REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 227 OF 2012

(From original conviction and sentence in Criminal Case No. Adult Criminal Case No. 234 of 2009 of the Chief Magistrate's Court at Nakuru)

GIDRUFF KIOI JOHN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Gidruff Kioi John, *(the Appellant)* was charged with one principle offence of defilement of a child *(girl)* contrary to Section 8(3) of the Sexual Offences Act, 2006 *(No. 3 of 2006).* He was also charged with the alternative offence of indecent act with a child contrary to Section 11(1) of the said Act. The Appellant was convicted on the principal offence and sentenced to twenty years imprisonment.

Aggrieved with both his conviction, the Appellant came to this court on appeal and advanced three grounds of appeal in his Amended Petition of Appeal submitted to the court on the hearing date of the appeal together also with his written submissions. The Appellant's grounds of appeal are -

1. ***that he was convicted on contradictory evidence as to the age of the victim;***

2. ***that there was a grudge against him by the victim on the grounds of non payment of ….. by the Appellant to the victim;***

3. ***that the prosecution failed to call child witness contrary to Section 150 of the Criminal Procedure Code, (Cap. 75, Laws of Kenya).***

And for the said reasons, the Appellant asked the court to quash his conviction, set aside the sentence and set him free.

The Appellant was expressly charged under Section 8(3) of the Sexual Offences Act, 2006. That section does not create any offence of defilement. It only provides for punishment of the accused if the evidence establishes the commission of the offence, and the age of the child as being between twelve and fifteen. The offence is created by Section 8(1) of the Sexual Offences Act, *(read for purposes of punishment)* with either sub-sections (2) – (4) according to the ages of the child. In this case, the child's age was assessed at approximately fifteen years ***"with margin of error – 1 year."***

The particulars of the charge referred to a girl of 12 years of age. The girl herself (PW2) gave her age as 14 years. Section 8(3) refers to a child between twelve and fifteen years of age. By reference to Section 8(3), the age bracket of the child victim was covered. The charge ought to have been framed as

follows-

"Defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006 (No. 3 of 2006)"

and then followed by the correct particulars.

Though the charge herein was technically defective, that defect is curable by Section 382 of the Criminal Procedure Code *(Cap. 75, Laws of Kenya)* which provides that -

"S. 382 …

… No finding, sentence, 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 proceeding 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."

In this case, the Appellant did not raise the question in his defence or at any time during the trial. I raised here because the defect is glaring from the charge, and needed to be observed and commented upon that it did not cause any prejudice to the Appellant, though he raised it obliquely on the grounds of the contradictory age of the complainant. I will therefore deal with this issue right away.

Though the particulars of the charge refer to the victim being 12 years of age, subsections (2), (3) & (4) of the Sexual Offences Act require the ages of the child victims to be proved in evidence for purposes of sentencing under those provisions.

In this case, the offences was committed on 23.10.2009 PW2, *(the child victim)* testified on 30.06.2010, some 8 months when stated that she was 14 years of age. The medical Assessment Report made on 17.10.2010, found her to be approximately 15 years of age, with a margin of error – 1 years.

Taking the testimony of PW2 *(the victim)* and the medical assessment, the child fell within the bracket of twelve and fifteen years as provided under Section 8(3) of the Act. The question of apparent contradictory age of the child did not therefore cause any prejudice or diminish the force of the evidence of age of the victim. That evidence was credible, ground 1 of the appeal therefore fails.

The Appellant's 2nd and 3rd grounds and indeed his testimony was that the woman who assisted the child was not summoned by the court as a necessary witness under Section 150 of the Criminal Procedure Code particularly because the woman had threatened to teach him a lesson and had a grudge against him.

Indeed Section 15 of the aforesaid grants the court the power to summon a necessary witness or witness of standing. A necessary witness in my view is a witness who would clarify the evidence before court in order to serve the cause of justice. This is however a discretion which should be sparingly exercised by the courts. The defence might consider it the dissension by the court into the arena of prosecuting counsel. It is the duty of that counsel, not the court, to call witnesses to establish its case or otherwise against an accused. Apart from putting or posing verbal hints to the prosecution as to whether a particular person mentioned by name would be called or not, the courts are reluctant to exercise the discretion to call witnesses. It is left to the courts to draw an inference whether or not such witness would adduce evidence adverse to the prosecution, or whether such evidence would not have added any further value or credence to the prosecution's case.

