**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CRIMINAL APPEAL NO. 67 OF 2017**

**MUTUA RICHARD...................................................APPELLANT**

**-VERSUS-**

**REPUBLIC..............................................................RESPONDENT**

***(From Original Conviction and Sentence in Criminal Case No. 276 of 2012 of the Principal Magistrate's Court at Makindu)***

**JUDGEMENT**

**INTRODUCTION**

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**. The particulars of the offence were that on the 14th day of March 2012 within Makueni County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of S M a child aged 15 years.

2. There was 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 were that on the same day and at the same place, the appellant intentionally and unlawfully touched the vagina of S M a child aged 15 years.

3. The learned trial magistrate convicted him on the main charge and sentenced him to 20 years imprisonment.

**THE APPEAL**

4. Aggrieved by that decision, the appellant filed the instant appeal and raised 17 grounds of appeal. The petition of appeal was repetitive and unnecessarily wordy. I have condensed it into seven grounds *to wit*;

> ***a) That the learned trial magistrate erred in law by failing to find that it was important for the complainant's age to be proved beyond reasonable doubt.***
>
> ***b) That the learned trial magistrate erred in law by convicting the appellant when there was no corroboration of the complainant's testimony.***
>
> ***c) That the learned trial magistrate erred in law in that no proper identification and/or recognition of the appellant was made.***
>
> ***d) That those who arrested the appellant did not testify and the inference to be drawn is that they would have testified against the prosecution. This was not considered.***
>
> ***e) That the learned trial magistrate misdirected herself in law by meting out an excessive sentence that violates the appellant's right to the benefit of the least severe punishment under the Constitution.***
>
> ***f) That the learned trial magistrate misdirected herself in law and facts in convicting without proper consideration and analysis of the evidence.***
>
> ***g) That the learned trial magistrate erred in both law and facts when he convicted the appellant against the weight of the evidence.***

5. The appeal came up for hearing on 17/01/2018. The appellant was represented by learned Counsel Mr. Wallah and the state was represented by Learned Prosecution Counsel Mrs. Gitau. The written submissions by the appellant were sorely about the issue of age

assessment. He referred the Court to several authorities.

6. In his oral submissions, Mr. Wallah contended that the expert who prepared the age assessment report did not appear in Court to testify and as such, the appellant did not cross-examine him/her. Further, he submitted that the victim was over 18 years as she was a neighbor of the appellant and he had known her since birth. He went on to say that the victim appeared to have had previous sexual acts, she never screamed and was a person who exhibited adult lifestyle. According to Mr. Wallah, when the victim's brother (PW3) walked in on them, she had to act as if she was being forced to avoid his wrath. He urged the Court to allow the appeal.

7. In opposing the appeal, Mrs. Gitau stated that all the ingredients of the offence had been proved. On age, she stated that the assessment was done two years after the incident and the report produced in Court showed that the victim was 16-17 years hence corroborating the age of 15 years indicated in the charge sheet.

8. She further submitted that the age assessment was done by a doctor and the investigating officer produced it without objection yet the appellant was represented in the lower Court. She contended that in view of PW1's testimony, there was no consent even if she was an adult.

9. With regard to the sentence, she submitted that it was proper as the minimum punishment prescribed by law, for victims of 12-15 years, is 20 years. She urged the Court to dismiss the appeal.

**DUTY OF COURT**

10. The duty of a first appellate Court as aptly put in the case of **Okeno V. Republic (1972) E.A. 32** is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

11. Guided by the condensed grounds of appeal, I will proceed to analyze and re-evaluate the evidence.

12. The brief facts of this case are that on 14/03/2012, the complainant was at home sleeping on the sofa set as she was unwell. The appellant found her sleeping there, violently laid her on the ground, removed her inner wear and raped her. The complainant's brother found him in the act and tied him with ropes. They were taken to Kalimani Hospital and then Kibwezi police station.

**PROOF OF COMPLAINANT'S AGE**

13. Neither PW1-the complainant, PW2-her mother nor PW3 her brother testified about the complainant's age. The charge sheet indicated that the offence was committed on 14/03/2012. The age of the complainant was stated to be 15 years.

14. The age assessment report was produced by the investigating officer as exhibit No. 4. I looked at it very carefully. It is dated 20/06/2013 and indicated that the assessment was done on the same day. According to the report, the assessment was done by Dr. Charles Ngige who signed off as the Dental Officer in charge at the Makindu District Hospital. He indicated the complainant's age to be between 16 and 17 years.

