REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 21 OF 2012

(From the original conviction and sentence in criminal case no.1015 of 2011 of the Principal Magistrate's Court at Kilifi before Hon. E. M. Kagoni – RM)

RUA NGAO MWATUMA …….....APPELLANT

VERSUS

REPUBLIC .....….....….....…...RESPONDENT

JUDGMENT

The appellant was charged with Defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. Particulars stated that on 8th September, 2011 at [Particulars withheld], Kanamai, Kilifi District, the appellant caused his penis to penetrate the vagina of S C N a girl aged 15 years. At the close of the trial he was found guilty, convicted and sentenced to twenty years' imprisonment.

He has appealed to this court against the conviction. The grounds of appeal attack the quality of evidence upon which the conviction was based.

The appellant through his advocate Mr. Kihanya submitted during the hearing of the appeal that the voire dire examination of the minor was not properly carried out. The defence further attacked the medical evidence tendered respective of age and alleged injuries occasioned to the minor. Mr. Musyoki representing the State opposed the appeal asserting that by virtue of the provisions of Section 124 of the Evidence Act no corroboration was required concerning the evidence of the minor. He stated that the question of age was not raised in the Lower Court or on a ground of appeal.

The duty of this court on a first appeal is to re-evaluate the evidence of the trial afresh and to draw its own conclusion (see **Okeno v R [1973] EA 322**). A finding of the Lower Court that was based on the credibility of witnesses can only be assailed by an appellate court where it is clear that no reasonable tribunal could have reached such a finding or where the finding is clearly wrong (see **R v Oyier [1985] KLR 353**.

The prosecution case was that the complainant (PW1) was aged 15 years in the material period and knew the appellant. On two occasions on 8th and 10th September, 2011 she had sexual intercourse with the appellant. Eventually her mother K C (PW3) suspected she was pregnant after she failed to go to school.

She was a standard 5 pupil at [Particulars withheld] Primary School. Through the intervention of the local administration PW3 managed to convince PW1 to confess about the abuse. She named the appellant.

On 21st September, 2011 police were notified. The minor was referred to Kilifi District Hospital for treatment and examination. The complainant, it turned out, was not pregnant. Eventually the appellant was traced, arrested and charged. His defence was that he knew PW1 as a neighbor but he denied having sexual intercourse with her.

Firstly, concerning the voire dire examination of PW1 by the court, it is true that the same was not conducted in a question –answer format as required and was rather brief. However the court it appears was alive to the provisions of Section 119 of the Oaths and Statutory Declarations Act and the conclusion arrived at cannot be faulted. At any rate the complainant was not really a child of tender years.

The Lower Court in my view also applied Section 124 of the Evidence Act correctly to the facts before it. The defence submissions have emphasized the question of corroboration which in my view seems to negate the proviso to Section 124 of the Evidence Act. The proviso allows the court to convict an offender on the basis of the uncorroborated evidence of a minor in sexual offences. The only consideration is for the court to be satisfied, for reasons to be recorded in the proceedings, that the alleged victim told the truth.

In his judgment the learned magistrate fully addressed his mind to this consideration. He was satisfied for the reasons in the judgment that the complainant was a witness of truth and stated finally. "The court has no reason not to believe the evidence of the complainant"

As regards the medical evidence tendered through Dr. Faraz Taher (PW2) the defence submissions appear to ignore the provisions of Section 77 of the Evidence Act. It was perfectly in order for PW2 to produce the medical report on behalf of a professional colleague whose handwriting he was well familiar with. No objection was raised during the trial or application made to cross-examine the actual maker of the P3 form. The medical evidence confirmed that the complainant's hymen had been raptured although there were no injuries noted in the genitalia. This evidence confirms that sexual intercourse had taken place even through the date thereof was not determined. The Lower Court stated in this regard:

> **"The court is alive to the fact that medical evidence is only corroboration of the fact that sexual intercourse took place but is not corroboration of the identity of the penetrator (sic)… All the P3 form reveals is that the complainant had intercourse prior to the examination"**

This is the proper approach to the matter.

In my considered view the most troublesome aspect of the appeal concerns the age of the complainant. It is true that this was not one of the grounds of appeal but age is an ingredient of the offence charged and the appellate court cannot gloss over it. PW1 simply stated that she was 15 years old. So did her mother PW3. The date of birth was not given and it would seem that the only medical evidence tendered was the P3 form which gives the estimated age as 15 years. In the case of **Kaingu Elias Kasomo v R Malindi Cr. App. No. 504 of 2010** the court of appeal stated that the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence.

Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the Sexual Offences Act, the practice has been that age assessment of defilement victims is carried out by dentists.

The said assessments while useful and in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial court heard the minor's evidence and saw her. The court was convinced that she spoke the truth.

In my humble view the true purport of the proviso to Section 124 of the Evidence Act would be lost if the

trial court has to separate what aspects of the minor's evidence can be believed without corroboration and those that need corroboration. In essence a requirement that the court can only act on the age assessment form and not even the P3 form as proof of age in my view is unreasonable and tends to negate the proviso to Section 124 of the Evidence Act, and effectively the entire purpose of the Sexual Offences Act and Article 53(d) of the Constitution.

In the instant case the trial court did not fully address its mind to the particular evidence offered in proof of the age of the minor.

My considered view is that the age stated in the P3 form was not challenged at the trial and cannot be dismissed. More so when it tallies with the evidence of PW1 and her mother as to her age and the fact that she was a standard five pupil. None of the grounds of appeal argued have merit. This court is satisfied that the appellant was properly convicted. The appeal is dismissed

Dated and signed at Malindi this **4th** day of April**, 2014**

O. A. ANGOTE

JUDGE