REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 53 OF 2010

ELIJAH KANDAGOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable C. A. Otieno Resident Magistrate, delivered on 4th February, 2010 in Nakuru Chief Magistrate's Court Criminal Case No. 50 of 2009)

JUDGMENT

1. The Appellant herein, Elijah Kandagor ("Appellant") was convicted of the offence of defilement contrary to section 8(1) as read together with section 8(3) of the Sexual Offences Act at the Nakuru Chief Magistrate's Court Criminal Case No. 50 of 2009. The particulars of the charge as reflected in the charge sheet were that on 12/02/2009, in Nakuru District within what was then the Rift Valley Province, the Appellant is alleged to have willfully and unlawfully caused the penetration of his male genital organ into the genital organ of GJK, a girl aged 15 years.

2. The Appellant faced an alternative charge of performing an indecent act with a girl contrary to section 11(1) of the Sexual Offences Act. The alleged particulars are that in the same place, he unlawfully did an indecent act with the said GJK by touching her genital organs.

3. The Appellant pleaded not guilty in the Court below and a fully-fledged trial ensued. The Prosecution called five witnesses and closed its case. The Learned Trial Magistrate found that the Appellant had a case to answer and placed him on his defence. He gave an unsworn statement. The Learned Trial Magistrate was persuaded that the Prosecution had proved the main charge beyond reasonable doubt and convicted the Appellant. She then sentenced him to twenty years imprisonment.

4. The Appellant is aggrieved by the conviction and sentence and has appealed to this Court. He advanced two grounds of appeal thus:

> **a.** The trial magistrate erred in law and fact by failing to appreciate that the crucial witness was not produced.
>
> **b.** The trial magistrate erred in law and fact by failing to appreciate and invoke the provisions of Section 8(1) of the Sexual Offences Act 3 of 2006 on sentencing.

5. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** (1957) EA 336, ***Ruwala vs. R*** (1957) EA 570.

6. The evidence that emerged at trial was as follows.

7. GJK, the Complainant, testified as PW1. She told the Court that on 12/02/2009, she was herding cattle and goats at around noon near their home. Although the Complainant was in Standard Five at [Particulars Withheld] Primary School, she had not gone to school on that day. Some of the animals wandered off to a neighbours shamba forcing the Complainant to go over to herd them back to their shamba. On her way back, the Complainant testified that she met the Appellant who chased after her, caught up with her and pushed her to the ground. The Appellant then removed her panties, then his pair of shorts. He then inserted his penis into the Complainant's vagina and defiled her while covering her mouth to stop her from screaming. The Complainant told the Court that she knew the Appellant who used to work as a herdsman for a neighbor.

8. The Complainant testified that her ordeal only ended when her brother, GK, happened on the scene forcing the Appellant to flee.

9. The Complainant testified that she went home and informed her mother what had happened. The mother, RCK, testified as PW3. She confirmed that she had sent her daughter to graze the animals on that day and that in the early afternoon the Complainant returned home and informed her that the Appellant had defiled her. G, too, knew the Appellant. G testified that she saw blood on the Complainant's panties, and upon examining her concluded that she had been defiled. She took the Complainant to the hospital after reporting the matter to Solai Police Station.

G also informed her husband and the Complainant's father, SKT. S testified in the trial as PW2 and confirmed receiving the information on the afternoon of 12/02/2009. He marshalled a group of young men to go looking for the Appellant in the forest into which it was reported he had run into. They found him there, arrested him and handed him to the Police. S, too, knew the Appellant as a neighbor.

10. At Solai Health Centre, the Complainant was attended to by Mr. Francis Kuria, a Clinical Officer. Mr. Kuria testified as PW5. He said that he examined the Complainant at around 4:30pm on 12/02/2009. He found bruises on her labia majora, labia minora and vaginal walls. He also found an old broken hymen. His conclusion was categorical: the Complainant had been defiled. He filled a P3 Form which was produced as an exhibit in the case.

11. Finally, the Investigating Officer, PC Githiari Kairu, testified about receiving the report of the defilement from PW2 (G) who was accompanied by the Complainant on 12/02/2009 and issuing them with a P3 Form to be filled at the hospital. Later on, the Appellant was brought to the station by members of the public and PC Kairu re-arrested him. He then commenced investigations and charged the Appellant.

12. Put to his defence, the Appellant rendered a straight denial. He told the Court that on 12/02/2009, he grazed cattle in the field the whole day. He then said that he went to sell milk. In the process, he met G K, who tricked him to go to Tenderess where he was arrested by the Police and taken to Solai Police Station accused of an offence he said he did not commit. He proffered the theory that the case was cooked by the Complainant's mother (PW2) because she owed him money. The Appellant claimed that PW2 had sought to repay the money by offering him sex and when he declined, PW2 swore that she would teach him a lesson.

13. In opposing the appeal, Mr. Motende, the Prosecution Counsel, argued that all the three ingredients for the offence of defilement were proved in the case: the age of the victim; penetration; and identity of the Appellant as the person who penetrated the Complainant. He, therefore, opposed the Appeal and supported the conviction and sentence.

