REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 89 OF 2018

LEONARD MWIRIGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of E. Ayuka Resident Magistrate

Nkubu CRC Case (SOA) NO. 31 of 2017)

J U D G M E N T

1. The appellant was charged with the offence of defilement contrary to ***section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006***. It was alleged that on diverse dates between 28th November, 2017 and 6th December, 2017 at Kathera Location in Imenti South District within Meru County, the appellant intentionally caused his penis to penetrate the vagina of AW, a child aged 12 years.

2. After trial he was convicted and sentenced to serve twenty (20) years imprisonment. Aggrieved by the said decision, he has now appealed to this court against his conviction and sentence setting out five grounds of appeal. Those grounds may be collapsed into three: ***that the trial court erred in convicting the appellant yet the age of the complainant had not been proven; that the evidence presented was insufficient to find a conviction and that the trial court erred in dismissing the appellant's defence***.

3. This being a first appeal, the court is obligated to revisit and re-evaluate the evidence a fresh, assess the same and make its own independent findings and conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Okemo vs. R [1977] EALR 32**.

4. The prosecution called five witnesses to support their case. **PW1 AW**, the complainant, testified that on 28th November 2017, she was taken by the appellant from her home to Kathera where he had rented a house. They stayed together for one month as the accused told her that he had married her. Over the period, they had sexual intercourse repeatedly until the area chief caught them and called the police who arrested them and took them to Nkubu Police Station. She was then taken to hospital and examined. She stated that she was 12 years old but did not know her year of birth.

5. **PW2 Seberina Kaimatheri,** a clinical officer at Kanyakine Level 4 Hospital produced the complainant's P3 form. She testified that the complainant was aged 12 years. That she attended hospital after 9 days and was examined after 13 days of the incident. She determined that the complainant had been defiled as the examination revealed the absence of the hymen.

6. **PW3 Charles Murethi** and **PW4 Mureithi Ndegwa,** were the area chairman of Nyumba Kumi and area manager, respectively. They told the court how they learnt on 3rd December 2017 that the accused was cohabiting with a minor. They called the area sub- chief of Marimba sub-location. They went to the premises where the the accused was staying and found him with the complainant. They handed them over to the police.

7. **PW5 NO. 96272 PC (w) C. Mueni,** the investigating officer, stated that on 6th December, 2017, she was allocated the case. She went to the scene and found **PW3 and PW4** with the appellant and complainant whom they arrested. She later took the two to Kanyakine District Hospital for medical examination. After examination, the complainant's age was ascertained to be between 12 and 16 years (***P. Exb. 3***).

8. When put on his defence, the appellant gave a sworn testimony. He told the court that he was a tea plucker and he spent the whole day picking tea. At 5.30 pm, he took the tea leaves to the buying centre and went back home. While on his way, the complainant called him and told him that she was looking for casual work. She then requested him for food. He took her to his house and gave her food. That it is then that the area chief and sub – area arrested him and the sub area swore to teach him a lesson.

9. Both the appellant and the prosecution submitted on the appeal, which submissions. The appellant submitted that the key ingredients of the

offence of defilement had not been proved. That the prosecution was contradictory and the case had not been proved against him to the required standard. The prosecution submitted otherwise and urged that the appeal be dismissed.

10. The first ground of appeal was that the age of the complainant was not proved. Age is a very important factor in sexual offences. This is so because of the appurtenant punishment that goes with an offence committed against children of certain ages. The punishment is imprisonment that differ from 15 years to life, for ages 17 and less than 11 years.

11. In **Joseph Kieti Seet v Republic [2014] eKLR,** Mutende J held:-

> ***"It is trite law that the age of the victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuuroni versus Uganda, Court of Appeal Criminal Appeal No.2 of 2000, it was held thus:***
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> > ***'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 also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."***

12. In **Dominic Kibet Mwareng v Republic [2013] eKLR** it was held that:-

> ***"I agree and add that while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."***

13. It is clear from the forgoing that, in sexual offences, the age of a victim can be determined by medical evidence or any other cogent evidence. In the present case, the complainant stated that she was 12 years of age but she did not know her date of birth. **PW2,** the clinical officer who examined her, testified that the complainant was 12 years. The prosecution went further and produced an age assessment report that was conducted to ascertain the complainant's age (**PExh.3**). The trial court concluded that the complainant was between 12 to 16 years old.

13. From the medical evidence, it was clear beyond any peradventure that the complainant's age was above 12 years but less than 16 years. She was a child of between 12 and 16 years which brought the offence squarely under ***section 8(3) of the Sexual Offences Act.***

14. In this regard, I am satisfied that the prosecution did discharge its burden of establishing the complainant's age to the required standard. Accordingly, the trial court did not err when it made a finding that the complainant was a child. I reject that ground of appeal.

