REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO 45 OF 2017

JOHN KIMEMIA NDUTA.....APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the judgment and sentencing of Hon. J.W Onchuru Principal Magistrate

in Mpeketoni Criminal Case No. 473 of 2015 delivered on 10/2/2017)

JUDMENT

1. The Appellant John Kimemia Nduta was charged with the offence of defilement contrary to **section 8(i)** as read with **section 8 (3)** of the **sexual offences Act, 2006**. The particulars of the offence were that on 22nd August, 2015 at about 0700hrs within Lamu County unlawfully caused his penis to penetrate the vagina of **SM** a girl aged 7 years old. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to **section 11 (i) of the Sexual Offences Act.** At the conclusion of the trial the Appellant was convicted and sentenced to serve 20 years imprisonment.

2. The Appellant was aggrieved with the conviction and sentence and filed the present appeal. His grounds as far as I can decipher from his home made amended grounds of appeal are that the court convicted the Appellant despite insufficiency of evidence; that the prosecution's evidence was full of contradictions; that the age of the complainant was not proved as required by law; that the trial court misapplied the provision of **Section 124 of the Evidence Act**, and; that the sentence was manifestly harsh.

3. The Appellant argued his grounds of appeal through written submissions filed on 25/9/2018. He submitted that the age of the victim was not proved and neither was penetration proved as the medical examination revealed that the victim had an infection in her genitals whereas the Appellant had none. The Appellant further submitted that the court misapplied the provisos of **Section 124 of the Evidence Act** by failing to record in the proceedings the reasons why he relied on the evidence of the complainant.

4. Mr. Kasyoka learned counsel for the Respondent conceded the appeal. In his brief submissions he stated that the State was conceding on two grounds. Firstly, that the age of the victim which was a key ingredient of the offence was not proved. Secondly, that the record did not indicate why the court relied on the evidence of the complainant alone. He cited the authority of **Samuel Waweru vs Republic, Garsen HCRA No. 39 of 2016 [UR].**

5. It is my duty as a first appellate court to re-evaluate the evidence not withstanding that the appeal is conceded to draw my own conclusions and findings. See **Okeno vs Republic [1972] EA 32. See also Eric Onyango Ondeng vs Republic [2014] eKLR.**

6. From my consideration of the grounds of appeal and submissions of the parties, the appeal raises three key issues namely whether the prosecution proved the case to the required standard; whether failure to prove the age of the victim was fatal to the prosecution case; and; thirdly whether the court misapplied the provisions of **Section 124 of the Evidence Act.**

7. **Section 124 of the evidence Act** provides that;

> "not withstanding the provision of section 19 of the Oaths and statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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 its 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." [Emphasis added]

The rationale for the proviso above is that a sexual offence would not normally be committed in the presence of other persons and therefore to expect eye witness corroboration would be to defeat justice.

8. In **Denis Osoro Obiro v Republic (2014) eKLR** the court of Appeal stated with respect to the proviso to Section 124 of the Evidence Act thus:-

> "Indeed under the proviso 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."

9. In the present case the Appellant submitted that the court accepted the evidence of the complainant victim and did not record the reasons for so believing it. I have looked at the record. The victim testified on 4th August, 2016 before **Hon. Onchuru.** A *Voire dire* examination was conducted and the court recorded that it formed the opinion that the minor was intelligent and could be sworn. In her testimony the minor (PW3) told the court that she was 7 years old and a class two pupil. She recalled that she was playing outside Kimemia's (accused) shop on 22nd August, 2015 with other children when Kimemia called her inside his shop and did "tabia mbaya" on a sofa after removing my skirt and my panty. He used "kadudu" to do "tabia mbaya".

10. PW3 further testified that she felt pain in her stomach and that Kimemia gave her juice and biscuits. She later told her brother B aged 13 and M what had happened to her and that B told their mother the following morning. Her mother asked her and she told her what had happened to her and thereafter she was taken to hospital where she said she was given an injection.

11. The court recorded that "tabia mbaya" was "bad manners". It was understood to mean having sex or penetration. I observe that the court did not indicate on the record the demeanor of the witness. However in analysing the evidence of the victim at page 3 of the judgment the court stated thus:-

> "…….This is supported by the evidence of PW3 a girl aged 7 years and who was so confident and consistent when she testified and cross-examined by counsel for the accused. She struck as an honest and credible witness despite her tender age and I have no reason whatsoever to doubt her evidence. She was candid in her evidence as to what happened and not that she was implicating him with her mother as alleged by the accused."

12. It is clear to this court therefore that contrary to the Appellant's assertion that the court did not state why it believed the testimony of the victim, the court did state why and in so many words. It is my finding therefore that this particular ground of appeal must fail as it has no basis in fact.

13. My consideration of the record also shows that the court did not rely on the evidence of the minor victim alone. The mother of the victim (PW4) testified that she learnt from her son B that the victim had been sexually assaulted by the accused who was a person known to the family. He lived in the neighborhood according to the sketch drawn (exhibit 5) drawn by No. 89079 PC Stephen Kakai (PW2). He also had a shop which was frequented by the victim's family including the victim herself. PW4 took the victim to Mpeketoni Sub-County hospital where she was examined.

