REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 80 OF 2017

THOMAS KALALE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence in criminal case no. 300 of 2015 in the Principal Magistrate's Court at Kabarnet delivered on the 1st day of February, 2016 by Hon. S.O. Temu (PM]

JUDGMENT

1. The appellant was convicted and sentenced to 20 years imprisonment for the offence of defilement of a girl aged 14 years as particularized in the charge sheet which also charged, in the alternative, indecent act with a child.

2. The appellant appealed from both conviction and sentence on the grounds of defective charge sheet, failure to conduct a *voire dire* on the complainant child (PW1), inconsistencies in the evidence of the prosecution as not to support the charge, and failure to call crucial witnesses.

3. The appeal was opposed by the DPP.

4. The appellant filed written submissions on the appeal and the DPP made oral reply to the submissions to which the appellant had nothing to respond over and above his written submissions.

5. The issues for determination in his appeal are:

> *i. Whether voire dire examination was necessary in the circumstances of his case, and*
>
> *ii. Whether the evidence before the court proved the prosecution's case against the appellant beyond reasonable doubt.*

Determination

6. ***Defective charge***

The particulars of the charge of defilement contrary to section 8 (1) as read with 8 (3) of the sexual offences Act No. 3 of 2006 were that:

> "*Thomas Kalale. On the 24th day of March 2015 in Marigat Sub-County within Baringo County did intentionally and unlawfully committed an act which caused your penis to penetrate the vagina of SJL a girl aged 14 years in contravention of the said Act".*

7. There is obvious discrepancy in the age of the complainant as given in the charge sheet and as testified to by the child who said that she was *"above 12 years"* having been born in 2003. However, the object of the charge is to inform the accused of the criminal offence facing him with sufficient detail as to enable him to prepare and present his defence. Section 134 of the CPC provides as follows:

> ***Offence to be specified in charge or information with necessary particulars***
>
> *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.*

8. In the charge herein, the appellant was informed of the charge of defilement of a girl named therein and stated to be 14 years of age. The

offence of defilement is complete if the victim is proved to be a child, and really only the penalty varies according to the age of the child. It cannot, therefore, be shown any real prejudice for purposes of section 382 of the CPC as would warrant the invalidation of the charge on the ground that the victim child was shown to be 12 years and not 14 years as charged. I, therefore, find that the discrepancy on the age of the complainant as set out in the charge sheet and as stated by PW1 in court is curable under section 382 of the CPC, which provides as follows:

> ***Finding or sentence when reversible by reason of error or omission in charge or other proceedings***
>
> *Subject to the provisions hereinbefore contained, no finding, sentence or 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 proceedings 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:*
>
> *Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings*

And in any event, the sentence meted out is the one applicable to cases where victim is aged 12-15 years, so there can be no prejudice.

Whether voire dire is necessary in the circumstances of the case

9. Section 19 of the Oaths and Statutory Declarations Act Cap 15 provides as follows:

> ***Evidence of children of tender years***
>
> *(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.*
>
> *(2) If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.*

The object of *voire dire* examination was set out in ***Maripett Loon Komok v. R*** C.A Cr App 68 of 2015.

10. The complainant was cross-examined by the appellant at length as shown on the Record at page 11-13, eliciting the following responses:

> ***CROSS-EXAMINATION***
>
> *I am telling the truth.*
>
> *I had gone to hospital and my age was assessed.*
>
> *You raped me on 24/3/15 and you had given me alcohol.*
>
> *I was taken to hospital and it was confirmed that you had raped me.*
>
> *You had raped me in your house.*
>
> *Your wife was also in the house drunk.*
>
> *I had come to your home to help your wife was utensils and I was given supper.*
>
> *I was also taking care of your children.*
>
> *I don't drink. You had forced me to drink alcohol while in your house and you were holding me.*
>
> *Your neighbours are at some distance.*
>
> *I did not scream because you were holding me.*
>
> *Many people had come including the village elders.*
>
> *Other people did not record their statements.*

I had fallen drunk when you gave me alcohol.

I had slept on the ground with your children.

I had gone to hospital on 24/3/15

You had defiled me on 24/3/15 night and in the morning I was taken to hospital.

I am talking the truth.

11. The trial Court record indicates the *"PW1 female minor aged 14 years sworn English –Kiswahili."*

12. It is clear from the record that the trial Court when presented with the complainant as a 14 years old, and having seen the child, considered that there was no reason for voire dire to determine whether the evidence of the child should be taken, whether with or without oath see ***Kibageny v. R*** (1959) EA 92 and Oloo Sexual Offence ***Gai v. R*** (1960) EA 86.

13. Section 19 of the Oath and Statutory Declaration Act is a permissive legislation for reception of evidence of minors for tender age. It has been held that a child of tender age reads a child of below 14 years. See ***Kibageny v. R*** (1959) EA 92, 94 that:

There is no definition in the Oaths and Statutory Declarations Ordinance of the expression "child of tender years" for the purpose of s. 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age, of under fourteen years; although, as was said by LORD GODDARD, C.J., in R.v. Campbell (1), [1956] 2 All E.R. 272,

"Whether a child is of tender years is a matter of the good sense of the Court…."

Where there is no statutory definition of the phrase. The two boys in this case, both of whom were estimated to be under fourteen years old, must therefore be considered as children of tender years."

