REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 236 OF 2012

MOSES SIMIRI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to **Section 8(1)** and **(2)** of the **Sexual Offences Act No. 3** of **2006**. The particulars of this offence were that on 7th August 2012 at Olchoro Area in Narok, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of **SD**, a girl aged 6 years. On the evidence, he was convicted of this offence and sentenced to life imprisonment.

2. By his petition of appeal filed in this court on 19th December 2012, he has appealed against the conviction and sentence on the grounds that:

(a) that the charge sheet was defective;

(b) that the evidence against him was not sufficient to sustain a conviction;

(c) that the provisions of Section 48 of the Evidence Act were not complied with; and

(d) that the trial court unlawfully rejected the appellant's defence.

3. The appellant filed written submissions which I have duly considered. He argued that by applying for an age assessment of the complainant, the prosecution did not believe its own witnesses. In addition failure to produce this report as directed by court was fatal because it rendered the age of the complainant not proved.

4. The appellant also argued that the charge sheet was defective because he was charged with a non-existed offence. The **Sexual Offences Act** does not have a **Section 8(1)(2)** under which he was charged. He argued that for this reason he ought to have been acquitted.

5. He also submitted that the P3 Form was irregularly produced by **PW3** who was not its maker. There was no application by the prosecution for its production by another person other than the maker and the appellant was not asked whether he objected.

6. Finally the appellant argued that the evidence was not sufficient to prove the charges against him beyond reasonable doubt.

7. The Prosecution Counsel argued that there were no inconsistencies in the prosecution evidence. There was no evidence of any bad faith on the part of the complainant or **PW2** that would cause them to make up the charges against the appellant.

8. Counsel argued that the appeal had no merit and urged the court to uphold the conviction and sentence.

ISSUES FOR DETERMINATION

9. From the appeal and submissions of the appellant and Prosecution Counsel, I find that the following are the issues for determination in this appeal:

(a) whether the charge sheet was fatally defective;

(b) whether the P3 Form was produced unprocedurally;

(c) whether the charges against the appellant were proved beyond reasonable doubt; and

(d) whether the age of the complainant was proved and whether the appellant's sentence was lawful.

ANALYSIS:

10. While determining the issues raised, this court is alive to its duty as the first appellate court, to analyse and examine the evidence afresh and make its own independent findings. The court is also mindful that it did not have the opportunity to observe the demeanor of the witnesses and will therefore not interfere with the findings of fact by the trial court unless they are based on misapprehension of evidence or it is demonstrated that the court acted on wrong principles in making its findings. See M'riungu And Others V. Republic, [1982-88] 1 KAR 360.

WHETHER THE CHARGE SHEET WAS DEFECTIVE

11. The appellant alleged that the charge sheet was defective as it charged him with the offence of **defilement** contrary to **Section 8(1) (2)** of the **Sexual Offences Act**. He argued that there is no such section under the Act and the offence and the charges against him are not known in law.

12. The charge against the Appellant was framed in the charge sheet as *"**Defilement of a girl** contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3** of **2006**."* **Section 8(1)** of the **Sexual Offences Act** provides for the definition of the term defilement, while **Section 8(2)** thereof creates the offence of defilement of a child aged of 11 years or less and prescribes the punishment on conviction.

13. The Appellant's allegation that he was charged for a crime not known in law has no basis. The charge sheet was in drawn in accordance with **Section 134** of the **Criminal Procedure Code** which provides for the ingredients of a charge sheet as follows:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

14. The prosecution, in the particulars of the offence, clearly disclosed to the Appellant that he was being accused of intentionally and unlawfully inserting his genital organ (penis) into the female genital organ (vagina) of **S.D** a child of 6 years.

15. The proceedings before the lower court demonstrate that the Appellant understood the charges before him and was able to cross-examine the witnesses and put up a defence.

16. It is clear that the failure to specify that the said Section 8(1) was being read together with **Section 8(2)** of the **Sexual Offences Act No. 3** of **2006** did not occasion the Appellant any injustice. Therefore, this defect in the charge is one which was curable under Section 382 of the Criminal Procedure Code.

WHETHER THE P3 FORM WAS PROPERLY PRODUCED

17. The second ground of appeal was that the P3 Form was produced by an incompetent witness. **PW3** was a clinical officer at Narok Hospital. He produced the P3 Form on behalf of Dr. Langat who examined the complainant and filled in the P3 Form.

18. PW3 told the court that he was conversant with Dr. Langat's handwriting and signature having worked with him for one and a half years and could therefore verify that the document was signed by him. He testified that according to the P3 Form the complainant had traces of blood and bruises on her vagina.

19. **Section 77(1)** of the **Evidence Act, Cap 80,** provides that a document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence. **Subsection (2)** thereof allows the court to presume the signature on such document to be genuine.

20. That notwithstanding, the P3 Form must be produced by its maker. This was the holding of the Court of Appeal in Sibo Makovo V. Republic, Criminal Appeal [1997] eKLR. It held:-

> *"**The P3 form was filled in by the Medical Officer, Naivasha District, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the Evidence Act (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in courts is to taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called."***

21. I am guided by the above finding that the prosecution must lay a basis for failing to call the maker of a document. The trial court, then has an obligation to inform the accused person of his right to insist on the maker to be called and to object to the production. In the instant case, I see no foundation that was raised by the prosecution. The appellant was also not informed of his right. The P3 Form was therefore produced irregularly.

