REPUBLIC OF KENYA

IN THE HICH COURT AT ELDORET

CRIMINAL APPEAL NO. 30 OF 2015

JOEL KIPKORIR ……..…… APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(Being an Appeal from the original conviction and sentence by Honourable B. MOSIRIA Principal Magistrate, dated 6th March, 2015, in Kapsabet Principal Magistrate's Court Criminal Case No. 2523 of 2012)

JUDGEMENT

1. The appellant *Joel Kipkorir* was tried and convicted of the offence of defilement contrary to *Section 8(1)* as read with *Section 8(3)* of the *Sexual Offences Act.*

2. It is alleged that on 17th day of August 2012 at [particulars withheld] village in Nandi County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of *R.C* (Name withheld) a child aged 15 years.

3. Upon conviction, the appellant was sentenced to thirty years imprisonment. He was aggrieved by his conviction and sentence hence this appeal.

4. In his Amended Petition of Appeal filed on 6th July, 2015, the appellant listed eleven grounds of appeal which can be collapsed into the following four main grounds;

i. That the trial magistrate erred in law and fact by convicting the appellant on the basis of a defective charge sheet.

ii. That the learned trial magistrate erred by relying on inconsistent and incredible evidence which did not prove all the elements of the offence of defilement beyond any reasonable doubt.

iii. That the trial magistrate erred in law by failing to consider the appellant's defence.

iv. That the learned trial magistrate made findings of fact in her judgment which were not supported by the evidence on record.

5. The appeal was prosecuted by way of oral submissions. Learned counsel *Mr. C.F Otieno* argued the appeal on behalf of the appellant while learned prosecuting counsel *Ms. Oduor* represented the state.

6. In his submissions, *Mr. Otieno* contended that the charge was fatally defective in that its particulars

contained the words "unlawfully" and "intentionally" which in his view were not applicable to the offence of defilement but to the offence of rape; that therefore the particulars supported the offence of rape and not defilement. For this proposition, Counsel relied on the authority of ***Yongo V Republic (1983) KLR 319*** which enumerates instances in which a charge can be held to be defective.

7. To demonstrate that the charge was not proved beyond reasonable doubt, counsel submitted that investigations in this case were shoddy as the complainant's alleged pregnancy was not proved; that no age assessment report was produced to prove the complainant's age. He invited the court to find that the appellant was framed with the offence and allow the appeal.

8. The appeal is contested by the state. *Ms. Oduor* in her submissions denied that the charge was fatally defective arguing that if there were any defects in the charge, the same were curable under *Section 382* of the *Criminal Procedure Code*. She urged the court to uphold the appellant's conviction as in her view, all elements of the offence had been proved beyond any reasonable doubt.

9. This is a first appeal to the High Court. I am well aware of the duty of the first appellate court which is to revisit all the evidence tendered before the trial court; to re-evaluate it and draw my own independent conclusions. In doing so, I should remember that unlike the trial court, I did not have the advantage of hearing or seeing the witnesses and give due allowance for that disadvantage. See: ***Okeno V Republic (1972) EA 32***; ***Njoroge V Republic (1987) KLR 99.***

10. I have carefully considered the grounds of appeal, the evidence on record, the submissions made on behalf of the appellant and the state as well as the authorities relied on by the appellant.

11. I wish to deal first with the appellant's complainant that he was convicted on a fatally defective charge sheet. I agree with *Mr. Otieno* that *Section 8* of the *Sexual Offences Act* (the Act) which creates the offence of defilement does not use the words "*unlawfully and intentionally"* unlike *Section 3(1)* of the *Act* which expressly uses the said words in describing the offence of rape. This is not the first time that these expressions have been used in particulars supporting the offence of defilement. I have encountered many cases in which they have been used and my view has always been that the words are merely used to depict the mens rea of the person accused of having committed the offence and the fact that his alleged conduct is against the law.

12. I wholly agree with learned counsel that those two words need not be included in the particulars supporting a charge of defilement but their inclusion in my opinion does not in any way change the nature and character of the offence of defilement. It does not therefore render the charge defective. I am thus not persuaded that the charge in this case is fatally defective merely because of the use of the said words in the particulars of the charge. I find that the charge clearly discloses the offence of defilement and it is not defective as alleged.

13. On the claim that the trial magistrate erred by failing to consider the appellant's defence, after reading the trial magistrate's judgment, I am satisfied that there is no merit in this complaint.

Pages 26-28 of the learned trial magistrate's judgment show clearly that the trial court considered and analysed the evidence tendered by the appellant in his defence and found it to be untruthful. Nothing therefore turns on that ground of appeal.

