REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 93 OF 2017

FORMERLY ELDORET HCCRA NO. 65/2013

ISAAC WAFULA

VERSUS

REPUBLIC

JUDGMENT

[1] The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence were that the accused had on the 7th December 2012 at [particulars withheld] village in Tenges Division within Baringo County intentionally and unlawfully did cause his penis to penetrate the vagina of J K, a child aged 14 years in violation of the said act.

[2] The accused faced an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006 with particulars that he did an indecent act to J K by touching her private parts namely vagina.

[3] The trial court convicted the accused of the main charge and sentenced him to serve imprisonment for twenty (20) years.

[4] The appellant appealed raising principal grounds in Petition of Appeal filed on 8th April 2013 that the investigating officer and police arresting officers were not called as witnesses and that the Police Form P3 that the court had used in convicting him had doubtful authenticity because the rubber stamp from Kabarnet Police station was missing. At the hearing of the appeal, the appellant urged the following other grounds of appeal, namely that –

i. The charge sheet has no Occurence Book (OB) number.

ii. Section 8 (2) of the Sexual Offences Act set out in the charge sheet did not apply to the case as the complainant was not under 11years of age.

iii. The charge sheet was not stamped.

iv. The P3 form did not give the doctor's Personal Number and the doctor who testified did not explain the redness of the girls private parts and did not give any treatment for the girl.

[5] The DPP through the Prosecution Counsel did not oppose the appeal pointing out that the appellant had been charged defilement under section 8(1) and 8 (2) of the Sexual Offences Act providing for life

imprisonment, that the age of the complainant was not proved other than by a statement by herself, and that if the complaint was 14 years old, the correct section in the charge should have been 8 (3), and not 8(2), of the Sexual Offences Act. The DPP submitted charge sheet was defective and therefore the conviction and sentence cannot stand and the Court was urged to allow the appeal and make its own judgment on the matter.

Peripheral Issues

[6] The complaint by the appellant that the charge sheet did not show the Occurrence Book Number, that the Personal Number of the examining doctor who completed the Police Form P3 and that the charge sheet was not stamped are, in the opinion of this Court, mere technical objections without any substantive prejudice or injustice, and are all capable of cure by section 382 of the Criminal Procedure Code, which provides as follows:

> **"382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings**
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> Subject to the provisions hereinbefore contained, **no finding**, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or r**evision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**
>
> *Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."*

[7] Indeed, no prejudice was alleged and no reason was ascribed as to why these objections were not taken in the trial court.

Duty of first appellate court

[8] As a first appellate court, it is the duty of this court as required by Okeno v. R (1972) EA 32 to re-evaluate the evidence produced by the Prosecution in support of the charges and by the defence and make its conclusion whether the commission of the offences by the appellant in the main charge of defilement or the alternative charge of indecent act with a child with respect to the complainant have been proved and whether the appellant was responsible. I have considered the evidence presented before the trial court and also given due recognition of the fact that it was the trial court that heard and saw the witnesses testify, and gave deference to its observations where necessary.

Proof of Defilement against the appellant

[9] The Complainant (PW1) narrated the principal act of the charges facing the accused as follows:

> *"I remember on 7.12.12 at 5pm I was at home with my C and i. Chepkoskei is a child. They told me to go with her to the accused home. We went to the accused home and used a foot path. We went and found him home. We went in and I was with C, C, and J. The accused then closed the door. He then removed my clothes. The accused then removed my underpant and took me to his bed. He then went on to do "mambo machafu" to me. By then C, C and the other were in the other room."*

[10] The complainant's testimony was confirmed by the complainant's grandparents PW2 and PW5 who on information by a neighbour T, (the grandmother of J, one of the girls who were with the complainant) that their grandchild had slept at the accused's house went there and found the complainant in his bedroom.

[11] The Clinical Officer who examined the complainant testified as PW3 and confirmed the finding also recorded in P3 Exhibit No. 1 that there was "hyperanaemia [excessive redness of the vagina and inflammation] and she had a whitish discharge from her vagina" on the basis of which he formed an opinion that there was penetration. The clinical officers finding further corroborates the complainant's evidence of sexual assault.