14. Medical evidence produced in court proved beyond doubt that the minor victim had been defiled. Stephen Ewai (PW1) is the Clinical Officer based at Mpeketon Sub-county hospital. He examined the minor victim on 23rd August, 2013. He noted in the treatment note [Exhibit 2] that the child had taken a bath before examination. He conducted a vaginal examination and observed "physical bruise and swelling of labia majora and minora with visible bruises at the introitus and the hymen membrane is missing". There is whitish vaginal discharge seen." PW1 captured these observations in the P3 form (Exhibit 1) which he produced in court. His testimony was that there was clear evidence of defilement. From this evidence, I find it proved, as did the trial court, that penetration was proved and that therefore the minor victim was defiled.

15. It was imperative on the trial court to establish beyond reasonable doubt the identity of the person who defiled the minor victim. As would be expected, there was no eye witness. I have scrutinized the record closely in order to draw my own conclusion on whether the Appellant was properly identified as the person who defiled the minor complainant. Medical evidence did not link the Appellant to the victim. It was explained by PW1 that the examination of the minor was done on 23rd August, 2015 which was a day after the incident. By that time she had already taken a bath and spermatozoa could not be traced. The medical examination of the Appellant therefore was of no value as there was no spermatozoa found on the victim to aid in any further analysis.

16. The testimony of the victim however carried weight in the identification of the Appellant. She was clear that she knew her attacker. He was the local shopkeeper and she had time and again been sent to the shop by her mother. He was also their neighbour and she knew him by name. When the mother (PW4) questioned her, she said that Kimemia had done "bad manners" to her. The defilement took place in Kimemia's shop. Besides the testimony of the victim, the Appellant admitted in his defence that he knew the child and her parents. He even suggested that the child mother (PW4) owed him money and had framed him.

17. In addition to the evidence above, the circumstances of the arrest of the Appellant point to him as the one who defiled the minor victim. Evidence before the trial court showed that when he was confronted, he attempted to run away and was arrested by the Administration Police officers who took him to the police station. The circumstances of arrest therefore corroborated the testimony of the victim that he was the one who defiled her. It is my finding that there was no error in linking him to the offence.

18. The court considered the Appellant's defence and dismissed it. The Appellant had given sworn evidence in which he denied having defiled the minor victim. On the one hand he said that he had not seen the child prior to her coming to the shop with the mother while on the other he said that the child had picked soda and biscuits from his shop. The Appellant also testified that he had been framed by the child's mother because she owed him Kshs. 1750/= in form of items she had taken on credit from his shop.

19. I have looked at the record. It appears that the issue of a grudge was put to the victim's mother (PW 4) when she answered in cross-examination that "I did not have a grudge with John. I owed him a debt of Kshs. 100/=. I had taken a jerican from the sister who was in the shop." Other than this, nowhere else is the issue of a frame up raised. It would have been expected that the same would have been raised with other witnesses including the investigating officer (PW2). It is my finding therefore that the frame up theory was only raised by the Appellant in an attempt to evade responsibility. It must be rejected as it is not supported by any evidence and does not in any way cast doubt on the prosecution evidence.

20. The final issue to address is the age of the victim. The Appellant submitted that there was no proof of the age of the victim. As earlier stated the Respondent's counsel also conceded the appeal on this ground.

21. Age is an important ingredient in sexual offences. By definition defilement is an act of penetration with a child. The **Sexual Offence Act** takes the definition of a child from the **children Act No 8 of 2001** which defines a child as any human being under the age of eighteen years. The establishment of the age of the victim is therefore important. Firstly in order to prove that the sexual act was with a child; and; secondly, to determine the appropriate sentence under **section 8 of the Sexual Offences Act**.

22. In the present case no birth certificate was presented to court. However, the mother of the child testified that she was 7 years old. The child victim testified that she was 7 years old and in class two. The court observed that the person before it was a child and went ahead to administer the *voire dire* examination to confirm that she understood the importance of telling the truth and that indeed she could testify. It has been held that failure to prove age is not fatal to a case of defilement as the age is only material to sentencing. In **Hadson Ali Mwachongo v Republic (2016) eKLR,** the court of Appeal held that:-

> "**Before we conclude this judgment, it is necessary to say a word on computation of the age of the victim. The Sexual Offences Act provides for punishment for defilement in a graduated scale. The younger the victim, the severe the punishment. Where the victim is aged 11 years or less, the prescribed punishment child of 12 to 15 years attract 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment…."**
>
> See also **Evans Wamalwa Simiyu vs. Republic (2016) eKLR.**

23. I observe that the Appellant was sentenced to 20 years imprisonment which is the sentence provided for in Section 8 (3). This means that although the court had noted that the child was between 7 and 11 years, the court exercised discretion to give the Appellant the benefit of the sentence applicable if the child was between 12 and 15 years. From the totality of the evidence I am of the firm view that the sentence was proper in view of concrete evidence not having been produced to support the lower age which as per section 8(3) would attract a life sentence.

24. In the end I find that the appeal, though conceded by the State, totally lacks merit. I uphold the findings of the trial court and confirm both the conviction and sentence. The appeal is dismissed.

Judgment delivered dated and Signed at Garsen on 13th day of March, 2019.

.....

R.LAGAT KORIR

JUDGE

In the presence of

S. Pacho Court Assistant

The Appellant

Mr. Kasyoka For the Respondent