REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 62 OF 2013

JACKSON MUNYAKA SIRENGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the original conviction and sentence in criminal case*

***number 1534 of 2011 in the Senior Principal Magistrate's Court at Webuye*)**

JUDGMENT

1. Jackson Munyaka Sirengo the Appellant herein was charged with the offence of defilement of a girl contrary to **section 8(1)** and **(2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on diverse dates between 6th November 2011 and 17th November 2011 at around 0830 hours at [particulars withheld] in Lugari District, Lugari County he intentionally caused his penis to penetrate the vagina of PNK a child aged 14 years. (Name reducted to protect the identity of the child).

2. A synopsis of the prosecution's case was that on 6th November, 2011 at around 3.00 p.m. the Complainant was at home cooking when the Appellant went to their home. He asked her brother J to call her. The Complainant went to see the Appellant at their gate where he asked her to get on to his motor cycle and took her to his home in [particulars withheld] village. They got to the Appellant's home at about 4.00 p.m. The Appellant expressed to the Complainant his desire to marry her. They engaged in sexual intercourse during their stay. The Complainant was eventually rescued on 16th November, 2011 at a Poshomill in [particulars withheld] in the company of the Appellant's sister.

3. In his defence, the Appellant gave unsworn testimony in which he denied committing the offence and proceeded to give an account of the events surrounding his arrest.

4. Following a full trial the Appellant was convicted and sentenced to serve twenty years imprisonment. The Appellant subsequently filed an appeal against both conviction and sentence. He advanced six grounds of appeal which in sum were that the age of the Complainant was not proved; the medical evidence did not link him to the offence; crucial witnesses were not called to testify; credibility of the prosecution witnesses was not taken into account and that the charge was unlawful since he was in police custody for more than the stipulated twenty-four (24) hours.

5. The state opposed the appeal through learned state counsel Mrs Njeru who stated that the prosecution had proved their case to the required standard and urged the court to dismiss the appeal and uphold the conviction and sentence.

6. I have scrutinized and re-assessed the evidence on record bearing in mind that in law, it is the duty of the first appellate court to weigh all the conflicting evidence and make its own inferences and conclusions, but bearing in mind always that it had neither seen nor heard the witnesses and make allowances for that. See – **Ajode vs. Republic Criminal Appeal 87 of 2004 [2004] eKLR**.

7. On the first ground, the Appellant argued that the age of the complainant was not proved. Mrs. Njeru opposed this argument and submitted that an age assessment done on the Complainant a year later put her at 16 years of age. That when the Complainant's mother PW1 testified she told the court that the Complainant was aged between 14 and 15 years.

8. The offence of defilement has three critical ingredients namely: age of the Complainant, proof of penetration and positive identification of the assailant. – See **Dominic Kibet Mwareng vs. Republic [2013] eKLR**.

9. On the age of the Complainant, the Appellant submitted that the evidence of the prosecution witnesses on the age of the Complainant was contradictory. That different witnesses gave varying ages of the Complainant. On this, Mrs. Njeru submitted that this issue was addressed by

the trial court in detail, and the court ruled that the ages fell within the same bracket when it came to sentencing and did not therefore occasion a miscarriage of justice.

10. The record demonstrates that the Complainant's mother PW1 testified on 22nd February, 2012 that the Complainant was aged 14 years at the time. This evidence was corroborated by PW3 the police officer who recorded the report of the incident, PW5 the investigating officer, and PW4 the medical officer who examined the Complainant. When the Complainant later testified on 20th September, 2012 she stated that she was aged 15 years.

11. The Appellant took issue with the fact that the age stated by the prosecution witnesses differed from that in the age assessment report. The age assessment was undertaken by Dr. Lydia Obiero, a dental officer at Webuye District Hospital who testified as PW6 and produced a report in this regard. She stated that she assessed the Complainant to be 16 years old. I note however that the age assessment was undertaken on 21st November, 2012 one year later after the offence which occurred on diverse days between 6th November, 2011 and 17th November, 2011. The upshot of this is that the Complainant was aged 15 years at the time of the alleged offence.

12. I note that in the instant case, proof of age is relevant at two levels, first to establish that the Complainant was a minor and therefore a child and secondly to establish that she was aged between 12 and 15 years such as to bring the sentence of the Appellant to the minimum provided under **section 8(3)** of the **Sexual Offences Act**.

