REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 92 OF 2015

V K.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Eldoret (Hon. S. Mokua, SPM) delivered on the 16th day of July 2015 in Eldoret Chief Magistrate's Court Criminal Case No.5526 of 2013)

JUDGMENT

[1] This is an appeal from the conviction and sentence of 20 years' imprisonment imposed on the Appellant herein, **V K,** for 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 Prosecution had alleged before the lower court that on the **2nd day of December 2013** in Eldoret East District within Uasin Gishu County, the Appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of **B E,** a girl then aged 12 years. In the alternative, the Appellant was charged with the offence of **Indecent Act with a Child,** contrary to **Section 11(1)** of the **Sexual Offences Act,** in that, on the **2nd day of December 2013** in Eldoret East District within Uasin Gishu County, he indecently caused his genital organ (penis) to come into contact with the genital organ (vagina) of **B E,** a girl then aged 12 years.

[2] The Appellant denied the charges and upon trial, a determination was made thereon by the Learned Trial Magistrate in his Judgment dated and delivered on **16 July 2015**. He was found guilty of the offence of Defilement as laid in the substantive count, was convicted thereof and sentenced to serve 20 years' imprisonment. Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on **22 July 2015** on the following grounds that:

> **[a]** The Learned Trial Magistrate erred in both law and fact by relying evidence that had no incriminating facts at all;
>
> **[b]** That the medical evidence tendered before the Trial Magistrate did not support the charge;
>
> **[c]** That the Learned Magistrate erred in both law and fact by relying on flimsy non-investigated allegations;
>
> **[d]** That the Prosecution did not prove its case beyond reasonable doubt.

Consequently, it was the Appellant's prayer that his appeal be allowed, the conviction quashed, and the sentence set aside.

[3] A perusal of the court record shows that the Appellant had evinced the desire to amend his Petition, but as of **15 March 2018**, no such application was on the court file. The record therefore shows that the Court made orders in the following terms:

> **"Appellant insists that he has filed an application. Same is not on record. I grant the appellant time to file the application. If he has filed one already, let him place the same in the court file and serve the Respondent. He has 15 days to do so. In the meantime, matter to be mentioned before the D/R to confirm compliance. Mention on 26 April 2018."**

[4] As far as can be ascertained, this Order was not complied with, in that no application was filed as directed or at all and therefore no Amended Petition was ever filed by the Appellant. However, he filed detailed written submissions in support of his Grounds of Appeal on **2 July 2018**, on which he relied in urging his appeal. The written submissions were fashioned under the following broad heads:

> **[a]** That Penetration was not proved;

[b] That the age of the Complainant was not proved credibly;

[c] That the evidence against him was fabricated and obtained by inducement;

[d] That the trial court failed to observe that he was a minor; and

[e] That vital witnesses were not called;

[5] The Appellant highlighted his submissions on **5 July 2018,** reiterating his argument that he was under 18 years of age at the time of his arrest and would like to continue with his education. He therefore urged the Court to reconsider the matter with a view of having him released so that he can reconstruct his life.

[6] On behalf of the State, **Ms. Kegehi** opposed the appeal. Her submission was that the Prosecution called 4 witnesses before the lower court whose evidence was credible, reliable and well corroborated. In her submission, that evidence proved beyond reasonable doubt that the Complainant was a minor; that penetration had occurred; and that the Appellant had been duly identified by the Complainant as the offender. It was further the submission of **Ms. Kegehi** that the Appellant was examined and found to be over 18 years of age and that his alibi defence was also considered but found to be untrue. She accordingly supported both the conviction and sentence and urged the Court to uphold the same.

[7] The Court has given careful consideration to the appeal and taken into account the written and oral submissions made herein by the Appellant and Learned Counsel for the State. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. This was well explicated in **Okeno vs. Republic [1972] EA 32** by the Court of Appeal for East Africa thus:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

[8] The evidence adduced before the lower court by the Prosecution was that, on the **2 December 2013**, the Complainant, **B E (PW1),** a 12 year old girl schoolgirl, had been sent to the local shops by her cousin to buy cooking fat. On her way back home, she met the Appellant who called her and told her to meet him at his place. It was the evidence of **PW1** that the Appellant went ahead and she followed him to his house where they agreed to have sex. She thereafter left for home and arrived there at about 7.30 p.m. Her parents questioned her lateness and even disciplined her for it, and she got to disclose what had transpired between her and the Appellant. Thereupon, the matter was reported, to **Moiben Police Station** by the Complainant's mother **(PW2)** for appropriate action. The Complainant was thereafter issued with a P.3 form by **PW3** and was then taken to **Moi Teaching and Referral Hospital**, where she was examined by **Dr. Jane Yatich, PW4**. In the opinion of **PW4,** the Complainant had, *inter alia*, a torn hymen, an indication that she had been exposed to vaginal penetration in the recent past.

