REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 41 OF 2015

GUNGA WAKILI BAYA *ALIAS* JUMA ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from the original conviction and sentence by Hon. S.K. Gacheru, Principal Magistrate, delivered on 2nd March, 2015 in Mombasa Chief Magistrate's Court Criminal Case No. 1736 of 2011).

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that between 23rd May, 2011 and 25th May, 2011 in Kisauni District of the Coast Province, unlawfully and intentionally caused his penis to penetrate the vagina of LW [name withheld] a girl aged 16 years. He was sentenced to serve 15 years imprisonment.

2. On 4th March, 2015, the appellant filed a petition and grounds of appeal. On 24th July, 2019 he filed amended grounds of appeal, with leave of the court. They are as follows:-

(i) That the Learned Trial Magistrate erred in law and fact by administering an oath to the complainant, PW2, without first subjecting her to *voir-dire* as provided in law, when taking the evidence of a minor;

(ii) That the Learned Trial Magistrate erred in law and fact in putting weight on the doctor's report yet the P3 form which was presented as an exhibit did not point out when PW2 lost her hymen, neither did the same reveal any penetration or anything to link him to the matter in question, thus infringing on his rights to equal protection of the law as provided under Article 27(1)(2) of the Constitution;

(iii) That the Learned Trial Magistrate erred in law and fact when he failed to direct his judicial mind to the fact that PW2 was not a good girl as she had a boyfriend, one Hamza, and she had run away from home and there was no evidence on record to support her claim of where she spent the nights of 22nd to 25th May 2011;

(iv) That the Learned Trial Magistrate erred in law and fact in convicting him without a proper finding that-

(a) Investigation was not done and the testimony tendered was by a mother and daughter;

(b) No reason was given as to why the persons who arrested him were left out of the prosecution case; and

(c) His defence was unreasonably rejected, yet it was not impaired by the shoddy fabricated prosecution case.

3. In his written submissions, the appellant stated that the Doctor's evidence could not corroborate that of PW2 with regard to the date when she was defiled. He also stated that the P3 did not connect him to the offence of defilement. He further stated that the only evidence adduced of defilement was from a single witness, PW2, who had run away from home and was most likely seeking sympathy from her parents so that she could be allowed to go back home.

4. The appellant submitted that the Post Rape Care (PRC) form was produced as P.exhibit 3 but PW2 never asked for the same to be marked as an exhibit. He challenged the fact that the author of the PRC was not called to produce the same.

5. He also submitted that one Rachael who was said to have been in the company of PW2 should have been called as a prosecution witness, as it was said that she was with PW2 almost all the time and witnessed what transpired. The appellant relied on **Bukenya v Uganda** [1972] EA 549 and **Olivia v Republic** [1965] EACA 144, on the issue of failure by the prosecution to call some witnesses. The appellant contended that failure to call Rachael to testify was a fatal omission by the prosecution.

6. The appellant also stated that the persons who arrested him were not called to give evidence. He relied on the case of **John Kenga vs Republic**, Nairobi High Court Criminal Appeal No. 118 of 1984, in which the appellant was acquitted because of failure by the prosecution to call the persons who arrested him to clear doubt about his arrest.

7. He claimed that the Investigating Officer never carried out any investigations as he did not bother to find out if the notice board (sign board) which PW2 said she saw of the appellant advertising services of a witch doctor existed.

8. The appellant submitted that his defence was not properly considered and it was used as a basis for his conviction because he did not explain where he was on 23rd and 24th May, 2011.

9. The appellant contended that PW2 spent almost 4 consecutive nights outside her parent's house and it was not disclosed where she slept on those days. He was of the view that if the Trial Court had considered the foregoing, it would have reached a different decision. He prayed for his appeal to be allowed.

10. Mr. Muthomi, Prosecution Counsel, filed his written submissions on 2nd September, 2019. He submitted that it was not a requirement to conduct a *voir dire* examination on PW2 as she was 16 years old. He relied on the decisions in **Samuel Warui Karimi v Republic** [2016] eKLR and **Kibangeny Arap Korir v Republic** [1959] EA 92, which addressed the definition of *"a child of tender age"*. He also relied on the case of **MK v Republic** [2015] eKLR where the Court of Appeal regarded *voir dire* examination conducted on a 15 year old child as unnecessary.

11. The said Counsel relied on the case of **Patrick Kathurima v Republic** [2015] eKLR, in which the Court of Appeal sitting in Nyeri held that the age of 14 years remains a good indicative age for purposes of Section 19 of Cap 15. Mr. Muthomi submitted that the said provisions were not applicable in this case

12. On the claim raised by the appellant that the P3 form did not connect him to the allegation made by PW2 that she was defiled by him, it was submitted for the respondent that a court can even convict in the absence of medical evidence. The Prosecution Counsel relied on the decision in Kakamega High Court Criminal Appeal No. 17 of 2016 **George Muchina Lumbasi v Republic**, **Aml v Republic** [2012] eKLR and **Kassim Ali v Republic** [2006] eKLR, to support his submission.

