REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 57 OF 2017

BETWEEN

KAULI BEJA LEWA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable P. K Mutai- RM dated 29th April, 2016 in Kwale Criminal Case No. 985 of 2014)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

KAULI BEJA LEWA.....ACCUSED

JUDGEMENT

1. The appellant, **Kauli Beja Lewa**, was charged in the Chief Magistrate's Court at Mombasa in Criminal Case No. *985 of 2014* with two counts of defilement contrary to section 8(1) as read with section 8(4) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars of the first count were that the appellant on the 21st day of August, 2014 at[particulars withheld], Mwaluvamba Location, Kwale District within Coast Region, intentionally caused his penis to penetrate the anus of **BC**, a child aged 17 years.

2. After hearing, the Learned Trial Magistrate found the appellant guilty of the two main offence of defilement, convicted him accordingly and sentenced him to serve 15 years in prison.

3. Being dissatisfied with the conviction and sentence the appellant appeals based on the following grounds that:

> **1. The trial court erred in convicting the Appellant with the offence of defilement when the prosecution did not prove its case against the Appellant beyond reasonable doubt.**
>
> **2. The trial court did not evaluate and analyze the evidence on record with the necessary circumspection, and thereby failed to see the glaring contradictions, discrepancies, and loopholes in the evidence tendered by the prosecution, that raised reasonable doubt on the prosecution's case.**

3. The trial court erred in law convicting the Appellant with the offence of defilement when the prosecution neither called the doctor who examined the victim of the offence as a witness nor tendered any medical report in evidence.

4. The court erred in law in convicting the Appellant on the sole evidence of B C (PW2), which required corroboration, and in the absence of any other independent evidence to corroborate the same.

5. The trial court did not consider the defence of the Appellant, but simply rejected the same as mere denial, without giving any reasons for rejecting the same.

6. The trial court misdirected itself as to the ingredients of the offence of defilement and therefore erred in law in convicting the Appellant.

7. The failure of the Prosecution to call Dr. Kanzele, who examined B C (PW2), and to tender the P3 form in evidence, is an omission that was fatal to the conviction of the Appellant.

8. The trial court erred in law in convicting the Appellant on the evidence of identification and/or recognition by a single witness without warning itself on the possibility of a mistake or error in the identification and/or recognition. Therefore, the recognition of the Appellant was not free from the possibility of error or mistake.

9. The trial court misapprehended the law and evidence required to prove the offence of defilement and thus erred in law in convicting the Appellant and sentencing him to 15 years imprisonment.

10. The trial court neither directed itself on the burden of proof, nor the standard of proof, thus raising a doubt, as to the standard upon which the court convicted the Appellant.

11. At the hearing of the case the prosecution called four witnesses.

12. PW1, **J K O**, on 21st August, 2014 came home at 9.00 pm and was informed by his wife that his daughter, PW2, who is the complainant herein, had been sent to the shopping centre. He then raised an alarm with the neighbours as a result of which a search for the complainant commenced. At a bout mid day, he saw the complainant coming crying and had a torn underwear. The complainant informed him that a neighbour, the appellant herein, had defiled her.

13. The following day, PW1 took the complainant to the dispensary from where they were referred to Kwale District Hospital for further medical examination where the complainant was treated and the P3 Form filled in. They then proceeded to the Police Station where they recorded their statements after which the appellant was arrested by members of the community. According to PW1, the complainant was aged 17 years and he produced the clinical card as an exhibit.

14. The complainant herein testified as PW2. According to her, on 21st August, 2014 she had been sent to the shopping centre at 5.00pm and while coming therefrom, she met the appellant on the way coming from the opposite direction who ordered her to stop and she complied. The appellant then got hold of her hand, pulled her into the bush, forcefully removed her clothes in the process of which they got torn and started inserting his penis into her vagina. According to her the appellant repeated the act three times and eventually released her at about mid night and escorted her home.

15. It was the complainant's evidence that she knew the appellant before the incident but they had never had sex before. She then found her father to whom she narrated her ordeal while carrying her clothes including her pats in her hands. She was taken to Mwaluvamba Dispensary the following day where she was treated and referred to Kwale where she was examined and the matter was reported to Kwale Police Station.

