 stated that he was PW1's guardian. She went missing for a day at first. The appellant assisted her to run away from her home a 2nd and 3rd time. When she ran away the 2nd time, PW1 told him she got pregnant but the appellant assisted her to abort. The appellant and PW1 were living together when she ran away whereas she was supposed to go back to school. He denied that there was a marriage between PW1 and the appellant.

15. PW3, S L M is PW1's mother. She testified that on 26th January, 2012 at night, PW1 eloped with the appellant. They found her missing from her bedroom when they woke up. PW2 went to look for her at Gorofani as they had received information that she had been seen there. They talked to the village Elder, Charo Kwalulunala who directed them to his young wife where they found PW1 with Charo and the Village Elder's wife. PW3 interrogated PW1 who told her that the appellant had taken her to Gorofani. PW3 stated that she knew the appellant as a boda boda rider. She had seen him in the village for a year before the incident. She indicated that PW1 had left with her clothes which she said were in the appellant's house where he was employed. They proceeded to the appellant's place of employment to get PW1's clothes but the workers there said they did not know him.

16. One of the workers called the Village Elder, Mr. Mrembe who gave them a letter to take to Kijipwa Police Station. The appellant who had been called on his cellphone, went to where they were but he ran away from them. At the Police Station they were given a document to take to hospital. PW1 returned home with them but eloped a 2nd time. She could not recall the date but it was on a date an organization was to take PW1 to Coast General Hospital for examination. PW1 ran away for a month and the appellant said he was not with her when he was called on phone. At that time PW1 was pregnant. She later gave birth. She returned home to pick her child's clinic card and told PW3 that she was at Bomani and the appellant was at work. PW3 stated that PW2 accompanied her to the clinic and reported to Kijipwa Police Station. It was PW3's evidence that PW1 told her that she had a miscarriage while at the appellant's place. PW1 was taken to Coast General Hospital for examination and then returned to school. PW3 informed the court that she had not differed with the appellant and that he was arrested at Majengo

17. On cross-examination, PW3 informed the court that PW1 eloped on January, 2013 and she found her a week later at her grandmother's place where she had stayed for 3 days. She was employed there. PW3 restated that the appellant was living with PW1 but he dumped her at her grandmother's. She stated that PW1 eloped with the appellant twice. PW1 had got an organisation to take her back to school but she told PW3 that she was going to charge her phone but she did not return home. PW3 indicated that she went to look for PW1 because she needed to be taken to Coast Provincial General Hospital and enrolled back to school. She further stated that PW1 informed her that the appellant took her to Bomani. She stayed with him for months. PW3 confirmed that Chengo assisted them to look for PW1 the first time she eloped.

18. PW4 was Dr. Amal Abdulaziz Almasi. He produced a P3 form dated 3rd April, 2014 for PW1 as p. exh. 2. It was signed by Dr. Mishi whom he had worked with from the year 2014. He was conversant with his handwriting and signature. The said report indicated that PW1 had a history of defilement, she had a miscarriage in February, 2014. She alleged the pregnancy was as a result of defilement. She was HIV positive and had been put on septrin. She had an old broken hymen and no discharge of blood in the vagina. Her genitalia was normal.

19. PW5 was No. 85262 PC Jacob Abulundu of Kijipwa Police Station. He was the Investigating Officer in this case. He testified that on 26th June, 2012, PW1 and her father went to the Police Station. He reported that PW1 went missing on 25th June, 2012 and was traced at the appellant's home on 26th June, 2012. She was sent to Vipingo Hospital for examination. She later disappeared again with the appellant's help. She was then 3 months pregnant. She was issued with a P3 form on 3rd April, 2014 which was filled at Coast Provincial General Hospital. Age assessment was done at the said hospital where her age on estimation was given as 17 years. PW5 produced the age assessment report as p. exh. 1. He stated that the appellant was arrested by Administration Police from Kikambala on 20th September, 2014 and taken to Kijipwa Police Station, from where he was charged.

20. On cross-examination, PW5 stated that a report was made in the year 2012 and PW1 was 3 months pregnant then.

The defence case

21. In his sworn defence statement, the appellant stated that PW1 was his wife and they have 2 children. He paid 2 cows as dowry to her father, W K. He started living with PW1 in the year 2012. He testified that PW1's mother went and took her away to work for someone who needed a house help. He later went for her and started living with her at Ndoya. He indicated that PW2 was arrested and taken to Kijipwa Police Station after differing with a woman and he went to the said Police Station with PW2's son J. The said woman said she wanted Kshs. 10,000/= but the appellant got Kshs. 5,000/= from his employer.

22. On 9th September, 2014 he was informed that he was needed at Kijipwa Police Station but did not go. He was later told he was needed at the DO's office. He went there and was told to call his wife. PW1 went there. He was taken into custody. PW1 was asked if she was his wife and she confirmed the same. He produced def. exh. 1 to show he had paid dowry.

23. On cross-examination, the appellant stated that he was told that PW1 was 18 years and 6 months by her mother. She had a waiting card for an identity card in the year 2012. He indicated that they were married for 4 years after getting married at the end of December, 2012. He stated that he did not ask PW1 how old she was.

