REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 43 OF 2015

(CORAM: J.A. MAKAU – J.)

NEWTON OCHIENG OKELLO …… APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(Being an appeal against both the conviction and sentence dated 16.7.2012, in Criminal Case No. 748 of 2010 in Siaya Law Court before Hon. Ngetich –SPM)

JUDGMENT

1. The Appellant **NEWTON OCHIENG OKELLO** was charged with the offence of defilement contrary to **section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the diverse dated between 28.5.2010 and 2.6.2010 at ***[particulars withheld]*** in Butere District of Western Province, intentionally caused his penis to penetrate the vagina of MAC a child aged 17 years. The Appellant also faced alternative charge of **committing an indecent act** with a child contrary to **Section II (1) of the Sexual offences Act No. 3 of 2006.** The particulars of the alternative charge are that on the same day, same time and place within the same County intentionally and unlawfully touched the vagina of MAC a child aged 17 years with his penis.

2. After full trial the Appellant was convicted and sentenced to serve 15 years imprisonment. Aggrieved by the conviction and sentence the appellant preferred this appeal setting out 8 grounds of appeal which can be summed up as follows:-

(i) That the prosecution did prove their case to the required standard of proof.

(ii) That the age of the complainant was not proved.

3. The Appellant appeared in person whereas M/s. M. Odumba Learned State Counsel appeared for the State.

4. That at the hearing of the appeal the appellant relied on his written submissions which he produced to the court. He added that he knew the complainant but he did not defile her and that PW3 her father, testified that she was 19 years old.

5. M/s. M. Odumba opposed the appeal against both conviction and sentence urging that the ingredients of the offence of defilement were proved and that prosecution proved the victim was 17 years old.

6. I am first appellate court and I have subjected the entire evidence adduced before the trial court to a

fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 KLR 174** where the court of Appeal held thus:

> ***"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."***
>
> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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."***

7. The facts of the prosecution case are as follows:- PW1 MAC, a pupil at ***[particulars withheld]*** School in Standard six aged 17 years, on 28.1.2010 met the appellant who was her boyfriend and asked her to accompany him to his home so that he could give her a book to read. On entering the appellant's house, the appellant closed the door and after struggling with the complainant he removed all her clothes, threatened to stab her with a knife if she resisted his andvances. He pushed her to the bed, removed his short, the appellant then asked the complainant to insert his penis into her vagina which she did. The appellant had sexual intercourse with the complainant and after he finished, he locked the complainant in the house and went away. That the appellant had sexual intercourse with the complainant and she stayed in the appellant's house for four (4) days. On 2.6.2010 people knocked the door to the appellant's house, the appellant opened the door and the people entered, found the complainant and took her away. They were three people including the complainant's father. The appellant was arrested and all proceeded to Mulumbi Chief's camp, then to Yala Police Station and complainant was subsequently taken to Yala Sub-District Hospital where P3 form was completed. PW1 identified card indicating her date of birth as 13.5.1993, MFI – P2, P3 form MFI – P1, baptismal card dated 18.7.1995 MFI P3, school attendance card as MFI – P4.

8. The appellant denied the offence and testified that MAC was her friend since 2009 and had agreed to get married and stay together in June 2010.

9. The first issue for consideration is whether the prosecution proved the ingredients of an offence of defilement? The ingredients of an offence of defilement are:

> ***(i) Identification/recognition of the perpetrator.***
>
> ***(ii) Penetration into the genitalia organs of another with genetalia organs of another***
>
> ***(iii) The age of the victim be prove to be under 18 years***.

10. In the instant case PW1, MCA, testified that she went to the appellant's house in company of the appellant and stayed therefore for four days during which time she had sexual intercourse with the appellant more than once. PW2, a clinical officer, at Yala sub-district hospital examined PW1, MCA's genitalia on 3.6.2010, found no abnormality and found no evidence of forced sexual intercourse. The P3 form, P exhibit 1, indicates no abnormal inflammation and no bruises were noted. In proving of penetration in cases of defilement there is no requirement for it to be forced penetration, all that is needed is a penetration. In view of evidence of PW1 and PW2 and P exhibit 1, I am satisfied that the prosecution proved penetration into the genital organs of the complainant by the genital organs of the appellant. PW3, PW4, PW5 and PW6 found the complainant and the appellant at the appellant's house. The appellant was placed at the scene of the crime as the complainant was found at the appellant's place. PW1 stated she was appellant's girlfriend and appellant confirmed so in his defence.