15. The next ground was that the trial court's findings were against the weight of evidence. The evidence available was that of the minor complainant (**PW1),** the clinician **(PW2),** nyumba kumi chairman **(PW3),** the sub-area **(PW4)** and the investigations officer **(PW5).**

16. The trial court's finding on the totality of the prosecution evidence was that, between 28th November, 2017 and 6th December, 2017, the appellant lived with the complainant and during that period, he had sexual intercourse with her.

17. The complainant was a minor aged 12 years. She told the court that on 28th November, 2017, the appellant took her from her home in Egoji to Kathera where he had rented a house. She stayed with the appellant for one month where they repeatedly had sexual intercourse. The area chief caught them and called the police who arrested them.

18. The evidence of **(PW3) and (PW4)** was that on 3rd December, 2017, they got to know that the appellant was cohabiting with the complainant. They alerted the sub-chief of Marimba sub-location who called the police to whom they handed the two.

19. The investigations officer **(PW5)**, told the court that she was called by the OCS of Nkubu Police Station on 6th December, 2017 and told that the chief of Kathera had called and stated that he had someone who was cohabiting with a minor. She, in the company of her colleagues, went and arrested the appellant with the complainant. Had the prosecution proved its case beyond any reasonable doubt?

19. The complainant was a minor of 12 years. The record shows that the trial court did not conduct *voir dire* examination before swearing the complainant to testify. There is nothing to show that the trial court asked the complainant any preliminary questions to satisfy itself that the minor understood the meaning and consequences of the oath or the consequences of not telling the truth. It is mandatory that, every child of tender age must be subjected to *voir dire* examination at all times before he/she testifies.

20. In **Johnson Muiruri v. Republic [1983] KLR 447 at pg. 448,** the Court of Appeal observed:-

> ***"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In* Peter Kariga Kiume v. Republic CR. A No. 77 of 1992 (UR)*, we said;***
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> > ***'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 voir dire examination whether the child understands the nature of the oath in which even this sworn evidence may be received. If the court is not satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused***

person shall not be liable to be convicted on such evidence unless it is collaborated by material evidence in support thereof implicating him …"

21. In **Maripett Loonkomok v. Republic [2016] eKLR,** the Court of Appeal stated:-

> ***" … in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the suitability of the child. … The courts today accept both the question and answer format and the recording of the child's answer's only. … What is constant is that, whatever format it takes, it must be on record.***
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> ***It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;***
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> ***'In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge … the court may still be able to uphold the conviction'.***

22. In view of the foregoing, the evidence of **PW1** is to be excluded when evaluating the prosecution case to see if the offence was proved to the required standard. The court has to examine the independent evidence to satisfy itself if the case was proved.

23. The evidence of **PW3 and PW4** was that, on 3rd December, 2017, they heard that the appellant was cohabiting with a minor. They called the sub-chief of Karimba sub-location who called the police to whom they handed the appellant and the complainant.

24. On her part, **PW5** told the court that on 6th December, 2017, the OCS Nkubu Police Station received a call from the chief of Kathera that a suspect was cohabiting with a minor. She went and found the area manager and chairman of nyumba kumi together with the appellant and the complainant and arrested the appellant. In cross-examination, she stated that she found that the area manager had already arrested the appellant and had removed him from the premises the appellant had rented.

25. **PW2's** testimony was that the complainant was attended to in hospital after 9 days and she examined her after 13 days. She found the hymen missing.

26. **PW3 and PW4** were categorical that they arrested the appellant and complainant on 3rd December, 2017. **PW5** testified that the police were alerted on 6th December, 2017 when they arrested the appellant. The complainant was taken to hospital on 7th December, 2017. From the treatment notes, nothing substantial was noted except what the complainant narrated to the clinician that she had been engaging in sex with the appellant for a week. What happened between 3rd up to 6th December, 2017 was not explained.

27. The appellant was categorical in his defence. He and the complainant were known to each other. On the material day, he met the complainant who asked him for food. He took her to his house where after eating, they were accosted by the area chief and the sub-area and arrested. The evidence suggested that the complainant was not living with him. He was not cross-examined to test his testimony. It remained unchallenged.

28. To my mind, excluding the testimony of the complainant that she and the appellant had had repeated sexual intercourse, the evidence of **PW2, PW3, PW4 and PW5** is not sufficient and consistent to prove the offence against the appellant to the required standard. He raised a plausible defence which was not challenged by the prosecution.

29. The trial court dismissed the defence on the basis that the appellant did not confront the sub-area when the latter testified. Firstly, the appellant is a lay person and may not have known how to confront his accuser. Secondly and more important, the appellant questioned the sub-area about the presence of food in the premises he was found with the complainant which was an aspect of his defence.

30. In view of the foregoing, I am satisfied that the totality of the evidence was not sufficient to prove the offence of defilement on the part of the appellant beyond any reasonable doubt. He had raised a plausible defence that was not displaced.

31. In the end, I find that the appeal has merit and the same is allowed. The appellant is to be set forth at liberty unless otherwise lawfully held.

DATED and DELIVERED at Meru this 13th day of June, 2019.

A. MABEYA

JUDGE