[9] On his part the Appellant told the lower court, in a sworn statement, that he was 17 years old at the time; and that on **2 December 2013**, he was from his grandmother's place where he had been from **26 November 2013;** and that he got to Eldoret at about 5.00 p.m. He added that on his way to Moiben, he encountered police officers who required him to explain where he was coming from, but who did not believe what he told them. He was then arrested and taken to the police station, before being arraigned in court. According to him, he saw the Complainant for the first time in court, and therefore did not know her as of the time of the alleged offence.

[10] I have given due consideration to the evidence that was presented before the lower court in the light of **Section 8** of the **Sexual Offences Act** pursuant to which the charges were laid, which provides as follows:

> **(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**
>
> **(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**
>
> **(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.**

[11] Accordingly, the Prosecution needed to prove the following essential ingredients:

[a] That the Complainant was, at the material time, a child aged 12 years;

[b] That there was penetration of the Complainant's vagina;

[c] That the penetration was perpetrated by the Appellant.

[a] On the age of the Complainant:

[12] From the evidence adduced before the lower court, the Complainant gave her age, as at **26 May 2014** when she testified, to be 13 years; and therefore that she was 12 years old at the material time. Her mother, **PW2**, also testified that the Complainant was 12 years old at the time of the incident. She produced the Complainant's Child Health Card as **Prosecution's Exhibit No. 2**, and it gives the Complainant's date of birth as **15 August 2001**. It is manifest therefore that sufficient evidence was placed before the lower court, which evidence was entirely uncontroverted, that the Complainant was born on **15 August 2001**, and therefore was aged 12 years and 4 months as at **2 December 2013**.

[13] I note that in his written submissions the Appellant was of the argument that the only way the Complainant's age could be ascertained was by an age assessment examination. He relied on **Felix Kanda vs. Republic [2011] eKLR** and **Pius Arap Maina vs. Republic [2013] eKLR**. However, in the **Sexual Offences Rules of the Court Rules, 2014** it is expressly recognized that:

> **"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."**

A Child Health Card is therefore admissible in proof of age for purposes of the Sexual Offences Act. Consequently, the contention by the Appellant that age can only be proved by scientific evidence is untenable; as there was credible evidence presented before the lower court to demonstrate beyond reasonable doubt that the Complainant was 12 years old at the material time. It is noteworthy that even as he challenged the use of the Complainant's Child Health Card to prove her age, the Appellant similarly produced his Child Health Card to demonstrate that he was underage when he was arrested and charged with this offence; thereby literally speaking out of both sides of his mouth as it were.

[14] Needless to say that the months following the last birthday, if any, do not count for purposes of determining the age of a child so long as they are less than one year. This was well explained by the Court of Appeal in **Hadson Ali Mwachongo vs. Republic [2016] eKLR** as hereunder:

> **"Section 2 of the Interpretation and General Provisions Act defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old . That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year."**

[15] Accordingly, credible evidence that was adduced before the lower court to prove beyond reasonable doubt that the Complainant was a child for purposes of **Sections 2** of the **Sexual Offences Act**, as read with **Section 2** of the **Children Act, No. 8 of 2001**.

[b] On whether Penetration of the Complainant Occurred:

[16] In this regard, the evidence adduced before the lower court was principally that of the Complainant. She testified at to how she met the Appellant at [particulars withheld] Centre on **2 December 2013** and was invited by the Appellant to his house, which she said was about 1 km from [**particulars withheld] Centre;** that she followed the Appellant to his house and agreed to have sex with him. When **Dr. Yatich**, examined her on **3 December 2013**, she found the Complainant with old healed hymenal tears at position 3 and 9 o'oclock as well as erythematous labia minora. She was accordingly of the opinion that there were chances of earlier sexual engagement granted that her hymen was torn and reddish, as the redness demonstrated that she had had sex in the recent past.

[17] Again, the Prosecution evidence in this regard was entirely uncontroverted, and was therefore cogent and credible. Accordingly, the lower court correctly came to the conclusion that penetration had been proved.

[c] On whether the penetration of the Complainant was perpetrated by the Appellant:

[18] As to the pertinent question whether the penetration of the Complainant was committed by the Appellant, the evidence of the Complainant was straightforward enough; and she stated, in her evidence in chief that she knew the Appellant before their meeting of **2 December 2013**. In cross-examination she said of the Appellant: **"...I have known you for some time. I know your two names... I walked to your place. I know the place where you took me. You were staying at the place where I came to..."** It is manifest therefore that the Complainant had known the Appellant before, hence her readiness to acquiesce to his instructions to meet him at his place. The Learned Trial Magistrate also took into consideration the evidence of the Complainant that this was not their first time to engage each other in sexual contact. Accordingly the possibility of mistaken identity was non-existent.

[19] Similarly, the Complainant's mother testified that she knew the Appellant well and that when the Complainant revealed that she had been defiled by him, she promptly made a report to the Police and the Appellant was accordingly arrested. Although the Appellant argued that his arrest and prosecution was motivated by "inducement" there is no discernible reason on the record why the Complainant and her parents would single the Appellant for such treatment.