WHETHER THE CHARGES AGAINST THE ACCUSED WERE PROVED BEYOND REASONABLE DOUBT

22. The complainant's testimony was clear. She testified that on the material day, she had been sent by her mother to get potatoes from her grandmother's house. She was with her brother. On their way back, they encountered the Appellant, whom she referred to as Moses, who slapped her and after giving her younger brother the potatoes to take home, he carried her to the bushes. He then tore her panties, unzipped his trouser and then made her lie on the ground.

23. She felt pain and bled from her private parts. The Appellant fled when the complainant started screaming.

24. PW2, the complainant's mother testified that she went out looking for the complainant after her young son returned home alone and informed her that the complainant had gone to get some money. When she

went outside the gate, she heard a baby crying from the bushes and saw the Appellant running away while zipping his trousers.

25. When **PW2** examined the complainant, she found that her panties were torn and that she was bleeding from her private parts. She immediately took her to hospital for treatment and thereafter informed the elders who arrested the Appellant.

26. PW4 the investigating officer charged the appellant on the evidence of the complainant's and her mother's evidence.

27. The trial court found that the prosecution had established a *prima facie* case against the appellant and put him in his defence. He gave unsworn testimony and denied having committed the offence and alleged that the charges had been concocted by his employer who did not want to pay him his Kshs. 15,000/= being the wages for the seven months he had worked for.

28. There was no doubt regarding identification because the complainant and **PW2**, who placed the appellant at the scene of the incident, knew the appellant well prior to the incident.

29. Their evidence also established that on the material day, the appellant attacked the complainant near her home. Having already found that the P3 Form was irregularly produced the question that follows is whether it was proved that the appellant defiled the complainant.

30. The proviso under **Section 124** of the **Evidence Act** allows the court to convict on the sole evidence of the complainant if, for reasons to be recorded, it believes that she is being truthful. In **Kassim Ali** V. **Republic,** the Court of Appeal held the absence of medical evidence to support the fact of rape is not decisive as this fact may be proved by the oral evidence of a victim of rape or by circumstantial evidence.

31. In **Dennis Osoro Obiri** V. **Republic [2014] eKLR** the same court affirmed this decision and held that the same principle applies in defilement cases. The court also relied on its decision in ***Geoffrey Kioji*** *V.* ***Republic,*** *Crim. App. No. 270 of 2010 (Nyeri) 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 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."***

32. The fact that the P3 Form was irregularly produced was not fatal to the prosecution case. The court could still safely convict if it was satisfied that the other prosecution evidence proved, beyond reasonable doubt, that the appellant committed an act which caused penetration with **PW1.**

33. The complainant's evidence was concise that she was defiled by the appellant. She gave details of how the appellant accosted her on her way from her grandmother's, carried her to the bushes and did bad things to her. She states that she felt pain and screamed for help whereupon the appellant fled.

34. Her testimony was corroborated by **PW2**. She confirmed that she heard a scream emanate from the nearby bushes. She then saw the appellant running away while zipping his trousers. She examined the complainant and found that her underpants were torn and she was bleeding from her private parts.

35. Their credibility was not shaken even during cross examination and their testimony remained consistent. The fact that the appellant defiled her was corroborated by the testimony of **PW2** who examined her and found that she was bleeding from her private parts. There was no reason to doubt that they were being truthful.

36. The appellant's contention that he was framed is not borne of the evidence. He did not lay a foundation for this claim and did not even name his alleged employer who had a grudge against him. He offered no reason why the complainant or her mother would frame him.

37. For this reason I find that the appellant's conviction was safe and find no reason to interfere with the trial court's decision.

WHETHER FAILURE TO TAKE THE COMPLAINANT FOR AGE ASSESSMENT WAS FATAL

38. The appellant's argument was that failure to take the appellant for age assessment was fatal because it rendered the age of the complainant unproved.

39. For offences under the Sexual Offences Act, the age of the victim is primary because it determines the sentence that will be meted out to the accused. ***John Wagner*** *V.* ***Republic*** [2010] eKLR, ***Macharia Kangi*** *V.* ***Republic,*** Nyeri Court of Appeal, Criminal Appeal 346 of 2006 [UR].

40. The prosecutor applied for an age assessment to be done and was granted leave by the court but he did not cause one to be undertaken. However, I find that the age of the complainant was established at the trial.

41. The complainant testified that she was six years old and her position was corroborated by her mother **PW2**. This is evidence of witnesses and which may be relied on to prove a fact. In addition the trial court had the opportunity to see the complainant. It was satisfied that even though she may not have been a six years, she was a child under eleven years. Therefore the appellant was liable to life imprisonment as prescribed by **Section 8 (2)** of the **Sexual Offence Act.**

FINDINGS

42. For the reason stated above, this court makes the following findings:

i) The charge sheet is found to be properly outline the essential ingredients of the offence. That defect is curable under the provisions of **Section 382** of the **Criminal Procedure Code.**

ii) The irregularity in production of the P3 Form is not fatal to the prosecution's case and by dint of **Section 124** of the **Evidence Act,** this court finds that there is sufficient evidence to support a conviction.

iii) This court finds that the complainants age was proved to be that of a child under the age of eleven years.

iv) The prosecution is found to have proved its case beyond reasonable doubt

DETERMINATION:

43. The appeal is found to be lacking in merit and it hereby dismissed.

44. The defect is hereby cured to read the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**.

45. The conviction and sentence are upheld.

It is so ordered.

Dated. Signed and Delivered at Nakuru this 20th day of April, 2015.

A. MSHILA

JUDGE