REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 3 OF 2017

KEK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Mpeketoni criminal case 203 of 2016, Hon. J.W Onchuru (PM) dated 30th January 2017)

JUDGMENT

1. The Appellant was charged with defilement contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006 (SOA).** The particulars of the offence were that on the 21st May 2016 at Witu Division within Lamu County unlawfully and intentionally caused his penis to penetrate the vagina of E.T. a child aged 15 years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 21st May 2016 at Witu Division within Lamu County intentionally touched the vagina of E.T. a child aged 15 years with his penis.

3. The Appellant pleaded not guilty and at the conclusion of the trial, the Appellant was found guilty on the main count and sentenced to imprisonment for 15 years.

4. The Appellant being aggrieved by the conviction and sentence lodged his appeal on the following homemade amended ground, which as far as I can decipher are to the effect that:-

(i) The evidence of the victim was that both the Appellant and victim were compelled to an early marriage; and therefore the evidence did not support the charge and particulars thereof.

(ii) The prosecution did not prove its case beyond reasonable doubt, and;

(iii) The trial magistrate failed to consider the Appellant's defence.

5. The Appellant filed submissions on the 17th October 2018 in support of his appeal. The gist of his submissions is that the charge sheet was defective. He submitted that the complainant in her testimony had informed the court that the Appellant's mother forced her to go with the Appellant thereby compelling them into a marriage. It was his argument that both the Appellant and the complainant were

minors who were incapable of giving consent therefore the charge was inaccurate and hence defective in the use of the terms unlawfully and intentionally.

6. The Appellant further submitted that the prosecution had failed to ascertain his age as they informed the court that he was above 18 years old instead of giving his exact age. He further faulted the police officer for producing the age assessment report while he was not its maker and while not an expert. It was the Appellant's submission that he was a minor at the time of the incident and therefore was not liable to imprisonment for 20 years under the Children's Act.

7. Finally, the Appellant submitted that the prosecution failed to prove its case beyond reasonable doubt as it failed to carry out a DNA test to ascertain the paternity of the child as the complainant might have engaged in intercourse with another person**.**

8. In oral submissions Mr. Kasyoka learned counsel for the Respondent opposed the appeal in its entirety. He submitted that the prosecution had established all the elements of the offence being penetration, age of the complainant and identification of the Appellant. He submitted that the Appellant's defence of an early marriage was an admission to the offence.

9. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusion. See **Okeno v R (1972) EA 32; Eric Onyango Odeng' v R [2014] eKLR.** Further, I have to caution myself that unlike the trial court, I did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and I can only rely on the evidence on record.

10. Having considered the record, grounds of appeal, and the respective submissions of the parties, I consider the issues in this appeal to be whether the charge sheet was defective; whether the prosecution proved its case to the required legal standard, and; whether the age of the Appellant was proved.

11. On the first issue in this appeal, the Appellant contends that the charge sheet was defective as it contradicted the evidence of the complainant. He submitted that the complainant testified that the Appellant's mother compelled the complainant to go with him and therefore it was not unlawful and neither did he have intention.

12. Section 43(1) of the Act defines intentional and unlawful acts and includes ***"a person who is incapable of appreciating the nature of an act which causes the offence."*** Section 43(4) of the Sexual Offences Act goes on to provide circumstances where a person is incapable of appreciating the nature of an act and includes a child**.** Section 2 of the Act adopts the meaning of a child as that assigned in the Children Act, which under section 2 defines a child as ***a human being under the age of eighteen years*.**

13. A simple interpretation of the law as stated above is that a child cannot appreciate any sexual act and therefore any such act with a child is intentional and unlawful. It therefore follows that despite the Appellant's assertion that his mother compelled him into an early marriage with the complainant, his actions were still intentional and unlawful. I find that the charge sheet was not defective and this ground must therefore fail.

14. On the second issue as to whether the prosecution proved its case beyond reasonable doubt, the elements of defilement are age of the complainant, proof of penetration and positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

15. On proof of age, it is trite that the age of the complainant is relevant in proving that the complainant was below 18 years in order to establish the offence of defilement, and; secondly to establish the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v Republic Criminal Appeal No. 169 OF 2014 [2015] eKLR** .

16. In the instant case PW1 the complainant stated during her *voire dire* examination that she was 15 years old, which she also stated under oath during her examination-in-chief. This was corroborated by

PW6, Pauline Karani, a clinical officer who produced a P3 form (Exhibit 2) which showed she was 15 years old. However the age assessment report (Exhibit 3) produced by PW6 only stated that the complainant was below 18 years. Considered together this evidence was sufficient to show that the complainant was a child and therefore established the offence of defilement.

17. It appears from the evidence that the actual age of the complainant was not established. The complainant did not explain the source of her information respecting her age. Similarly the age assessment report stated that the complainant was below the age of 18 years while PW2, the mother of the complainant, did not state the age of the complainant. All the evidence established was the apparent age.