[20] I have take into consideration the submission of the Appellant that the Complainant confessed that she lied to her uncle when questioned about her whereabouts; and it was correct for the Appellant to posit that a witness whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person; or raise suspicion about his trustworthiness. (see **Ndungu Kimani vs. Republic [1979] KLR 282)**. However, it is also instructive that, when it comes to credibility, this Court, as an appellate court, would defer to and be guided by the impression formed on the trial court by the by the witnesses. Hence, in **Shantilal Maneklal Ruwala vs. Republic [1957] EA 570,** it was held, *inter alia*, that when the question arises which witness is to be believed rather than another and that question turns on demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses.

[21] Accordingly, having found that the Prosecution proved the three pertinent elements of the offence charged in the Main Count, of which the Appellant was convicted, I would be of the view that the contradictions that were singled out by the Appellant in his written submissions were not of the sort that would suffice to invalidate the conviction. This was well explicated by the Court of Appeal in **Joseph Maina Mwangi –Vs- Republic Criminal Appeal No. 73 of 1992** thus:

> **"An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence"**

[22] Hence, contradictions and discrepancies are not entirely uncommon in criminal prosecutions; and therefore, the question the Court must bear in mind is whether their sum total is serious enough as to create reasonable doubt on the guilt of the person accused; and, from a review of the entirety of the case presented before the lower court, I am satisfied that that is not the case herein.

[23] The Appellant also raised the issue to do with the failure by the Prosecution to call a crucial witness, namely **B K**, with whom the Complainant was staying at the time or the Complainant's cousin who sent her to the shops; or even her uncle who she admittedly lied to. There was also a fourth person who made a report to the parents of the Complainant about the Complainant's predicament. Hence, the Appellant cited the provisions of **Section 144(1), 145, 146 and 150** of the **Evidence Act, Chapter 80** of the **Laws of Kenya,** as well as the cases of **Bukenya vs. Uganda [1972] EA 549** and **John Kenga vs. Republic [1984].** It is indubitable that these witnesses were never called by the Prosecution to testify before the lower court.

[24] It is however instructive that, in **Section 143** of the **Evidence Act,** it is recognized that:

> **"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."**

Accordingly, in **Keter vs. Republic [2007] 1 EA 135**, it was held, *inter alia*, that:

> **"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."**

[25] In the premises, the obligation of the Prosecution was to only avail such witnesses as were sufficient to establish the charge beyond reasonable doubt, as was underscored by the Court of Appeal in the case of **Daniel Muhia Gicheru vs. Republic Criminal Appeal No. 90 of 2007 (UR)** as hereunder:

> **"The often trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden? In BUKENYA AND OTHERS V. UGANDA [1972] EA 349 the Court of Appeal for Eastern Africa held that the prosecution has the discretion to decide as to who are the material witnesses. That Court, however, qualified that general principle by stating that:**
>
> **"…. There is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent …. While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."**

In the premises, not much turns on this ground of appeal.

[26] On whether the Complainant consented to sexual intercourse, it is true that in her evidence she stated that **"...we agreed to have sex..."** Nevetherless, the law is clear and unequivocal that a child under 18 years of age is incapable of giving such a consent (**Section 42** of the **Sexual Offences Act**).

[d] On the Appellant's age at the material time:

[27] The Appellant submitted at length regarding his contention that he was a minor when the offence in issue occurred; and added that, in his defence, he produced a Child Health Card which showed that he was born on **15 January 2000**. According to him, he was aged 13 years at the time of his arrest and ought to have been treated as a minor. He relied too on the observations made by the trial court at page 10 of the lower court record and submitted that he ought to have been accorded the protection due to minors in similar circumstances. He accordingly urged the Court to uphold his rights under **Article 53(1)(f)(i)(ii)(2)** of the Constitution by allowing the appeal.

[28] A perusal of the lower court record confirms that an order was made for a medical examination to be done to ascertain the Appellants age; and that a report was availed to confirm that he was over 18 years as of **January 2014**. This evidence completely displaced any allegations that he was underage and was endorsed by the lower court as confirmed by the proceedings of 7 August 2014. Accordingly, his contention that his rights under Article 53 of the Constitution were violated have no basis.

[29] Thus, having re-evaluated the evidence adduced before the lower court, I am satisfied that the essential ingredients of the principal charge of Defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** were proved against the Appellant beyond reasonable doubt as laid in the substantive count that the Appellant was charged with before the lower court; and that the so called

contradictions and inconsistencies singled out by the Appellant are not material enough to invalidate the sound findings arrived at by the lower court.

[30] In the result therefore, I am satisfied that the conviction of the Appellant for the offence of Defilement contrary to **Section 8(1**) as read with **Section 8(3)** of the **Sexual Offences Act** was based on sound evidence, and that the sentence of 20 years imposed by the lower court is not only lawful but was also deserved. I would accordingly confirm the Appellant's conviction and sentence and dismiss his appeal in its entirety, which I hereby do.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF SEPTEMBER, 2018

OLGA SEWE

JUDGE