REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 41 OF 2015

SILAS KIMTAI MWANGA……………………………………APPELLANT

VERSUS

REPUBLIC…………………………………………………..…RESPONDENT

(An appeal arising from the original conviction on 6/3/2015 and sentence on 9/3/2015 by Hon. K. Mukabi, RM in Sirisia Criminal Case No. 843 of 2013)

JUDGMENT

The Appellant SILAS KIMTAI MWANGA was charged with the offence of defilement contrary to section 8(1) (4) of the sexual offences act No. 3 of 2006.

The particulars of the charge were that on diverse dates between 2nd day of December 2013 and 5th day of December 2013 in Cheptais District within Bungoma County, intentionally caused his penis to penetrate the vagina of EYG a child aged 16 years.

He also faced an alternative charge of committing indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of that charge were that on diverse dates between 2nd day of December 2013 and 5th day of December 2013 in Cheptais district within Bungoma County, intentionally touched the vagina of EYG a child aged 16 years with his penis.

The evidence before the trial court was that pw1 EY-the victim- a 14 year old and a student at [Particulars Withheld] school while in the company of M (pw5). They however did not find him and instead opted to visit a mutual friend S (Pw6). Pw6 then proposed to the victim and Pw5 that they go visit the accused at his house and they proceeded there at 11pm. They found Silas-the appellant - in the company of 2 friends Boi and Shadrack and they split into couples and Pw1 slept with Appellant, Pw5 and Pw6 with the two other boys and they all had sexual intercourse.

The next day they woke up and went to do casual jobs and then retired at the home of S Pw6's stepmother. On 4.12.13 the victim went to work at Kipsiprop. On 5.12.2013, one DK (Pw4) a brother to the victim got wind as to the whereabouts of the victim and he traced her near a forest at about 8.30 pm and took her home. Pw3 Humphrey Kibet Chebus testified being chairman of Makutano market- Kopsiro, that he received information as to the whereabouts of the victim's friends who were at the appellant's rental house. He visited the house and encountered the girls who admitted having spent the night there.

Pw7 John Keya a clinical officer from Kopsiro Health Centre he examined the victim and established that the hymen was broken with foul smelling discharge with minor lacerations of the labia. He formed the opinion that the victim had been defiled 24-72 hours prior to examinations. Age assessment was done by an examination of the dental formula and was born in 1998 and was found to be 15 years old. Examination on the appellant established he was 22 years old and no discharge was noted in genitalia and no injuries noted in the penis.

Pw8 police No. 71645 PC Lazarus Kikubi testified on 5.12.2013 at 11pm he was on duty at the Kopsiro police station with his colleague PC Serem when the appellant was brought to the station by the public of Makutano area in the company of the complainant and Pw5 M on allegations of defilement. He re-arrested the appellant and placed him in custody.

Pw9 police No. 55597 CPL David Mutua the investigating officer testified that he escorted the complainant and the accused to hospital for examination and issued P3 Form to the complainant which was returned duly filled. Pw9 then visited the house of the accused to fetch the accused permit. However, the same was never retrieved. He also witnessed 4 mattresses on the floor in the house where defilement allegedly took place. He recorded witness statements and charged the appellant.

The appellant elected to give unsworn evidence without calling any witnesses. He testified that he was aged 22 years and never knew the complainant and could not recall anything that happened between 2-5/12/2013. He further stated that on 27/11/2013 at 1pm while coming from the farm he saw 2 policemen in the company of 2 of his step brothers. The step brothers then alleged owning the farm that the appellant was ploughing. It was at that time that the appellant was allegedly arrested and escorted to the police station due to the land dispute. At the

police station the appellant further alleged that they tried to solicit a bribe of Kshs.50,000/=which he was not able to raise hence he was charged with the subject offences.

It is upon this evidence that the trial court convicted and sentenced the appellant to life imprisonment. Having been dissatisfied with that decision the appellant preferred this appeal on grounds that: he was not conversant with the language used in court, that his rights were violated during trial, that the clinical evidence did not support the charge sheet and that the sentence was harsh in the circumstances.