Analysis and Determination

24. The appellant filed his written submissions which he relied on entirely. The Prosecution Counsel, Ms. Ogweno conceded to the appeal on the grounds that the dates on the charge sheet and those stated by the prosecution are at variance, which raises doubt as to when the offence was committed. She also submitted that the age of the complainant was not adequately established as the complainant said she was 17 years old but the charge sheet gave her age as 15 years. No birth certificate was produced. The said Counsel further stated that PW1 said she was married to the appellant and they had 2 children and that PW3 told him that PW1 was 18 years old.

25. In his written submissions, the appellant stated that the charge was incurably defective for failing to disclose who the victim of the offence was and that the charge was not amended. A perusal of the lower court proceedings reveal that on 11th February, 2015 when the hearing of the case begun, the Prosecution applied for PW1 to be stood down so that he could amend the age of the complainant on the charge sheet. The Prosecutor never did so. A perusal of the charge sheet reveals that the complainant was said to be a child of 15 years. The age assessment undertaken on 28th March, 2014 indicated that her estimated age

was 17 years. This anomaly would only go to the benefit of the appellant if the evidence adduced against him was not sufficient to form the basis of a conviction for the offence of defilement. The element of age only goes to the extent of determining the sentence that should be meted out to an accused person.

26. I have considered the said submission and hereby hold that the error on the face of the charge sheet as to PW1's age is curable under the provisions of section 382 of the Criminal Procedure Code. The said provisions stipulate that:-

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."*** (emphasis added).

27. On the complaint that the charge does not disclose who the victim of the offence was, it is clear that the accused person before the lower court was the appellant herein and he was charged with having defiled one MMN. The appellant therefore was aware from the outset who the victim of defilement was.

28. The appellant also submitted that the P3 form showed that PW1 had no injuries on her genitalia. It is clear from the evidence of PW1, PW2 and PW3 that PW1 would at times run away from her home to live with the appellant between 20th January, 2012 and 20th September, 2014. She had previously had a sexual relationship with the appellant which led to the birth of a child. It is therefore far-fetched for the appellant to expect that PW1 would have visible injuries on her genitalia following his numerous sexual liaisons with her. As at the time she was examined at Coast General Hospital on 28th March, 2014, the appellant had been her boyfriend for 3 years. The P3 form indicates that she was found to have an old broken hymen and to be HIV positive. She had been put on septrin medication. She had had a miscarriage 3 months before the time of examination, out of a pregnancy from defilement.

29. On the appellant raising the issue of failure for a DNA examination on his person, such an examination is not a mandatory requirement and failure to adduce such evidence does not water down the prosecution's case. The Court of Appeal in **George Kioji vs Republic**, CR App. No. 270 of 2012 (UR) stated thus:-

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten 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 it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to 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."***

30. Having analyzed the prosecution evidence, I find it to be consistent and overwhelming as against the appellant. It was clear that the appellant had a sexual relationship with PW1 a female child below the age of 18 years. He admitted that he paid dowry to her father W K and for the said reason PW1 was his wife. He stated that PW3 told him that PW1 was 18 years and 6 months old. He added that she had a waiting card for an identity card. He also claimed to have raised an alibi defence. It is evident that the appellant could not in one breath allege that PW1 was his wife of 3 years and at the same time raise an alibi defence. The appellant said that he had 2 children with PW1. However she mentioned of having had one child with the appeallant which fact was supported by the evidence of PW2 and PW3. His defence was far-fetched, untruthful and unreliable.

31. The evidence of PW2 and PW3 is of parents that deeply cared for the welfare of PW1 and went to great lengths to trace her whereabouts on the occasions she disappeared from their home with the assistance of the appellant. They were intent on having PW1 resume school but the appellant kept on disrupting her studies. It is my finding that if PW3 had told the appellant that PW1 was 18 years and 6 months old, she would not have bothered to look for her as she would have been an adult.

32. Although the appellant stated that PW1 was his wife, the law does not condone marriage of underage females. Any sexual intercourse in such a relationship amounts to defilement. The assessment report gave the age of PW1 as 17 years. She was therefore legally recognized as a child. Even in the absence of a birth certificate, production of the age assessment report was sufficient proof of PW1's age.

33. The appellant raised the issue of PW1's biological father W K not having been called as a witness. The prosecution was under duty to call only the witnesses that would have advanced its case. The said W K did not play any role in ensuring that PW1 did not elope with the appellant. If the appellant thought he was an important witness for his case, he could have called him as a witness. He did not do so. In the case of **Cliff Bikeri Mokua and Another vs. Republic** [2014] eKLR, the Court of Appeal stated that the duty of the prosecution is to present before the trial court such witnesses as it thinks will establish its case beyond reasonable doubt.

34. The impression that this court got from Ms Ogweno, the Prosecution Counsel is that she did not thoroughly go through the proceedings that took place before the lower court. Had she done so, she would not have conceded in the face of the overwhelming evidence against the appellant.

35. It is my finding that the appellant was properly convicted. On the issue of sentence, the Sexual Offences Act in Section 8(4) provides for 15 years imprisonment for an offender who defiles a child between the age of sixteen and eighteen years. I therefore reduce the appellant's sentence from 20 years imprisonment to 15 years imprisonment. His appeal only succeeds to that extent. The appellant has the right to appeal within 14 days.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **19th** day of **December, 2017.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person.

Ms Ocholla holding brief for Ms Ogweno for the Director of Public Prosecutions.

Mr. Oliver Musundi - Court Assistant