18. On the apparent age of the complainant, the Court of Appeal in **Thomas Mwambu Wenyi v Republic Criminal Appeal No. 21 OF 2015 [2017] eKLR** cited with approval the case of **Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2of 2000** which held that:-

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense…."***

19. It is trite that where the actual age of the complainant is not proved, the apparent age of complainant can be used. In **Evans Wamalwa Simiyu vs. R Criminal Appeal No. 118 Of 2013 [2016] eKLR,** The Court of Appeal pronounced itself as follows:-

> ***"As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."***

20. Being guided by the foregoing authorities, I find that the apparent age of the complainant was proved.

21. On proof of penetration, courts mainly rely on the evidence of the complainant which is corroborated by medical evidence. In **Dominic Kibet Mwareng vs. Republic Criminal Appeal No 155 OF 2011 [2013] eKLR** , the court held that:-

> **"…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."**

22. The complainant, PW1, testified that she was "staying" with the Appellant as husband and wife and they had sex throughout the said period even when in Mpeketoni. The clinical officer, PW6, produced a P3 form (Exhibit3) and testified that the complainant's hymen was broken, she had a discharge and that she was pregnant. Her evidence corroborated that of the complainant which established penetration

23. On the identification of the Appellant, it is not disputed that the complainant was with the Appellant for almost 3 weeks. It was the complainant's undisputed evidence that the Appellant's mother took her to her house where she handed her over to her son the Appellant. The Appellant then went with her to Witu Mashambani where they stayed for one week before going back to the Appellant's mother's house for three days. Thereafter the Appellant's mother took the complainant to the Appellant at Mpeketoni where they stayed for a number of days before she was finally found by her relatives and taken back to Witu to

the police station.

24. The complainant's evidence in this respect was corroborated by PW2, PW3 and PW5 all who testified that the Appellant was arrested together with the complainant. From the record, it is not in dispute that the Appellant was the only person who stayed with the complainant in different places for almost 3 weeks.

25. The Appellant faulted the prosecution for failing to conduct a DNA test to ascertain the paternity of the child on the allegation that the complainant could have had sexual intercourse with someone else. It is trite that a DNA test is not mandatory and failure to adduce such evidence does not weaken the prosecution case. What was sought to be proved was defilement not paternity. The evidence therefore leaves no doubt that the Appellant defiled the complainant in the said period. See **George Kioji vs Republic**, **CR App. No. 270 of 2012 (UR)**.

26. In **Williamson Sowa Mbwanga v Republic Criminal Appeal No. 109 Of 2014 [2016] eKLR**, the Court of Appeal pronounced itself with respect to DNA in defilement case as follows:-

> ***"As regards the first ground of appeal, it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See TWEHANGANE ALFRED V. UGANDA, CR. APP. NO. 139 OF 2001)." (Emphasis mine)***

27. It is immaterial whether or not the pregnancy of the complainant was as a result of the alleged marriage as the offence of defilement requires that penetration be proved which has sufficiently been done as stated earlier in this judgment.

28. On the age of the Appellant, it was the Appellant's submission that he was 17 years of age and that the court erred in accepting the age assessment report produced by the prosecution. It is trite that the document is supposed to be produced by the maker and where it is not possible to call the maker, a basis should be laid before it is produced by someone else. See **Sibo Makovo v. Republic (1997) e KLR.**

29. In **Joseph Makau Katana v Republic Criminal Appeal No. 47 of 2015 [2018]** Odunga J held that:-

> ***"59. In this case the age assessment report was similarly produced by a police officer without any reason being afforded for not calling the maker or even another medical officer to do so. In the premises, I am unable to rely on the said document as evidence of the age of the appellant."***

30. From the record it is clear that the age assessment report was produced by the prosecution on 3/2/2017 on the same date that the judgment was read and sentence passed. It did not afford the Appellant an opportunity to dispute its production. Further, even if I was to accept the age assessment as produced it is clear that the age assessment was carried out on the 2/2/2017 while the defilement was said to have taken place on or about the 21st May 2016. This is almost a period of one year. The age assessment found the Appellant to be 18 years old on the 2/2/2017. It is quite possible that at the time the offence was committed the Appellant was 17 years old and therefore a minor. The Appellant shall benefit from the lingering doubt as to his age.

31. Section 8(7) of the SOA provides for the punishment where the offender is a minor and provides that:-

> ***"7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of***

the Borstal Institutions Act (Cap. 92) and the Children's Act (Cap. 141)."

32. **Section 191 (1)** of the Children Act provides for methods of dealing with child offenders and states that a child offender who has attained the age of 16 years shall be dealt with in accordance to any act that provides for establishment of borstal institutions.

33. **Section 6** of the **Borstal Institution Act** provides for that a youthful offender shall undergo training at borstal institution for a period of three years and states as follows :-

> ***"Where the High Court or a subordinate court of the first class or a juvenile court is satisfied, after considering the matters specified in section 5 of this Act, that it is expedient for his reformation that a youthful offender should undergo training in a borstal institution, it may, instead of dealing with the offender in any other way, direct that the offender be sent to a borstal institution for a period of three years."***

34. The Appellant herein was sentenced on the 3 February, 2017 and has already served 2 years and 4 months prison sentence. It is also noted that he was in custody from the date of his arrest on the 12/6/2016 for a period of seven and a half months during the pendency of the trial. The Appellant has been in custody for a period of 3 years. This is the same period that he was liable to serve in a Borstal Institution under the Borstal Institution Act.

35. In the upshot, having evaluated all the evidence on record, it is my finding that the main charge was proved beyond reasonable doubt that the Appellant was the one who defiled the complainant. However, I find that the Appellant was a child at the time the offence was committed and that the sentence was therefore excessive and is reduced to the period already served. The Appellant shall therefore be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Judgment dated delivered and signed at Garsen on this 12th day of June, 2019.

R. LAGAT KORIR

JUDGE

In the presence of:

The Appellant in person

S. Pacho - Court Assistant

Mr. Kasyoka - For Respondent