16. **Warungu John**, a Senior Registered Clinical Officer attached to Kwale Sub County Hospital testified as PW3 that on 31st August, 2014, he examined the appellant who was aged 18 years. According to him the appellant had visible injuries on his genitalia. He also sent him for siphylis and HIV test both of which turned out negative. He also filled in the P3 form on 31st August, 2014 which he produced as exhibit.

17. PW4, PC **Tom Oleli**, testified as PW4 that on 22nd August, 2014 the complainant went to the police station with a case of defilement. He investigated the matter and the accused was arrested by members of the community policing. He also recorded statements for the witnesses and took the complainant to the Hospital. Late the appellant was charged with the subject offence. He also sought for age assessment to be done for the accused which showed that the accused was 18 years. He produced the assessment report and the health card as exhibits.

18. Upon being placed on their defence, the appellant chose to give sworn evidence. According to him, on 30th August, 2014 at about 8.00 am two people, **B M** and **Z** went to his home and on arrival asked for his father claiming they were looking for the appellant. He then accompanied them to the Chief's office. He was then arrested and taken to Kwale Police Station and was charged on 1st September, 2014. In his evidence the claims against him were false.

19. Upon the close of the case, the Learned Trial Magistrate found based on the health card that the complainant was born 20th January, 1997 and the alleged act occurred on 21st August, 2014 hence the complainant was 17 years and 7 months at the time and he therefore concluded that the complainant was a minor.

20. He however found that though the complainant's P3 form was only marked for identification and was not produced, the evidence of the complainant was candid and convinced him that the accused person penetrated the complainant. He therefore found that all the three elements in a charge of defilement had been proved and convicted the appellant accordingly.

21. It is now submitted on behalf of the appellant that the prosecution neither called **Dr. Kanzale**, who examined the Complainant, to testify in court, nor tendered the P3 Form in evidence and that the Court then proceeded to convict the Appellant on the uncorroborated evidence of the Complainant, not only without warning itself on the possibility of mistake or error in the identification, but also without recording reasons in the proceedings and satisfying itself, as required under ***Section 124 of the Evidence Act***, that the alleged victim was telling the truth.

22. I have considered the evidence on record in this matter. It is true that no medical evidence was produced on behalf of the complainant. The law on the necessity for corroboration of the evidence of a minor is quite clear: it is that corroboration is required in such cases. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction since section 124 of the ***Evidence Act*** makes this quite clear:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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."*** [Emphasis added]

23. In the case of **Mohamed vs. R, (2008) 1 KLR G&F 1175,** the Court held that:

> **"It is now well settled that the courts shall no longer be hamstrung by requirements of**

corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

24. What is required for the trial court to do is to be satisfied that the alleged victim is telling the truth. Although the appellant contends that there was no such finding, the Learned Trial Magistrate however found that:

"The complainant striked (sic) as candid witness."

25. There is no set formula for recording the Court's satisfaction with the truthfulness of the complainant's evidence as long as the substance of the finding reveals that the Court believed in the evidence of the complainant. I therefore find that the Learned Trial Magistrate was indeed satisfied with the evidence. Having considered the evidence on record, the fact that the complainant knew the appellant, there was no suggestion of any bad blood between them, it is my view that the Learned Trial Magistrate was entitled to arrive at such a finding. In **Keter versus Republic [2007] 1EA135**, the Court held *inter alia* that:-

"Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not. There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused."

26. As regards proof of age, it was submitted that it was not proved that the complainant was a child. According to the appellant, the Prosecution neither tendered age assessment report, nor a Certificate of Birth of the complainant in evidence and that the Prosecution did not call the mother of the Complainant to testify and give evidence on the date of birth of the Complainant.

27. In the case of **Kaingu Elias Kasomo vs. Republic Criminal Appeal No. 504 of 2010** the Court of Appeal appreciated that:

"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

28. The Court quoted with approval its own decision in **Alfayo Gombe Okello vs. Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault; in that case it said:-

"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)…In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find."

29. The court concluded that *"prove of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond*

reasonable doubt in material particulars.

