REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 136 OF 2014

GEOFFREY MUTUNE MWANZIA……..……APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. L. Simiyu. Ag SRM delivered on 21st July 2014 in Criminal Case No. 354 of 2013 in the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was convicted and sentenced to serve twenty (20) years' imprisonment for the offence of defilement of a child, contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act. The particulars of the offence were that on 7th April 2013 at [particulars withheld] Market in Mwala District within Machakos County, the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of M M, a girl aged 17 years. The Appellant had also been charged with the alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2016.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Petition of Appeal dated 28th July 2014 and filed in Court on 30th July 2014, as well as in submissions dated 13th September 2016 both filed by his legal counsel, L.N. Ngolya & Company Advocates.

The grounds of appeal are as follows:

1. The trial Court erred in law and fact by convicting the Appellant on a charge of defilement when the age of the victim of the alleged sexual assault was not proved beyond reasonable doubt.

2. The trial Court erred in law and fact by convicting the Appellant on Medical evidence which amounted to hearsay.

3. The trial Court erred in law by convicting the Appellant on documentary exhibits evidence was at variance with the charge.

4. The trial Court erred in law by failing to explain to an unrepresented and unsophisticated Appellant his rights with regard to production of a documentary exhibit by a person other than the maker thereof.

5. The trial Court erred in law and fact by finding that the prosecution had proved case as against the Appellant beyond reasonable doubt.

The Appellant in his submissions mainly focused on the ground that the cardinal ingredient of the charge of defilement as regards the age of the victim of the alleged sexual assault had not been proved beyond reasonable doubt. It was submitted that the trial Court misdirected itself on the question of age by holding that that age of the complainant was not in dispute, and that the Age Assessment Report tallied with the evidence of the complainant.

According to the Appellant, the prosecution should have endeavored to tender in evidence an authoritative document such as a Certificate of Birth, and that the evidence before the Court on the issue of the victim's age was contradictory. In this regard it was pointed out that the Medical Examination Report (P3) which was tendered in evidence by PW 3, at page 3 gave the age of the victim as 18 years, and the nature of the offence was indicated as rape. Further, that PW 3 testified that the complainant's guardian whose name was not provided told her that the complainant was aged 17 years, and that the alleged guardian was never called to testify.

Lastly, it was urged that the Age Assessment Report alleges that the complainant was 17 years, and that the maker of the Age Assessment Report was never called to testify or produce it as an exhibit. The Appellant contended that the doubts raised in this regard should have been resolved in his favour, and relied on the Court of Appeal decision in **Kaingu Elias Kasomo vs Republic, Criminal Appeal No 504/2011 (Malindi).**

Ms Rita Rono, the learned prosecution counsel, filed written submissions dated 23rd January 2016 in response. It was urged therein that that the victim's age was sufficiently proved as an age assessment report was produced in court by the investigating officer, and the Appellant did not object to its production. Further, that that the age assessment was done on 12th April 2013 after the P3 form was filled on 8th April 2016. Reliance was placed in this regard on the Court of Appeal decision **Stephen Nguli Mulili vs Republic, Criminal Appeal No 90 of 2013,** and the decision in **Kennedy Ochieng Rabilo vs Republic, Criminal Appeal No 96 of 2014**. Lastly, it was submitted that the Appellant in his defence admitted having had intercourse with the minor which he stated was by consent, however, that legally, a child below 18 years cannot give consent to have sex.

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

In this regard after going through the grounds of appeal, the arguments made and evidence of the prosecution witnesses and that of the Defence, I note that the main issue raised by the Appellant is whether the age of the complainant was proved. The ingredients of the offence of defilement were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

"**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

The Court of Appeal in addition stated in the case of ***Kaingu Elias Kasomo vs Republic, Malindi CRA No. 504 of 2014*** that age is a key ingredient to the offence of defilement, and failure to prove it beyond reasonable doubt amounts to failing to prove the offence.

The said Court in ***Moses Nato Raphael vs Republic*** **[2015] eKLR** further clarified the difference between proof of age for purposes of establishing the offence of defilement and for purposes of sentencing as follows:

On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010,

where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.

Therefore, the Court has discretion to find what the apparent age of a victim is from the documents presented to it and from the victim's testimony, when the only inconsistency is as regard the age of a minor as regards the various categories of ages provided by section 8 of the Sexual Offences Act for purposes of sentencing. This was also the position taken by the Court of Appeal in **Stephen Nguli Mulili vs Republic, Criminal Appeal No 90 of 2013**.

However, the issue whether the victim is below 18 years old, and therefore a minor for the offence of defilement to be found to have been committed, must be proved beyond reasonable doubt as emphasised in the above-cited decisions.

In the present appeal, the evidence provided during trial as to the age of the victim was the testimony of the complainant who was PW1, and who testified on 18th June 2013 that she was 17 years old in the previous year. The offence the Appellant was charged with was alleged to have been committed on 7th April 2013, and it therefore would put the age of the complainant at 18 years at the time of the offence according to her testimony.

PW3 who filled the P3 form which she produced as an exhibit indicated therein that the victim was 18 years old at the time of examination, which was on 9th April 2013. Upon cross-examination, she testified that the victim had told her she was 18 years old but that a guardian clarified that she was 17. The said guardian was not named nor was he or she called to give evidence on this fact. Lastly, PW4, the Investigating Officer, produced an age assessment form prepared by a doctor at Machakos Level 5 Hospital as an exhibit, which showed that the victim was 17 years old.

It is my finding that there was inconsistency in the evidence as to the victim's age, and particularly as to whether or not the victim was below 18 years old. As this evidence was crucial for the purposes of establishing whether the offence of defilement was committed or not, the doubt created as to whether the victim was 17 or 18 years old at the time of the alleged offence can only be resolved in favour of the Appellant, as the fact that she was below 18 years was one that was required to be proved beyond reasonable doubt.

I accordingly allow the Appellant's appeal and quash his conviction for the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act. I also set aside the sentence of twenty years' imprisonment imposed on the Appellant for this conviction, and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 1ST DAY OF FEBRUARY 2017.

P. NYAMWEYA

JUDGE