13. Mr. Muthomi submitted that failure by the prosecution to call some witnesses did not prejudice the appellant. He relied on Criminal Appeal No. 32 of 2005 **Julius Kalewa Mutunga v Republic** [2006] eKLR **and Benjamin Mbugua Gitau vs Republic** [2011] eKLR, to support his position.

14. In response to the submissions by the respondent, the appellant stated that PW2 made a report on 27th May, 2011 at Nyali Police Station and said that she was defiled on 21st May, 2011 at 3:00p.m. The appellant submitted that the P3 form indicates that PW2 was escorted to hospital on 17th June, 2011 by PW4, yet the charge alleged that he defiled PW2 on 23rd to 25th May, 2011. He as such wondered how PW2's evidence supported the charge.

15. The appellant pointed out that the age assessment report bore the date of examination as 15th November, 2011 but PW4 in his evidence did not indicate that he took PW2 to hospital on the said date. The appellant suggested that PW2's age was assessed on 17th June, 2011 as that was the date PW4 stated that he took PW2 to hospital.

16. The appellant raised the issue of the character of PW2, whom he termed as a *"bad girl"* who had run away from home and that her evidence did not reveal where she spent the nights of 23rd to 25th May, 2011.

THE EVIDENCE TENDERED BEFORE THE LOWER COURT.

17. PW1 was Doctor Lawrence Ngone who was based at Coast Province General Hospital (CPGH). He had with him a P3 form for the complainant (PW2) who alleged to have been defiled on 21st May, 2011 (I have counterchecked the date the offence was committed from the original handwritten proceedings of the lower court). The Doctor indicated that PW2 went to hospital on 27th May, 2011 for examination. He found that her hymen was not intact. The Doctor stated that PW2 had been defiled but he could not ascertain when she was defiled. He filed and signed the P3 form on 17th June, 2011. (I have counterchecked the year the P3 form was signed from the original handwritten proceedings).

18. PW2 was LW [name withheld]. At the time she testified she was a pupil in standard 8. She gave evidence of how she went for choir practice on 21st May, 2011 and then went back home. That the following day, her brother reported her to their mother. Her mother got annoyed and beat her up. She recounted that on that day, which was on a Sunday, her friend Rachael picked her and they went to church. They later went back home. That Rachael's mother went to PW2's house and harassed Rachael.

19. PW2 stated that she became afraid and went to her grandmother's house at [*particulars withheld*]. She stated that she sent [*particulars withheld*]l to buy food and on her part, she went to take some letters to one Akongo. She indicated that on going back, she found her clothes missing. Afterwards, they went to Mlaleo where their family friend offered her and [*particulars withheld]* a place to sleep.

20. She recounted that the following day, they saw a poster advertising services of a witch doctor. They entered the room where they found

the appellant. They explained to him about her lost clothes. PW2 testified that he sent them to collect some food from the place where her clothes were stolen. He told her that she had evil spirits. He then told her to remove her clothes and he poured water on her. He then laid her on the floor and inserted his penis in her vagina.

21. It was her evidence that the appellant injured her private parts. She rose up and went outside. That Rachael entered another room where there was a man inside. She later came out and told PW2 that what she had done was a secret. The appellant told them to go for results on 24th May, 2011.

22. PW2 testified that they went to her grandmother's house and returned to the appellant's house on 24th May, 2011. That when they reached there, she entered the appellant's house while Rachael was left outside. She indicated that she found the appellant with the other man, who went outside. PW2 further gave evidence that the appellant told her to remove her clothes and he removed his. He then defiled her through her vagina.

23. PW2's evidence was that she, Rachael and the appellant went to the Indian Ocean where he collected some water. They went back to his room where he defiled her again. He then told her and *[particulars withheld*]to call out the names of their parents loudly. Afterwards he told them to go for the results after 3 days. She indicated that they left and returned to his house after 3 days. That the appellant told them he would organize for them to go to Tanzania. [*particulars withheld*]went outside and the appellant defiled her again. She left the said house and later found her mother.

24. PW2 testified that she showed the police the appellant's room and he was arrested together with the other man. PW2's evidence was that her mother asked her where she had been and she told her she had been with a witch doctor. Her mother took her to hospital where she was examined and treated. They reported the matter to Nyali Police Station. She never recovered her lost clothes.