Appellant filed his written submissions in which he submitted that there was contradiction in prosecution evidence with regard to age that whereas the charge sheet stated in 2013 that the complainant was 16 years but the complainant testified that she was 14 years. That in the evidence the complainant stated that she was forced to say that she was given money thus indicating the evidence was fabricated. The appellant was not properly identified. Contradictory evidence, that the evidence of Pw1 stated that the appellant's house was 1 room but pw4 stated that it was 2 rooms. The charge sheet stated that the offence was committed on 5th while Pw1 stated it happened on 2nd and finally that this matter was a frame up because of the existing bad blood between the appellant and the complainant's kins.

The State counsel Mr. Oimbo opposed that appeal. Counsel submitted that an interpreter of the Sabaot community was used to interpret the court proceedings and as such there was no language barrier. The age was proved by the baptismal card and the age assessment report. The appellant was positively identified since Pw1, 5 and 6 were all present when the complainant was being defiled. That the contradiction with regards to the nature of the house is not material since there is no dispute as to the location of the house and it does not contradict the evidence. There is no contradiction as to the dates of the offence as in the charge sheet it is indicated between 2nd and 5th. That the appellant was examined 72 hours after the incident and therefore results compromised.

In reply the appellant prayed for leniency and or reduction of sentence so that he could assist his mother living in Uganda.

This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno VS R 1972 EA** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved beyond any reasonable doubt.

The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them singly.

On the age of the complainant, the prosecution produced a Certificate of Dedication of the Complainant (Exhibit 3) in an attempt to prove her age. The same was issued on 5/2/2012 at the Africa Inland Church of Kenya and sealed by Pastor Philip Kipkomu. It contains the date of the complainant's birth as 6/6/1998 hence translating to 16 years as the complainant's age as at the alleged time of the commission of the offence. I have also seen the treatment notes from Kopsiro Model Health Center (Exhibit 2) which indicates the complainant's age as 15 years old. Of more paramount importance is the complainant's P3 Form (Exhibit 1) where at page 3, the Clinical Officer indicated that upon examination he assessed the complainant's age to be 15 years. Further when PW7 was testifying in Court on this issue he indicated that he did age assessment based on dental formula. That the victim was born in 1998 and she came along with an infant certificate of dedication.

The Sexual Offences Act promulgated some rules towards the achievement of its objectives. Those rules came to be known as ***"The Sexual Offence Act (Rules of Court) 2014*** which came into force on 11/07/2014 under Legal Notice No. 101.Under **Rule 4 thereof**, the age of the complainant may be determined by way of a Birth Certificate, any school documents, a Baptismal Card or any other similar document. It is therefore the finding of this Court that on the foregone evidence, the complainant was a minor at the alleged time of commission of the offence.

On the issue of penetration of the Complainant's private parts, Section 2 of the Sexual Offences Act defines penetration as:

> "*the partial or complete insertion of the genital organs of a person into the genital organ of another person."*
>
> This position was fortified in the case of **Mark Oiruri Mose vs R (2013)eKLR** when the Court of Appeal stated thus:
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> **"…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ….".'** (emphasis mine).

This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

In demonstrating this particular ingredient of the offence, the complainant had the following to say:-

> "*....The house is 1 roomed and is round in shape and is iron sheet roofed. This was not my first encounter with Silas I had previously seen him but we never conversed. He then said we sleep together. He then removed my pant and he also undressed while it as dark and he removed his penis and he penetrated it into my vagina and we had 3 rounds of intercourse. Silas then woke up and*

he went outside…………..I was told by Silas that he would give me Kshs.500/= if I did not scream for help."

Pw7 was the Clinical Officer who filled in the P3 Form. He was the one who examined the complainant. He recorded the following notes as appearing in Exhibit 1:-

> *"Hymen broken, foul D noted greenish…greenish yellowish d per vaginally with minor lacerations"*

Pw5 while testifying before the trial Court stated as follows:-

> *"When I examined her, her clothes were intact and further exam revealed hymen was broken with foul smelling discharge with minor lacerations of the lavia. I did HIV test which was negative. I also examined the Accused on the same date. The girl had no physical injuries. There were indication of defilement and evidence of sexual act based on broken hymen, foul smelling greenish discharge with minor lacerations on the labia. Sexual act had happened before 24-72 hours prior to examination"*

From the evidence of the complainant which was both detailed and close that they had sexual intercourse and the results of examination by the Clinical officer, I am satisfied that penetration was proved.