[12] The most valuable witness in the Prosecution's case was the complainant's girl friend PW6 who the court gave an apparent age of 8 years but who on voire dire examination said she was 12 years and in class Standard 5. The Court found her to be possessed of sufficient intelligence and to understand the nature of the oath and consequently took her testimony on oath. Her testimony was unchallenged on the accused's cross-examination of her. She said she knew the accused as a worker at C's house where he used to irrigate bananas, and went on to describe the event of the day in material part as follows":

> *"Wafula [accused] asked us to sleep in his house. Then J and J went inside. J and I and smaller J said they would not sleep. J then went to the accused bedroom and I remained inside the sitting room. C told Cosy today they would see "chemtamakuni". We told the accused to open the door of the bedroom so that smaller J would come out. I, smaller J and J then went outside. J then remained in the bedroom. We then went out and asked Wafula to come out and escort us home. He came out and took us. We left the J inside. The accused escorted us to the main road and refused to take us home. We feared going alone and went back to Wafulas. Wafula came out and we asked him for J. She did not respond. J then came out and went back inside. We went inside and tried to carry her out. She almost slapped me. J also attempted to take her away by force but she almost bit her. We decided to leave. We went and J went and told the grandmother. The grandmother told us to sleep."*

As with that of the PW1, the evidence of the minor PW 6 is corroborated by the evidence of PW3 and PW5 and that of the clinical officer support her testimony.

[13] Section 124 of the Evidence Act provides as follows:

> "***124. Corroboration required in criminal cases***
>
> *Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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.*
>
> *[Act No. 5 of 2003, s. 103, Act No. 3 of 2006, Second Sch.]"*

[14] The Court is, therefore, entitled under the Proviso to section 124 of the Evidence Act to accept and rely on the evidence of a complainant minor if it finds that her evidence is truthful. In this regard, I defer to the finding of the trial Court which heard the testimony of the PW1 and found "that the complainant when she was giving her evidence in court was bold, clear [and] had clear understanding of the issues and events that took place on that night [of her sexual assault]."

[15] The appellant when put on his defence raised the defence that the complainant's mother had a grudge with him following his refusal to work for her at Nakuru; that he was the only one from his tribe in the area and his life and that of his wife had been threatened; and in response to the clinical officer's findings of injury to her private parts, offered a conjecture that the girl 'may have scratched her private parts'.

[16] Weighed against the prosecution evidence and when the evidence in the case is considered as a whole, the appellant's defence must be rejected as improbable in view of the coherence of the evidence of the PW1, its corroboration (unnecessary in the circumstances) by the evidence of the grandparents PW2 and PW5 and the medical findings of the clinical officer PW3, as well as the separate testimony of the child PW6 who was with the complainant during the incident and whose evidence is also confirmed by the testimony of the said witnesses. The issue of grudge and ethnicity of the appellant were issues raised only in the defence statement and never as cross-examination questions, and the court rejects these as merely afterthoughts.

Age of the Complainant

[17] The age of the complainant was not proved. PW1 gave her age as 14 years and said that she in class Standard 7. No birth certificate or other relevant document was produced. The Court in noting the offer of PW1 as a prosecution witness gave apparent age as 15 years and went on to conduct a voire dire as to determine whether her evidence could be received and, if so, whether on oath or not. This court must accept the view of the trial court that the complainant was a minor, whose evidence could only be taken after a successful voire dire. The Court did not make a finding at the age of the complainant.

[18] The trial Court had power under section 179 of the Criminal Procedure Code to convict for a lesser offence although the accused was not charged with such lesser offence. Section 179 of the Criminal Procedure Code is in the following terms:

> "*179. When offence proved is included in offence charged*
>
> *(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*
>
> *(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."*

[19] However, the trial court did not establish the age of the complainant, and proceeding to convict of the main charge, which charged defilement of a child under 11 years and proceeding to sentence in a case where the child is between 12 and 15 was without evidential basis. I agree with the DPP that it is prejudicial for appellant to serve a sentence of 20 years which is based on section 8 (3) of the Sexual Offence Act on the assumption which was not proved that the girl was 14 years.