14. The complainant whom the trial Court thought was 14 years and therefore did not require a *voire dire* examination gave evidence on Oath and was cross-examined by the appellant fully, and the appellant has not pointed to any injustice occasioned thereby. That the complainant turned out to be 12 years does not distract from the trial Court's assessment of ability to testify on oath especially given the fact of the cross-examination on her testimony.

I would find that the default to carry out a *voire dire* examination on the complainant who was said to be 14 years old but who turned out to be 12 years, was not fatal.

Whether evidence established the accused defiled the complainant

15. The duty of the 1st appellate court has been set out in ***Okeno v. R*** (1972) EA 32,36 as follows:

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E.A 336) and to the appellate conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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, see Peters v. Sunday Post, [1958] E.A. 424.

Proof of age of complainant

16. While the prosecution did not produce a birth certificate to show the age of the complainant, there was evidence from PW 1 the complainant herself and her father that the she was born in 2003 and was therefore 12 years at the time of the defilement. It is trite that the age of the complainant in sexual offences is a matter of fact which may be proved in the usual manner, and lack of a birth certificate is not fatal. In this case, consistently with the allowance of ***Okeno v. R***, the appellate court must defer to the trial Court which saw and heard the complainant and stated in the judgment that:

The complainant minor was examined on the age and found to be 12 years which falls within the age bracket of 12-14 years and this her age was properly assessed and I had the privilege to look at the complainant and indeed my opinion and observed was that the complaint was within the said age bracket".

17. The learned Magistrate must have had in mind the age bracket of 12-15 years relevant to the offence under section 8 (3) of the sexual offences Act. As held above, no prejudice is shown to be occasioned by the charging of defilement of a 14 years while the testimony before Court was that she was 12 years.

Conviction on corroborated evidence of the victim of Sexual Offence.

18. Section 124 of the Evidence Act provides as follows:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a Sexual Offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

19. The evidence of the complainant on the indecent was clear and consistent and the Court would have convicted on it even if there had been no other evidence. She said:

PW1

I am resident of [particulars withheld] village within Marigat.

I go to church and school at [particulars withheld] primary school.

I am in class seven.

I know Thomas Kalale. He is my neighbour.

On 24/3/15 I was assisting the accused wife to wash cloths and utensils at home.

That was in the evening at about 4 pm.

The accused's wife was drunk and asleep.

The accused came and he gave me alcohol which was changaa but I informed him that I don't drink.

The accused had forced me to drink by holding my hand and I had drunk.

The changaa was in Kazuku container and it was much.

I was drunk and I went and I slept with the accused's children.

The accused had come to where I was sleeping on the ground and he carried me to his bed.

I did not hear when he carried me.

When he placed me on his bed I woke up and I found that I was naked.

I was feeling pain on the stomach and my private parts when I woke up.

When I wake up I had found many people in the house.

The accused's wife had screamed and attracted members of the public.

The village elder had come to the scene.

My father had taken me to our home.

When the morning came I was taken to hospital at Marigat district and I later went to the police station.

As shown in the lengthy cross-examination by the appellant, the complainant was consistent and unshaken during cross-examination.

20. The Court, however, finds corroboration of the evidence of the complainant in the evidence of the father Pw2 who was called by a neighbour in response to the discovery of the incident and of the Clinical Officer (Pw4) who examined on the following day the complainant and found evidence consistent with defilement. In ***Oloo v. R*** (2009) KLR 416, corroboration should in practice be sought even where the evidence of the child is on Oath.

21. Indeed, the trial Court had found *"the complainant's (minor) evidence was truthful as she was not shaken on cross-examination and the clinical officer who examined her a few hours after the odeal/defilement confirmed that indeed there were lacerations"*. I did not find any reason to doubt the complainants' evidence.

Weighing the prosecution evidence against defence

22. While alleging a frame up on account of a land dispute with the complainants' father, the unsworn statement of his wife witness (Dw2) was inconsistent as to whether the complainant had spent the night at the appellant's house on the material date or ever. The appellant said the complainant had never slept at his house with his wife (DW2) conceded in cross-examination that *"the complainant used to sleep in my house some days. On the date of incidents the complainant had slept at my house."* In addition, the appellant asserted that the dispute was over land and not defilement yet all he gave information on in defence was an alleged fight over unpaid mutura and an alleged demand by the complainant's father that the appellant moves *"out of the plot which belonged to his brother."*

23. Weighed against the evidence of the prosecution, I do not find in the unsworn statement of the appellant and the supporting testimony of his wife (DW2) any evidence as to raise doubt as to the appellant's guilt which the evidence by prosecution establishes.

24. I find the appellant's guilt for the offence of defilement contrary to section 8(1) and 8 (3) of the Sexual Offences Act proved beyond reasonable doubt. The sentence is a minimum which must be imposed. According to the Sentencing Policy guidelines of the Judiciary where the law provides minimum sentences (e.g the Sexual Offences Act), then the Court is bound by those provisions and must not impose a sentence lower than what is prescribed.

Orders

25. Accordingly, for the reasons set out above, the appellant's appeal is dismissed for want of merit.

Order accordingly.

DATED AND DELIVERED THIS 16TH DAY OF JANUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Assistant DPP for the Respondent.