25. PW3 was IW [name withheld]. She was PW2's mother. She recounted that on 22nd May, 2011 at 2:00 pm., she went to the market. When she returned home she found PW2 was not there. They looked for her and reported the matter to the police. They continued looking for her. She later heard that she had spent the night at Mama Mwangi's house at Mshomoroni Mwisho. PW3 indicated that she later saw PW2 passing by and asked her what had happened. She told PW3 that she lost her clothes and went to a witch doctor by the name Gunga Wakili who defiled her.

26. PW3 testified that she took PW2 to CPGH where she was examined and treated. She later reported the matter to Nyali Police Station, where she was given a P3 form for PW2, which was filled later on. PW3 further indicated that a Post Rape Care (PRC) form for PW2 was also filled. That the appellant was arrested at his workplace after being identified by PW2.

27. PW4 was No. 60197 Corporal Domitilla Matheka who was attached to Nyali Police Station. She was assigned duties of investigating the case. It was her evidence that she summoned PW2 and the other witness. She took PW2 to CPGH, accompanied by her mother, for examination on 28th May, 2011. PW4 further testified that she took PW2 to CPGH for the filling of the P3 form on 17th June, 2011. PW4 stated that PW2's age was assessed and she was found to be 17 years old. PW4 produced the age assessment report and the PRC form.

28. PW4 further testified that PW2 reported that she was defiled by the appellant on 23rd, 24th and 25th, May, 2011 and that on 26th May, 2011 she met with her mother who took her home. They reported the matter to Nyali Police Station on 27th May, 2011.

29. The appellant gave unsworn defence. He said that he lived in Malindi where he looked after cows and that on 26th May, 2011, some people he did not know knocked at the door of his house. That the people told him he was required and they took him to Nyali Police Station. That he was then charged for offences he did not know about.

ANALYSIS AND DETERMINATION

30. The duty of the 1st appellate court if to analyze and re-evaluate the evidence adduced before the lower court and reach its own independent decision while bearing in mind that it has neither seen nor heard the witnesses testify and make an allowance for the said fact.

31. The issues for determination are:-

(i) Whether failure to conduct *voir dire* examination on the complainant was fatal to the prosecution case;

(ii) If medical evidence supported the charge of defilement;

(iii) If the charge was defective;

(iv) If the prosecution's failure to call some witnesses weakened its case; and

(v) Whether the sentence was harsh or excessive.

Whether failure to conduct *voir dire* examination on the complainant was fatal to the prosecution case.

32. The appellant's argument on the above issue was that *voir dire* should have been conducted on PW1. The age assessment report showed that she was 17 years old as at 15th November, 2011. PW2 was not a child of tender age which would otherwise have necessitated the Trial Court to undertake *voir dire* examination. *Voir dire* is necessary to enable a court to determine if a child understands the meaning of an oath,

the importance of telling the truth and if the child is intelligent enough to give evidence. In **Johnson Muiruri v Republic** [1983] KLR 445, the Court of Appeal held as follows:-

> ***"Where, in any proceedings before any court a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of peaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him ….."***

33. In **Patrick Kathurima v Republic** [2015] eKLR, it was held thus:-

> ***"We take the view that this approach resonates with the need to preserve the integrity of the viva voice evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. <u>The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15</u>. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declarations Act Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes."*** (emphasis added).

34. Further, in the case of **Maripett Loonkomok vs Republic** [2016] eKLR, the Court of Appeal held as follows:-

> ***" …. That the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify.***

35. The decision in **Paul Kathurima v Republic** (supra) defined the term *"children of tender age"* to be children aged 14 years and below. Many decisions have held that it is not necessary to conduct *voir dire* examination on children above the said age. In the present case, PW2 was 17 years of age it was therefore not a requirement or necessary for the Trial Court to have conducted *voir dire* examination.

If medical evidence supported the charge of defilement.

36. The PRC form indicates that PW2 was examined on 27th May, 2011. On examination, her hymen was not intact. The date of the alleged offence was given as 25th May, 2011. The P3 form produced by PW1 gave the date of the alleged offence as 21st May, 2011. The Doctor's findings as at 17th June, 2011 when PW2 was examined was that her hymen was not intact. The appellant took issue with the fact that no injuries were found on PW2's private parts. The appellant should have raised the said issue with the Doctor, PW1, who produced the P3 form. The appellant brought up the issue of PW2's character into question by claiming that PW2 had a boyfriend by the name Hamza. In cross-examination, PW2 said that Hamza was her friend but she did not say that he was her boyfriend. There was no allegation that he defiled her. The duty of this court is to determine if the appellant defiled PW2.