[20] Although, there was on the evidence penetration with the meaning of section 8 (1) of the Sexual Offences Act, the want of credible evidence to base a finding on the age of the complainant makes the conviction of the appellant unsafe as the girl could have been over 15 years, which was the court's apparent age, for which penalty would be 15 years. This uncertainty must go to the benefit of the accused.

[21] Section 8(1) of the Sexual Offences Act provides for the offence of defilement that –

> "*8. (1) A person who commits an act which causes p**enetration** with a **child** is guilty of an offence termed defilement."*

The Sexual Offences Act defines penetration as follows:

> "*penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."*
>
> *A child for purpose of Sexual Offences Act is defined as – "child" has the meaning assigned thereto in the Children Act", which is a person under the age of 18 years.*

There was on the evidence proved an offence of defilement, but as the penalty therefor depended on the age of the victim, the court cannot properly impose an penalty without determination of the age of the complainant which was not done in this case.

[22] The girl's apparent age was assessed by the court which saw the complaint as 15 years and it proceeded to conduct a voire dire and found her to understand the nature of the oath and to be possessed of sufficient intelligence to justify reception of her evidence on oath. In addition, her own evidence that she was in class 7 may give an indication of her age as a minor, as the Court is entitled under section 60 (o) of the Evidence Act to take judicial notice of matters of general notoriety – for instance that a class 7 pupil would normally be a minor. The girl was clear a minor within the meaning of the Children Act and, therefore, a child for purposes of the Sexual Offences Act.

The alternative charge of indecent act

[23] The offence of indecent act with a child with which the appellant was charged in the alternative is proved. Indecent act is defined in the Sexual Offences Act as follows:

> "indecent act" **means an unlawful intentional act which causes-**
>
> (*a) A**ny contact between any part of the body of a person with the genital organs,** breasts or buttocks of another, but does not include an act that causes penetration.*
>
> *(b) Exposure or display of any pornographic material to any person against his or her will."*

[24] The offence of indecent act is, therefore, complete in the act of defilement, which this court finds proved, save that the age of the victim was not proved so as to enable punishment under provisions for the offence of defilement. The penalty for indecent act with a child under section 11(1) of the Sexual Offence Act is an imprisonment term for not less than 10 years as follows:

> "*11. (1) Any person who commits an **indecent act with a child** is guilty of the offence of committing an indecent act with a child and is liable upon conviction to **imprisonment for a term of not less than ten years."***

[25] The appellant shall therefore be found guilty of the alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

Conclusion

[26] The offence of defilement was proved by the evidence of the complainant (W1) and corroboration by her grandparents PW2 and PW5 who found the complainant in the appellant's house on the morning after the incident and the clinical Officer (PW3) who examined and filled a medical examination report (Police Form P3). The evidence of the complainant's girl friend (PW6) who, together with other girls, was with the complainant at the time of her defilement by the appellant further supports the Prosecution's case. The appellant's defence that he did not know the complainant is rejected as a bare denial when weighed with the strong case of the prosecution. The grounds of appeal before this court were, in addition, merely technical objections on the charge sheet and the Police Form P3 without affecting the substance of the charges against the appellant.

[27] The Prosecution's case is only affected by the want of proof of age of the victim making it impossible to pass appropriate sentence based on the age of the complainant. There was evidence that the complainant was a child within the meaning of the Sexual Offences Act. Therefore, the alternative offence of indecent act with a child is however complete in the act of defilement, and the appellant will therefore be convicted and sentenced accordingly for the offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. For this reason, the conviction and sentence for the offence of defilement charged in respect of the girl herein stated to be aged 14 years is quashed and set aside, respectively.

Orders

[28] Accordingly, for the reasons set out above and in exercise of the power of the appellate court under section 354 (a) (ii) of the Criminal Procedure Code, the Court makes the following orders:

1.The appellant's appeal is allowed the conviction for the main charge of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act is quashed and the sentence imprisonment for of twenty (20) therefor is set aside.

2. The Court enters a conviction against the appellant for the alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act, and sentence him to serve the minimum sentence therefor, that is imprisonment for ten (10) years from the 27th March 2013 the date of the sentence in the trial court.

[29] Order accordingly.

DATED AND DELIVERED THIS 5TH DAY OF JUNE 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person

Ms. Macharia for the Respondent.