30. However in In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** was observed as follows:

> **"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..."**

31. It was therefore held in In **Dominic Kibet vs. Republic Criminal Appeal No. 155 of 2011** 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."**

32. The emphasis is therefore that the onus of proving the age of the Complainant lies on the prosecution and that while, in the absence of any other evidence, medical evidence is paramount in determining the age of the victim, where there is credible evidence other than medical evidence, the conviction will not be overturned simply because of lack of medical evidence. In fact according to the above authorities age may well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words in assessing age a holistic approach must be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other information and circumstances. See **Aroni, J** in **Kevin Kiprotich Amos alias Rotich vs. Republic** - Criminal Appeal No. 89 of 2016.

33. What the Court frowns upon is mere averments of age without any documents in support thereof. In this case the Learned Trial Magistrate simply stated that there was no dispute that the complainant was a child and that she was born in 1998 and that she was 16 years at the time of the alleged offence. He did not state what his basis for making such a finding was. Nevertheless, being a first appellate court this court is duty bound to re-evaluate the evidence and make a finding on the same.

34. PW1, the complainant's father testified that the complainant was 17 years old. In support of this fact he relied on the clinical card which shows that the complainant was born on 26th January, 1997 while the offence was committed on 21st August, 2014. It is therefore clear that at the time of the commission of the offence, the complainant had not attained 18 years and was therefore a child under the ***Children Act***.

35. As regards the evidence of identification, while it is true that it is only the complainant who testified as to the identity of the appellant as the perpetrator, this was not an issue of identification but recognition. In **Peter Musau Mwanzia vs. Republic [2008] eKLR**, the Court of Appeal expressed itself as follows:

> **"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition."**

*36. In **Anjononi & Others vs. The Republic [1980] KLR 59** it was held that:-*

> ***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of***

the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

37. In **Wanjohi & 2 Others vs. Republic [1989] KLR 415**, the Court of Appeal held that, "recognition is stronger than identification but an honest recognition may yet be mistaken."

38. In this case the complainant knew the appellant. She was with the appellant till midnight and according to her the appellant escorted her after the act. In my view in those circumstances there cannot be any possibility of mistaken identity.

39. Similarly in **R Vs. Turnbull (1976) 3 ALL E.R 549** the Court held that:

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

40. As regards contradictions in the prosecution case, whereas I appreciate that there were minor discrepancies in the evidence of the witnesses it is my respectful view that such minor discrepancies are common. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See ***Law of Evidence*** **(10th Ed) Vol. 1 at 46.**

41. As was stated in **John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:**

"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place and than that one or both suffered from a defective memory."

42. This was the position in **Willis Ochieng Odero vs. Republic [2006] eKLR,** where the Court of Appeal held:

"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of *section 382* of the *Criminal Procedure Code*."

43. In my view the contradictions pointed out were not so material as to vitiate the conviction.

44. As for the failure by the prosecution to call some witnesses, I can do no more than reiterate what the Court of Appeal stated in **Benjamin Mbugua Gitau vs. Republic [2011] eKLR** that:

"It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular

number of witnesses who are required for proof of any fact unless the law so requires – see *section 143* Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys."

4. In **Mwangi vs. R, [1984] KLR 595** the Court of Appeal held that:

"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."

45. In cases of defilement, the prosecution is only required to prove three elements: the age of the complainant, that there was penetration and identity of the accused as being the culprit. The prosecution is not duty bound to call all persons involved in the transaction and his failure to call them is not necessarily fatal unless the evidence adduced by him is barely sufficient to sustain the charge. In **Keter versus Republic [2007] 1EA135** the court was categorical that:-

"The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

46. Having considered the evidence presented before the trial court it is my view that the appellant was properly convicted on the offence of defilement and I have no reason to interfere with both the conviction and the sentence.

47. Accordingly, the appeal fails and is dismissed.

48. Right of appeal 14 days.

Judgement read, signed and delivered in open court at Mombasa this 7th day of September, 2018.

G V ODUNGA

JUDGE

In the presence of:

Mr Odera for the Appellant

Ms Ogweno for the Respondent

CA Gladys