13. In the case of **Francis Omuroni vs. Uganda Court of Appeal Criminal Appeal No. 2 of 2000**, it was held thus:

> **"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…"**

14. From the evidence on record, it is not in doubt that the Complainant was aged between 14 and 15 years at the time of the offence. Her mother PW1 testified that she was aged 14 years at the time of the offence, and this was corroborated by PW4 the medical officer who examined her and filled the P3 form produced in court. Whereas the Complainant testified that she was aged 15 years, I note that she testified on 20th September, 2012, ten (10) months after the offence took place.

15. Whereas the witnesses gave varying ages, I note that there is an age assessment report carried out on 21st November, 2012 which assessed the Complainant at 16 years old and which translates to her being aged 15 years at the time of the alleged offence. The age assessment report therefore conclusively proved the age of the Complainant.

16. On the requirement of proof of penetration, Mrs. Njeru submitted that this was proved by the evidence of the Complainant and corroborated by medical evidence and the testimony of PW4 the medical officer.

17. Penetration is defined under **section 2** of the **Sexual Offences Act** as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

18. In her testimony, the Complainant gave an account of what transpired between her and the Appellant. The relevant part of her testimony is as follows:

> "*Accused was bringing food from his parents' house. We were having sex for the 03 days. I was with him. I had not had sex before. I felt pain during the act. I did not scream. Accused was covering my mouth.*"

19. The Complainant's testimony found support in the medical evidence tendered by PW4 Eric Soita the medical officer who examined her. He testified that the Complainant was presented to the hospital on 18th November, 2011 with a history of having been defiled by a person known to her. On examining her, his observations were that: the pubic hair was well distributed, the hymen was missing, there were no visible lacerations, the urine had pus cells and there was a visible white vaginal discharge.

20. The medical officer formed an impression of defilement, and filled and signed the P3 form which he produced in evidence. He treated the patient for sexual assault and even though the pregnancy and HIV tests were negative, he administered to her drugs to prevent pregnancy and put her on post exposure prophylaxis (PEP) drugs. This is therefore proof beyond peradventure that the Complainant had engaged in sexual activity in the recent past before she was examined in hospital.

21. Further, PW1 the Complainant's mother testified that the Complainant had informed her that she and the Appellant had engaged in sexual activity. PW3 PC James Obiri who recorded the report of the incident also testified that on interrogating the Complainant, she confirmed that she and the Appellant had engaged in sexual intercourse.

22. On whether the Appellant was positively identified as the assailant, I note that this is a case of recognition as opposed to identification. From the evidence on record, the Appellant was someone well known to the Complainant as evinced by her testimony in examination in chief that:

> "*I know the accused…I had known the accused before he came for me. I knew him at Brigadier market.*"

On cross-examination she further stated that:

> "*I had known you before…I knew you at the market. You were working on a lorry which was selling maize in the market. It is not true that you were mistakenly arrested.*"

23. The evidence of the Complainant's mother PW1 lends credence to the Complainant's testimony. In her testimony she stated that her daughter had informed her that she was married to Jackson the Appellant herein.

24. Further, when the minor gave a description of the assailant, PW3 who recorded the report was able to comprehend who the Complainant was referring to. The relevant part of his testimony in examination in chief was as follows:

> "*I interrogated the girl. She said she was married to Jackson Sirengo. I recorded the report…I then started looking for the suspect. I later found him. I knew him. I interrogated him. The girl identified him as her husband. The girl told me that they were having sex with him. Accused also told me that the girl was his wife. I booked the suspect.*"

He went further to state in cross-examination that:

> "*The girl told me she was staying with you in* [particulars withheld]. *I met you on the road from* [particulars withheld] …*I interrogated you and you said you married the girl. You were staying with the girl in* [particulars withheld]. *She was taking flour to your home…You come from* [particulars withheld]. *You normally do casual work in* [particulars withheld]. *I know you very well. The girl said that Jackson Sirengo who is you was staying with her as husband and wife.*"

25. From the evidence on record, I am satisfied that the Appellant was positively identified as the assailant and that the prosecution proved all the ingredients of defilement to the required standard.