37. The appellant claimed that PW2 failed to account for where she was on 22nd to 25th May, 2011. The record is clear that PW2 said that she spent the 1st night at their family friend's house and the other nights at her grandmother's house.

38. The medical evidence did not reveal any injuries on PW2's genitalia. It however revealed that her hymen was not intact. The evidence of PW2 was to the effect that she had sex with the appellant once on 23rd May, 2011, twice on 24th May, 2011 and on the last day she went to his house.

39. In **Keter v Republic [2007] 1 EA 135, the Court of Appeal stated thus on the demeanour of witnesses when testifying before Trial Courts-**

> ***"Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not. There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused."***

40. In the Trial Court's assessment, PW1 gave cogent evidence on how she lost her clothes and sought assistance from the appellant, who had advertised services of a witch doctor on a sign post at Mshomoroni. The evidence she adduced before the lower court left no doubt in the mind of this court that she was defiled by the appellant. She was the one who took the police to the appellant's room from where he was arrested. It is this court's finding that the medical evidence adduced supported the evidence of PW2 that she was defiled.

If the charge was defective.

41. The appellant alluded to the charge being defective for the reason that it was alleged that he committed the offence between 23rd May, 2011 and 25th May, 2011 yet according to the P3 form, the date the alleged offence was committed 21st May, 2011. A perusal of the lower court proceedings reveals that the offence was committed on three different dates from 23rd May, 2011. This court notes that PW2 was not the one who filled page 1 of the P3 form but it was filled Nyali Police Station by a police officer. It is therefore apparent that an error was made when filling the said page of the P3 form as to the date when the offence took place. The said error does not mean that the charge was defective as framed. The evidence of PW2 supported the charge and there was no departure from it which would lead this court to draw the conclusion that the charge was defective.

42. The appellant questioned the fact that PW2 was examined on 17th June, 2011 and her P3 form filled. It must however not be forgotten that she was examined on 27th May, 2011 at CPGH and a PRC form was filled and signed by one Fatma. It did not have to bear a stamp for the hospital for it to be regarded as valid. It bears the date of examination, the name of the person who examined PW2, the outcome of the examination and the signature of the person who examined her. The lack of a hospital stamp does not vitiate the findings made by the medical personnel who examined PW2. With regard to the late filling of the P3 form, this court notes that a PRC form is the primary document which guides a Doctor in filling the P3 form. Nothing untoward can be drawn from the filling of the P3 form on 17th June, 2011.

If the prosecution's failure to call some witnesses weakened its case.

43. The appellant pointed out that the prosecution failed to call PW2's friend, Rachael, whom she said was in her company when she went to the appellant to seek the services of a witch doctor. This court's view is that since Rachael was not in the same room with the appellant and PW2 when the act of defilement took place, she would not have added any weight to the prosecution's case.

44. The appellant also submitted that the medical personnel who examined PW2 and filled her PRC form was not called. In **Julius Kalewa Mutunga vs Republic**, Criminal Appeal No. 31 of 2005, the Court held as follows with regard to failure by the prosecution to call witnesses:-

> ***" ……..As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."***

45. In this case, the PRC form was produced by the Investigating Officer. The appellant did not object to the production of the same by the said officer and he cannot therefore now question its production at the appellate stage. It is the finding of this court that the said ground of appeal is lacking in merit. The prosecution is the one which determined the witnesses to call in this case. In addition, failure to call the persons who arrested the appellant does not weaken the prosecution's case.

Whether the sentence was harsh or excessive.

46. The appellant was sentenced to serve 15 years imprisonment. The provisions of Section 8(1) as read with Section 8(4) of the Sexual Offences Act provides for a sentence of 15 years imprisonment. PW2 in this case was 17 years old as at 15th November, 2011, when she was examined. The appellant's claim that her age was assessed on 17th June, 2011 is backed by no evidence, and in any event, age assessment of a victim can be done at any stage before the close of the prosecution's case. Since the age of the victim was established as 17 years, although the charge sheet gives her age as 16 years, the appellant was charged under the right provisions of the law. It is the finding of this court that he was convicted on sound evidence. As per the evidence of PW2, she was defiled on different dates. The sentence of 15 years imprisonment was well merited. I uphold the said sentence.

47. During the trial before the lower court, the appellant was released on bond. The provisions of Section 333(2) of the Criminal Procedure Code are not applicable to him. The appellant's sentence will run from the date when he was sentenced by the lower court, being the 2nd of March, 2015. The appeal is dismissed in its entirety. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **12th** day of **May, 2020. Judgment delivered through microsoft Teams online platform due to the covid-19 pandemic.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Valerie Ongeti, Prosecution Counsel for the DPP

Mr. Mohamed Mohamud - Court Assistant