15. This assessment was done 1year and 3 months after the offence. Therefore, at the time of the commission of the offence, the complainant was between 15 and 16 years.

16. Contrary to the appellant's submissions, the evidence on record shows that the age assessment was conducted by a dentist. All what the investigating officer (PW6) did was to produce the report and there was no objection from the appellant who was ably represented by Mr. Kasyoka. Infact, he went ahead and cross-examined the investigating officer on that report.

17. In the Ugandan Court of Appeal case of ***Francis Omuroni –vs- Uganda, Criminal Appeal No. 2 of 2000***; it was 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 also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."***

18. The Court of Appeal of Kenya has also expressed itself on the issue of age assessment. In ***Criminal Appeal No. 61 of 2014; Richard Wahome Chege –vs- R,*** the Court of Appeal sitting in Nyeri *(Visram, Koome & Otieno-Odek JJ.A)* found the evidence of the complainant's mother to be sufficient proof of age. The learned Judges expressed themselves as follows;

> ***"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant and the complainant herself."***

19. In ***Machakos High Court Criminal Appeal No. 91 of 2011 Joseph Seet –vs- R***, the court relied on the Clinic Health card of the child in a defilement case to uphold a conviction in a case where proof of age was an issue.

20. The appellant attached the Eldoret ***Court of Appeal case No. 661 of 2010 (***Maraga, *Musinga & Murgor JJ.A)* to his written submissions. In my view, this authority is distinguishable to the extent that no assessment report was produced in Court and the evidence of a police constable with regard to the complainant's age was disregarded as he was found to be an incompetent witness. However, the Court went

ahead and relied on the complainant's evidence as well as that of her mother to conclude that the complainant was between the ages of 12 and 15 years. The Court declined to hold that the charge sheet was defective due to the discrepancies in the complainant's age regardless of the fact that the state was ready to concede.

21. Guided by the above authorities, I am of the view that that the complainant's age was sufficiently proved. This ground of appeal should fail.

**CORROBORATION**

22. According to the appellant, the complainant's evidence was not corroborated. **PW1, S M M** testified that she was a class 8 pupil at [particulars withheld] Primary School. She recalled that on 14/03/2012 she was sleeping in her mother's house as she was unwell. Her mother had gone to the women's group meeting. The appellant found her lying on the sofa set, violently laid her on the ground, removed her inner ware and raped her.

23. Her brother (PW3) came and found the accused in the act. He tied him with ropes. **PW2, F W M**, the complainant's mother testified that on 14/03/2012, she was at the women's group meeting. She had left PW1 resting in the house as she was sick. While at the meeting, she received a call from her son (PW3) who informed her that he (PW3) had found the appellant in their house defiling PW1. She went back home and found that the appellant had been tied.

24. **PW3, J K M** testified that on 14/03/2012, he came back from the river at around 10.00 a.m. and found the accused having sex with PW1. He tied him up then called neighbors, the area councilor and his mother. **PW5, Ann Wangesi Nderitu** testified that she was a holder of masters of science and chemistry. She had worked at the Government chemist for 15 years. She produced a report (exhibit 3a) which had been prepared by Dr. Paul Waweru Kang'ethe who had proceeded on retirement.

25. The report showed that the DNA profile of the blood sample collected from the appellant matched the DNA profile of the semen collected from the complainant's pant.

26. Section **124 of the Evidence Act** Cap 80, Laws of Kenya provides;

> ***"Notwithstanding the provisions 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 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."***

27. From a plain reading of the above section, it is clear that corroboration is not a requirement. All that is required is for the Court to record the reasons for believing the victim where the only evidence is that of the alleged victim.

28. In the current case, there was the evidence of PW3 who found the appellant in the act. In my view, the proviso to section 124 of the Evidence act is not applicable in this case. Further, even in the absence of the need for corroboration, the testimonies of PW1, 2, 3 and 5 were cogent and pointed to the accused as the offender. Accordingly, this ground should fail.

**IDENTIFICATION/RECOGNITION**

29. The appellant contends that he was not properly identified and or recognized. PW1 testified that the offence happened at 10.00 a.m. while she was sleeping in her mother's house. She said that the appellant was their neighbour. PW1's mother and brother also said that the appellant was their neighbor. None of them was cross-examined on the issue of identification.