11. I now turn to the issue of the age of the complainant, PW1 testified that she was 17 years old, but did not produce any Birth Certificate however, she identified a Child Health card produced as P exhibit P2,

showing the date of birth as 13.3.1993, Baptismal Card P exhibit 3 and School Attendance Card P exhibit 4, all the three documents are photocopies and they were not certified as true copies and stamped. I will turn to the issue of the uncertified Child Health Card P exhibit P2 and Baptismal Card P exhibit 3 later. PW3, father to the complainant testified that on 31.5.2011, thus at the time he was giving evidence PW1, MCA was 19 years old and added he did not know when she was born. The appellant testified that PW1, MCA had been his girlfriend since 2009 and had agreed to get married in 2010. DW2, cousin to the appellant confirmed the appellant and the complainant, PW1, intended to marry in 2010 and she told DW2 she was of age to marry since her parents used to harass her forcing her to leave school. He added that the two were friends and that in 2009 PW1 told him she was 18 years old but her father had taken her Birth Certificate. DW3 neighbour to both the complainant and the appellant, testified the appellant and complainant were friends and both have children and are married. On cross-examination he testified PW1, MCA was born in 1992.

12. Under **Section 8(5) (a) (b) and (5) of the Sexual Offences Act** it is provided as follows:-

"Sec. 8 (5) It is a defence to a charge under this section if –

> ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
>
> ***(b) the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."***

13. In the instant case the appellant did not directly raise a defence that PW1, MCA, deceived him into believing that she was over the age of 18 years at the time of the alleged commission of the offence and that he reasonably believed that PW1 was over 18 years however, the burden of proof as regards the age of the victim always lies with the prosecution and never shifts to the accused to prove, otherwise. PW1, MCA, testified that she was 17 years old and produced uncertified copies of Child Health Card P exhibit P2. A quick perusal of the card reveals that it has some alterations on the first date seen and the name of the father is altered, but there are no initials as to who caused the alterations, nor did the photocopy have a stamp, nor is it certified to be true copy of the original. P exhibit 3 similarly is a photocopy and it is not certified nor does it have any stamp. I therefore find the two documents not to have been authenticated as true copies of original and I do find the same, could not be relied upon, to prove the age of the complainant. P exhibit 4 a copy of the School attendance Register do not support the age of the complainant, of 17 years as claimed. The Child Health Card and Baptismal Card can be used to prove the age of the victim but when prosecution opts to produce a photocopy, the same has to be certified as true copy of the original, before a photocopy can be relied upon and specially at this era and age, a lot of injustice may be occasioned to the accused person by relying on unauthenticated documents.

14. In the case of **Daniel Mugambi V Republic (2016) eKLR** the Court of Appeal at Nyeri addressed itself thus:-

> ***" ---------- it is our view that in the absence of a birth certificate in circumstances where no explanation was given as to its unavailability, the appellant's complaints that the complainant may very well have been sixteen (16) years at the time of the conviction of the alleged offence was sound and it should not have been brushed aside, the disparity ought to have been considered for the purpose of sentencing."***

In the instant case, PW3 father to PW1, MCA and PW1 did not produce PW1's Birth Certificate, nor did they give any explanation as to its unavailability, opting to produce uncertified photocopies of the Child Health Card and Baptism Card. PW3 testified that his daughter as of 31.5.2014, was 19 years old, adding he did not know the date of her birth. The Appellant might not have specifically stated the age of the complainant, but he called true witnesses who in support of his defence, one stated that, PW1 MCA as of

2010 was of the age to marry and the other witness was more authentic being a neighbor and stated PW1 MCA, the appellant, had children and were married. He gave the date of birth of PW1, MCA, as 1992. Faced with such glaring evidence the trial court dismissed the defence and stated that there is no dispute that the complainant was born on 13.5.1993 and was 17 years old. I find that the trial court was in error in dismissing the appellant's defence as regards the victim's age and more specifically when evidence of DW2 and DW3 was not controverted as regards the age of the victim who according to them was above 18 years old.

I now turn to whether any Sexual offence was proved as required by law against the appellant?. PW1, MCA from her evidence she stated she went to the appellant's home voluntarily, she per took sexual activity with the appellant voluntarily and testified that the two had been friends since February 2010 and that she used to visit the appellant's home and that the appellant also used to visit the complainant's brother, the appellant testified that PW1 had become his girlfriend since 2009 and the two had agreed to marry in 2010. DW2's evidence corroborated the evidence of the appellant that the two had agreed to marry. DW2's evidence is that the two were married and had children, that PW1 was born in 1992, thus as of the time of commission of the offence she was 18 years and not a minor. PW3's evidence is that PW1, his daughter was in 2011, 19 years old and in 2010 she was 18 years old. I find that in view of the fact that the complainant was a girlfriend of the appellant, she voluntarily went to the appellant's house and voluntarily took part in the sexual intercourse with the appellant and as by then her age was 18 years and above, the offence of defilement was not proved as against the appellant nor the offence of rape or any other, as the action was consensual between the appellant and the complainant.

15. The upshot is that the appeal is merited. Accordingly I quash the conviction and set aside the sentence. The Appellant is set at liberty unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 24TH DAY OF NOVEMBER, 2016.

J.A. MAKAU

JUDGE

Delivered This 24th Day of November, 2016.

In Open Court in the Presence of:

Appellant present in person.

Mr. M. Odumba for State.

C.A.1. K. Odhiambo

2. L. Atika

J. A. MAKAU

JUDGE