In this case the summoning of the Appellant's woman neighbour who, according to the Appellant's unsworn statement, had threatened to teach him a lesson, did not cause the trial court to draw any adverse inference against the prosecution. Having examined the entire evidence of the prosecution and the appellant's unsworn statement, no adverse inference can be drawn for omission either to record the statement of the alleged woman neighbour or to summon her. Indeed in his final submission to this

court, the Appellant said -

"I ask the court to look at both sides of the case. I regret my offence."

Taking the last sentence "I regret my offence" the appellant admitted in open court that he committed the offence, and regrets it. But even if the Appellant did not so admit the commission of the offence, the prosecution evidence as submitted by the prosecuting counsel who opposed the appeal, was overwhelming. I will cite two examples, the evidence of PW2, the victim, and PW1, the Clinical Officer.

PW2 testified -

"On 23/10/2009 at 12.30 I was at the accused person's home working. I went to a neighbour and borrowed a bucket. I then came and started washing clothes.I finished washing clothes. The accused person's two (2) children had gone to play. I took basins inside the house.The accused was inside the house looking for CD's. He called his wife to ask where the CD's were. He started looking for them in the cupboard. He put the CD's inside the DVD and played loud music. He then closed the door and held me. He told me if I don't remove my clothes he shall do to me what he wants.

I removed my trouser and my pant. I had a dress on top. I pulled up my dress. I then slept on the bed facing upwards. The accused removed his trousers up to his knee level. He pulled up the vest that he had up to his neck and then he proceeded to defile me. I attempted screaming but the accused closed my mouth using his hand. He then let me go and sat on a chair next to him.

I excused myself to go and take the bucket where I had borrowed from. I was crying. The neighbour asked why I was crying and I related the incident to her. She called the children's office. She was asked to take me to hospital. The neighbour called another neighbour woman and they hid me and took me to hospital"

and – There was a day before the above incident when the accused had attempted defiling me but I ran away. I got injuries in my vagina. I was treated. When the accused defiled me, I bled from my vagina. I had a white pant which I threw away. The same was blood stained"

And PW1 the Clinical Officer put it this -

"I am Grace Gulani. I am a registered Clinical Officer. Officer in charge in Bahati District Hospital. I have a P3 form that I filled in respect to L W aged 12 years. She had been defiled by someone well known to her. Her cared reference No. 1054/09. She was in fair general condition. She wasn't under influence of alcohol or drugs. Her clothes were unchanged. She didn't have a pant. She was approximately 12 years. Both labia minora and majora were intact. Her hymen was torn and bleeding. There was blood on examining finger from genitalia. There was spermatozoa seen from the high vaginal swap. HIV test negative. Approximate age of injuries – hours. Type of weapon – PENIS. She was put on analgesics and antibiotics and post exposure prophylaxis. Degree of injury grievous harm."

Even without invoking the proviso to Section 124 of the Evidence Act *(Cap. 80, Laws of Kenya)* there was enough credible evidence to convict the Appellant. The victim was alone with the Appellant, the Appellant created an atmosphere of loud music, so that in event of any screams by the victim, no one would hear her screams.The hour was about past noon.He closed the door, and had the girl alone to himself. She was at the his mercy. He told her he could do what he wished with her unless she complied with his lusty desires. He overcame her.The results were the testimony of PW1, the Clinical Officer. The neighbours were not called it is true, but as already observed from evidence would not have been adverse. It would but only have confirmed what the child testified, that had warned her to inform of any untoward moves by the Appellant against her, and when it happened, they were at her assistance. The calling of the neighbours would merely have added another nail to the Appellant's for conviction and eventual sentence.

The Appellant's act, is no way to trial the poor, the orphans and the wretched of the earth. It reminds one of girl character "Ki....." in Haleys Book, "ROOTS" to who informed her male slave companions the night after the slave stamp master pulled her to his private cabin, that *"I am no longer a Mandingo maiden"* meaning that her maidenhood had been violated by the slave-shy master. So it was in this case, the house master had violated the innocence of a house-help, the caretaker of his own children. Who would care for them when he himself was not there to protect them. They have a mother while the Appellant is in jail. The victim here had no parent, an orphan trying to fend for herself.

The sentence of twenty years is what the law provides. In times gone by, the Appellant would also have been subjected to corporal punishment of several cases to his bottoms.The law has moved on, but not the like of the Appellants. I see no merit in his appeal, I dismiss it, and confirm both the conviction and sentence by the lower court.

It is so ordered.

Dated, signed and delivered at Nakuru this 21st day of June, 2013

M. J. ANYARA EMUKULE

JUDGE