30. The appellants defence painted a picture of someone who knew the complainant and her family very well. He testified that on the material day, the complainant's mother requested him to check after her goats. He met the complainant outside their house but they spoke while inside the house. It was not the first time to enter their house. The complainant told him that she was unwell. Shortly thereafter, the complainant's brother found him in the sitting room and attacked him.

31. While orally submitting in support of the appeal, the appellant's counsel told the Court that the appellant and the complainant are neighbours and that he had known her since birth. According to him, the complainant was a person who exhibited adult lifestyle and when PW2 found them in the act, she had to act as is she was being forced to avoid the wrath of her brother.

32. From the foregoing, it is crystal clear that there was no mistaken identity. The offence happened in broad daylight and the appellant was well known to the complainant. It is my considered view that the identification of the appellant by PW1 through recognition was positive and free from any error or mistake. Accordingly, this ground should also fail.

33. As for the issue of 'exhibiting adult lifestyle', my view is that the appellant should have pursued it as his defence before the lower Court. Actually, it is provided for under section 8 (5) (b) of the Sexual Offences Act No. 3 of 2006. I have perused the record carefully and note that this issue did not feature anywhere. The appellant did not even cross examine PW1 on the same. The duty of the first appellate Court as stated earlier is to re-evaluate the evidence before the trial Court and reach its own conclusions. That duty in my view does not extend to considering new evidence.

**THE ARRESTING OFFICERS**

34. According to the appellant, those who arrested him did not testify and the inference to be drawn is that they would have testified against the prosecution.

35. According to the Investigating officer PW6, the appellant was taken to Kibwezi Police station by APC Maseras who had been ordered to do so by the OCS. This contradicts the appellant's version that he was arrested by officers from Kibwezi Police station.

36. Confronted by a similar issue in ***Eldoret Court of Appeal case No. 661 of 2010 (supra),*** the learned Judges of appeal expressed themselves as follows;

> ***"With respect to the persons who took the complainant into safe custody, since the prosecution conclusively connected the appellant to the offence, there was no further evidence that was required from these persons to assist the prosecution prove its case. We are also satisfied that no prejudice was visited upon the appellant by the failure to call them. In any event, section143 of the Evidence Act provides that no particular number of witnesses is required to prove a particular fact and we take the view that it was the prerogative of the prosecution to determine and call such witnesses as it deemed necessary to prove its case, as a consequence, this ground fails."***

37. The sentiments of the learned Judges of appeal ring true in the current case and I wholly associate myself with them. Consequently, this ground should fail.

**EXCESSIVE SENTENCE**

38. The age assessment report (exhibit 4) indicated the complainant's age to be between 16 and 17 years. As indicated earlier, the assessment was done 1 year and 3 months after the commission of the offence. Therefore, at the material time, the complainant was between 15 and 16 years.

39. The Sexual Offences Act, No. 3 of 2006 prescribes different punishments for victims of different ages. For victims aged 11 years or less, the punishment is imprisonment for life. For victims aged between 12 and 15 years, the punishment is imprisonment for a term not less than 20 years. For victims aged between 16 and 18 years, the punishment is imprisonment for a term not less than 15 years.

40. The victim in this case was between 15 and 16 years at the time of the offence. This does not fall within a specific age bracket as provided for by the law. As much as the P3 form stated that she was 15 years, the expert who assessed her age did not come up with a definite age. It is my considered view that the learned trial magistrate should have given the appellant the benefit of the age bracket which prescribes a lesser sentence *to wit* 'between 16 and 18 years'.

41. Accordingly, this ground should succeed only to the extent of reducing the term of imprisonment from 20 years to 15 years.

**CONVICTING WITHOUT PROPER CONSIDERATION AND ANALYSIS OF EVIDENCE**

42. Save for the age bracket issue highlighted above, the record bears witness that the learned trial magistrate analyzed all the other facts and evidence in arriving at her decision.

**CONCLUSION**

43. In my view, the conviction should be and is hereby upheld and the sentence is varied as stated herein above. Therefore the court orders;

> ***i. Appeal succeeds on the issue of sentencing and same is reduced to 15 years from the date of arrest.***
>
> ***ii. Appeal on conviction fails.***

**SIGNED, DATED AND DELIVERED THIS 10TH DAY OF APRIL, 2018, IN OPEN COURT.**

**C. KARIUKI**

**JUDGE**

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