On whether the Appellant was the perpetrator, as the Appellant has denied committing the alleged offence, that calls for an in-depth examination of the circumstances so as to settle the issue as to whether the Appellant was rightly identified as the perpetrator of the offence.

The offence was allegedly committed in the night of 2.12.2013 in a house belonging to the appellant. It is the evidence of Pw1, that she went to the appellant's house in the company of M Pw5 and S Pw6 at 11pm where thy found the appellant in the company of two more boys i.e Boi and Shadrack. That they engaged in sexual intercourse the three of them till 2 am when they left to Pw6's place to spend the rest of the night. Pw1 testified that before the material date she had known the appellant for about 2 months as she used to see him around Makutano.

Pw1's evidence was effectively corroborated with that of Pw5 and Pw6 who were eye witnesses. Pw5 testified that on 2.12.2013 she went to the appellant's house at around 10pm in the company of the complainant and Pw6. She testified that ***"S is the one who suggested we go to Sila's place because some 2 boys i.e. Shady and Boi were interested in us."*** Pw 5 also told court that she had known the appellant for about 3 months as he was a mason in the area and hailed from Uganda. Pw6 testified that they went to the appellant's house on that day at around 4pm and found Boi, Shady and Benjamin and that they engaged in sexual intercourse that night. She told court that she had known the appellant for about 5 months and that he was a mason in the area and hailed from Uganda.

This was therefore an issue of recognition. The complainant was able to identify the appellant by way of his name and this was equally corroborated with the evidence of Pw5 and Pw6 who also recognized the appellant by the same name the complainant used. The complainant also testified that she knew the appellant as she used to see him around theirs area and he was working as a mason. In ***Lesarau -Vs- R, 1988 KLR 783***, Court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name.

In ***R -Vs- Turnbull, (1976) 3 All ER 551,*** Lord Widgery CJ observed that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger. He went on to state;-

> *"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." Underlining supplied*

The above does not mean that there cannot be safe identification or recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

> ***"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-***
>
> *"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."*
>
> ***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."*** *Underlining supplied.*

I am satisfied that the complainant knew the appellant before; knew his house, went and stayed there overnight having sexual intercourse and had the opportunity of recognizing him. There was no error in recognition that the appellant was effectively identified because the complainant was able to mention him by name and at the same time she used to see the appellant around Makutano area their home place often working as a mason. The identification was free from error.

The evidence of the appellant in the trial court was that he had not known the complainant. The evidence of the witnesses in this aspect displaces the appellants assertion that he did not know the complainant.

The appellant has prayed for leniency on the sentence. Sentencing is discretion of the court and the high court can only interfere if the

sentence is illegal or was arrived at by applying wrong principles of law. From the evidence on record it emerged that the complainant was a minor but there were disparities as to the age. Pw1 the complainant testified that she was 14 years old at the time of giving evidence. Pw2 produced a certificate of dedication indicating the complainant was born on 6/6/1998 which means the complainant was 15 years during the alleged day of the offence which took place on 2.12.2013. Pw7 the clinical officer's notes on the p3 indicated that she was 15 years. Court also considered in its judgment that the complainant was 15 years after considering the evidence adduced.

Section 8(4) of the sexual offences act provides:

> *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* <u>*for a term of not less than twenty years.*</u> *Underling supplied*

The trial magistrate sentenced the appellant to a 15 year term imprisonment - after considering the probation report which was not favourable to the appellant. I find no reason to disturb the sentence of the trial court.

I therefore find no merit in this appeal; I uphold the conviction and affirm the sentence of 15 years imprisonment imposed. This appeal is hereby dismissed.

Dated and Signed at Bungoma this 15th day of October, 2018.

S.N. RIECHI

JUDGE