14. Mr. Motende argued that the victim was 15 years old and that PW3 testified about the age. On penetration, Mr. Motende argued that the Complainant gave account how he was defiled by the Appellant. He pointed out that the incident happened at midday at the time brother to the complainant rescued the complainant. The mother to the complainant also testified that she examined the Complainant and saw blood in the inner wear of the complainant. Mr. Motende argued that this was corroborated by the evidence of PW5, the Clinical Officer, who confirmed that there were bruises along the vaginal walls and that there was evidence of penetration.

15. Finally, on identification, Mr. Motende argued that the evidence on record is one of identification by recognition. Since the incident happened at mid-day, Mr. Motende argued that there was no possibility of mistaken identity. He finally pointed out that the Learned Trial Magistrate relied on section 124 of the Evidence Act in accepting the evidence of the Complainant on identification.

16. The main charge which the Appellant faced is defilement. Sections 8(1) and 8(3) of the Sexual Offences Act provide that:

> *8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *8(2) A person who commits an offence of defilement with a child between the age of twelve and fifteen is liable upon conviction to imprisonment for a term of not less than twenty years*.

17. Section 2 of the Act defines "penetration" as:

> *the partial or complete insertion of the genital organs of a person into the genital organs of another person*.

18. Going by this definition of defilement, I agree with Mr. Motende that to successfully obtain a guilty verdict, the Prosecution was required to prove three elements:

> a. That the Complainant was a child – in this case between twelve and fifteen years old;
>
> b. That there was penetration of the Complainant's genital organs; and
>
> c. That it was the Appellant who caused the penetration.

19. I have carefully evaluated and analyzed the evidence presented at the trial.

20. On appeal, the Appellant impugns the Learned Magistrate's conclusion that age of the Complainant was proved. In particular, the Complainant says that no documentary proof such as an age assessment report was produced to prove age.

21. The age of the Complainant was proved through oral testimony by the Complainant and her mother (PW3). The P3 form, filled by a duly qualified Clinical Officer, also established that the Complainant was fifteen years old.

22. Our case law has now established that the age of a Complainant for purposes of sexual offences can be established by any credible

evidence. The Court of Appeal in ***Mwalongo Chichoro Mwanjembe v Republic, [2015] eKLR*** has recently stated this:

> ***…****the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See* ***Denis Kinywa v R, Cr. Appeal No.19 of 2014*** *and* ***Omar Uche v R, Cr. App.No.11 of 2015****. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in* ***Francis Omuroni v Uganda, Crim. Appeal No.2 of 2000****. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable…*

23. In the present case, the Prosecution was required to prove beyond reasonable doubt that the Complainant was between twelve and fifteen years old. In my view, it did. The unchallenged oral evidence of the Complainant and her mother coupled with the P3 Form established that fact beyond reasonable doubt

24. The Appellant does not appear to contest that penetration was proved in this case. In any event, on the evidence on record, there was much evidence to prove penetration beyond reasonable doubt: the oral evidence of the Complainant; the oral evidence of the Complainant's mother who did a layman's examination and saw blood in the Complainant's innerwear; and the categorical evidence of the Clinical Officer who produced a P3 Form showing bruises on the labia majora; labia minora and vaginal walls of the Complainant leading to his medical conclusion that there was penetration.

25. The Appellant's main complaint on appeal is that a crucial witness was not called. This was GK, the brother to the Complainant who allegedly rescued the Complainant from the Appellant. The Appellant argues that the failure to call this witness is fatal as it should be presumed that his evidence would have been prejudicial to the Prosecution case. He relies on Joseph Ulsue v Republic.

26. It is true that the Prosecution did not offer any explanation why GK was called as a witness. However, the correct rule is as stated in ***Bukenya & Others Vs Uganda (1972) EA 549*** where the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; and that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case.

27. However, in this case, it cannot be said that GK was an essential witnesses witness to prove the Prosecution case. As the Court of Appeal stated in ***Keter V Republic [2007] 1 EA 135***, *"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."*

28. In the present case, the Complainant gave straight-forward and credible evidence identifying the Appellant as her assailant. The evidence was one of identification by recognition, the Appellant having been their neighbor. The incident happened at noon when there is surfeit of sunlight. The Complainant promptly reported to her mother that it was the Appellant who had assaulted her soon after the incident. There is simply no room to argue that there was possibility of mistaken identity.

29. The upshot is that the evidence on record reveals no reasonable doubt that the Appellant committed the offence he was convicted of. The conviction was safe and free from errors.

30. Since the Appellant received the minimum sentence applicable to the offence he was convicted of, no appeal against sentence is tenable.

31. The result is that the Appeal herein is without merit and it is dismissed. Both the conviction and sentence by the Lower Court are hereby affirmed.

32. Orders accordingly.

Delivered at Nakuru this 20th day of September, 2018.

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JOEL NGUGI

JUDGE