26. On the second ground, the Appellant complained that the trial court held that the Complainant's evidence was corroborated by medical evidence when there was nothing linking him to the offence. It is noteworthy that the fact of rape or defilement is not proved by way of a DNA test but by way of evidence as held by the Court of Appeal in **AML vs. Republic [2012] eKLR**. In the present case, the medical evidence tendered before the trial court ties up with the evidence of the prosecution witnesses and proved the offence against the Appellant to the required standard.

27. On the third and fourth grounds the Appellant argued that the prosecution failed to call crucial and independent witnesses and that the court failed to take into account the credibility of the prosecution witnesses. Mrs. Njeru submitted on these two grounds that the Appellant did not indicate who the prosecution failed to call and that in any event he should have called them as witnesses if they were of importance.

28. To begin with, this being a criminal trial, the onus was not of the Appellant to prove his innocence by calling witnesses that the prosecution failed to call if any. I am also alive to the fact that the prosecution has a duty to call all witnesses necessary to establish the truth of a matter even if their evidence may be inconsistent as elaborated in the case of **Bukenya and Others vs. Uganda [1972] EA 549**. I however note that **section 143** of the **Evidence Act** provides that no particular number of witnesses are required to prove a fact.

29. All that the prosecution is required to do is to call such number of witnesses as sufficient to prove its case. **Section 143** provides thus:

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

The record shows that the prosecution called six (6) witnesses in support of its case, all of whom they considered sufficient to prove their case. Further, in the present case, there is no provision of the law stipulating that the prosecution should call a particular number of witnesses. The record demonstrates that the trial court considered the evidence on record and found that the offence of defilement had been proved against the Appellant.

30. The Appellant also called the credibility of the prosecution witnesses to question. There is nothing on the record to indicate that the credibility of the witnesses was ever called to question during the trial, and there is nothing to show that the trial court which had the benefit of seeing and hearing the witnesses first hand, found them to be unbelievable so as to disregard their testimony. If anything, the trial court found their evidence overwhelming and credible enough to sustain a conviction.

31. On the last ground, the Appellant complained that the charge preferred against him was unconstitutional since he had stayed in police custody for more than twenty-four hours in breach of his rights under **Article 49(1)(f)** of the **Constitution**.

32. Article 49(1)(f) of the **Constitution** provides that an arrested person has the right to be brought before a court as soon as reasonably possible but not later than twenty-four hours after being arrested; or if the twenty-four hour period ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.

33. I observed from the record that the Appellant was arrested on 17th November, 2011 as indicated in the charge sheet and arraigned in court on 21st November, 2011 to take plea. The stated 17th November, 2011 fell on a Thursday whereas the date of arraignment fell on a Monday. There is however nothing on the record to show the time when the Appellant was arrested on the said 17th November, 2011. The only details of the events surrounding the arrest are found in the unsworn defence testimony of the Appellant, in which he stated that:

> "*He took me to a police post at kogo market and the following day to brigadier police patrol Base. I was being detained the following day I was taken to Kiminini police station and thereafter charged with an offence I did not commit.*"

34. The record points to a one day delay between the date of the Appellant's arrest and the date of his arraignment. This is because the Appellant was arrested on a Thursday and arraigned in court on a Monday as opposed to Friday which fell on an ordinary court day. This was an issue that would have been addressed and put to rest by the Investigating Officer. Sadly, this issue did not arise during trial and was therefore not dealt with by the trial court.

35. This issue was deliberated upon in the case of **Evans Wamalwa Simiyu vs. Republic Criminal Appeal 118 of 2013 [2016] eKLR** in which the Court of Appeal stated that the correct position in law in this regard was set out in the case of **Julius Kamau Mbugua vs. Republic [2010] eKLR** where the court stated that the violation of the Appellant's right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the Appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights. In the premise therefore, I find no basis to consider the issue fatal to the prosecution's case.

36. In the end, I find that the offence of defilement was proved against the Appellant to the required standard. I also find that the trial court acted properly in dismissing the Appellant's defence since it did not manage to debunk the evidence on record. I am satisfied that the conviction entered against the Appellant was based on sound evidence and the sentence of twenty years meted against him is that which is lawful as by law prescribed.

For the foregoing reasons therefore, this appeal must fail, and is accordingly dismissed. I uphold the sentence and the conviction imposed.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 14TH DAY OF DECEMBER 2018.

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H. K. CHEMITEI

HIGH COURT JUDGE