14. The appellant's other key grievance is that he was wrongly convicted as the evidence adduced by the prosecution was inconsistent and did not prove his guilt beyond any reasonable doubt.

I will start by pointing out that in order to establish the offence of defilement, the prosecution must prove beyond doubt three essential elements of the offence; that is; the age of the victim which must be below 18 years; that there was penetration and thirdly, that the penetration was of the accused person's genital organ into the genital organ of the complainant. The question that this court must now answer is whether these three ingredients were proved against the appellant beyond doubt by the evidence which was tendered before the lower court.

15. Regarding the age of the complainant in this case, the complainant who testified as PW1 stated in her evidence that she was born on 28th January, 1998 which averment was confirmed by the birth certificate which was produced as Pexhbit 1. This evidence conclusively proved that the complainant was slightly below the age of 15 years by the time the offence was allegedly committed. To be precise, she was 14 years seven and a half months old. Having produced in evidence the minor's birth certificate, the prosecution did not need to produce an age assessment report as alluded to by the appellant.

16. On my re-appraisal of the rest of the evidence on record, I find that the complainant's claim that the appellant lured her into a sugar cane plantation where he had sexual intercourse with her and continued to do so thereafter until she became pregnant was collaborated by the evidence of PW3, a clinical officer at Chemase Health Centre who examined her on 16th October, 2012. She however miscarried thereafter.

17. PW1 testified that on the material date before the appellant led her to the sugar plantation, he had promised to send her some money. This claim was supported by the evidence of PW4 another minor who confirmed in her evidence that sometimes in year 2012, her teacher who she identified as the appellant gave her Kshs.100 to take to PW1 which she did. PW1 maintained in her evidence that she knew the appellant very well prior to the material date since they were neighbours. The two according to her had engaged in sexual relations before the material date. These claims were not contested by the defence. Her identification of the appellant as the person who had had sexual intercourse with her is therefore not open to question. The claim that he was framed with the offence is not supported by the evidence on record.

18. Given the above evidence, I find no reason to fault the finding of the learned trial magistrate that the charge of defilement had been proved against the appellant beyond any reasonable doubt. She accepted the evidence of PW1 who she found to have been a truthful witness for the reasons that she was consistent in her evidence even under cross examination and the appellant in his defence did not controvert any of her claims. He did not also deny having sent PW4 to take her some money. Under the provisions of *Section 124* of the *Evidence Act*, the learned trial magistrate was perfectly entitled to convict the appellant on the uncorroborated evidence of PW1 if she believed that she had told the court the truth and recorded her reasons for that belief. This is exactly what the learned trial magistrate did in this case. On my part, I have no reason to doubt the credibility of PW1.

19. Given the totality of the evidence on record, I am satisfied that the appellant was properly convicted. I have made the above finding knowing too well that the trial magistrate wrongly described in her judgment the locus in quo as a house instead of a sugar cane plantation. She also stated that the age of the complainant was proved by production of an immunization card while no such card was produced in evidence. In my view, these were errors which could not have affected the validity of her decision. They did not occasion any prejudice on the appellant. It is my finding that the errors are curable under *Section 382* of the *Criminal Procedure Code.*

20. On sentence, *Section 8(3)* of the *Sexual Offences Act* prescribes a minimum sentence of twenty years imprisonment for an accused person convicted of the offence of defilement where the victim is between the ages of twelve and 15 years. In this case, the evidence proved that the complainant was slightly less than 15 years old.

21. As a general rule, sentencing is always at the discretion of the trial court. And an appellate court cannot interfere with a sentence passed by the lower court unless it is satisfied that it was either illegal or was harsh and manifestly excessive. See ***Macharia V Republic (2003) KLR 115.***

22. In this case, the appellant was sentenced to thirty years imprisonment. As the law prescribes a mandatory minimum sentence of twenty years imprisonment, it cannot be said that the sentence imposed on the appellant in this case was illegal. I am not also persuaded that the sentence is harsh or manifestly excessive given the circumstances surrounding the commission of the offence.

The evidence discloses that the appellant was a teacher albeit in a different school from that attended by the complainant and given his position in the society, he ought to have been at the forefront protecting minors instead of sexually molesting them. The sentence meted out against the appellant is lawful and it

is consequently upheld.

23. In the end, I find that the appeal is devoid of merit. It is accordingly dismissed in its entirety.

C. W. GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 7th day of June 2017.

In the presence of:-

Appellant

Ms Kainga for the Republic

Mr. C.F Otieno for the appellant

Mr. Lobolia court clerk