REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

HIGH COURT CRIMINAL APPEAL NO. 44 OF 2016

MOHAMMED EKAI ABDI …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(An appeal from the conviction and sentence in original Lodwar PMCR 444/2013 delivered on 15/4/2015 by R W Washika Senior Resident Magistrate)

JUDGMENT

The appellant **Mohammed Ekai Abdi** was charged in the magistrate's court with the offence of defilement contrary to section 8(1) as read with section 8(3) of the sexual offences act No.3 of 2006. The particulars of the offence are that on the diverse dates between 9/3/2013 and 2/6/2013 at Lowarengak sub-location in Turkana County intentionally and unlawfully caused his penis to penetrate the vagina of SM a girl aged 15 years old.

The case for the prosecution was that the complainant S M was a pupil at [particulars withheld] Primary School in Std 5. The appellant was her social studies teacher at the school. The appellant in the year 2013 approached the complainant and wanted to be his girlfriend. The complainant at first declined but he insisted. On 9/3/2013 the appellant sent one A a neighbor of the complainant to call her. The complainant accompanied A to the home of Christine where they found the appellant. They entered the house which had a bed. The appellant then asked the complainant to have sex with him. He removed his clothes and asked her to remove her clothes which she did. He then inserted his penis into her vagina. They had sex for about five minutes. He then released her. They continued with the affair. On 2/6/2013 they went to the home of Lopiding at about 8am and had sexual intercourse. After the act, the complainant met the wife of the appellant who confronted her about the affair. The appellant wife then fought with the complainant. The mother of the complainant then knew of the incident and reported the matter to the AP Camp. The complainant was referred to Lokitaung District Hospital where she was examined and P3 form filled. The appellant was then arrested and charged with present offence.

PW2 SAE the mother of the complainant runs a kiosk where she sells flour and fish. The complainant is her 4th born child and was aged 15 years at time of the offence. She was a pupil at [particulars withheld] girl's primary school. On 2/6/2013 she left the complainant at home with her siblings. At 5pm while at the kiosk the appellants wife went there and informed her that she had found the complainant having sexual intercourse with the appellant at a lodging. She went home and asked the complainant who confirmed the same. She took her to the Administration police and informed the head teacher. The appellant was called and interrogated and said that the complainant was his wife. The complainant was taken to hospital where she was examined and found she had been defiled but was not pregnant as they had earlier suspected.

PW4 Sonyah Etopon Moses a clinical officer at Lokitaung hospital examined the complainant. He estimated the age of the complainant to be 15 years. On examination he found the labia majora and minora normal; hymen was intact and formed opinion that there was no penetration. The appellant gave sworn evidence where he denied defiling the complainant. He stated that the complainant was 15 years old and he only heard that his wife had fought with the complainant. It is on this evidence that the appellant was convicted and sentenced to serve 20 years imprisonment.

The appellant was aggrieved by the conviction and sentence. He then preferred this appeal on the following amended grounds of appeal.

1. **That the prosecution side did not have first report**

2. **That the prosecution departed from original case of assault to defilement**

3. **That the prosecution had many contradictions and uncorroborated evidences.**

4. **That the prosecution side failed to avail the key witnesses especially his wife**

5. That the learned magistrate convicted him on a single evidence of relative.

6. That the prosecution case did not have special document that showed the real age and age assessment report to ascertain the proper age of PW1.

7. That his chief defence was merely rejected

8. That the trial magistrate erred in law to affirm a conviction without noticing contravention of article 50 (e) of the constitution of Kenya.

The appellant filed written submissions in support of the appeal. Appellant submitted that the prosecution did not produce in evidence the first report made by the complainant to the authorities to verify the allegations made against him. He submitted that the initial report to police was a case of assault of the complainant by appellant's wife.

Appellant further submitted that there were material contradictions in the prosecution witnesses evidence particularly on the school where the complainant was alleged pupil; the dates and places they had sex.

Appellant further submitted that the age of the complainant was not proved and that the only evidence of age is the evidence of the complainant and the mother. He submitted that no birth certificate was produced. He submitted that the complainant testified that she consented to the sexual act and declared to her mother that the appellant was her husband. Appellant urged the court to be guided by the decision of Chitembwe J in Malindi Cr. APP 32 of 2015. The appellant in his submission took issue to the prosecutions inability to call crucial witnesses who were mentioned who included his wife, and one E E and urged the court to find that had the prosecution called them they would have given evidence adverse to the prosecution. Appellant submitted that the complainant and her mother have ganged up to destroy him and that the alleged evidence of defilement is by a single witness. Finally the appellant submitted that the trial magistrate did not consider his defence.

Besides the written submissions, the appellant in his additional oral submission, he stated that the charge was defective and that he had more information that the complainant had been married and that the mother had been imprisoned for 6 months as per OB of 8/5/2014.

Mr. Gikunda for the state opposed the appeal. He relied on the evidence and exhibits produced. He confirmed that the complainant's mother had been charged with exposing the complainant to early marriage and sentenced to 6 months imprisonment. He submitted that the complainant was 15 years old and that the sentence of 20 years imprisonment imposed was the minimum sentence allowed.

From the submission by the appellant he faults the judgment of the trial magistrate on two main grounds (1) that the age of the appellant was not proved and (2) there was no evidence of penetration and therefore no defilement.

The appellant is charged with the offence of defilement contrary to section **8(1) and 8(2) of the Sexual Offences Act**. The section provides:

8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement.

(2) A person who commits an offence of defilement with a child aged Between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

Where a person is charged with an offence of defilement as in this case, the prosecution must establish or prove the main ingredients of the offence which are:

a. That there was penetration which is the partial or complete insertion of the genital organ of a person into the genital organ of another person.

b. That the person causing penetration is properly identified and

c. That the age of the child is proved to establish the offence and also ascertain the punishment applicable.

The appellant first ground of appeal is that the prosecution did not prove the charge beyond reasonable doubt. The duty of the prosecution was to lead evidence to prove all the ingredients of the offence of defilement, which are identification of the appellant; penetration and age of the complainant.

The first issue in the appeal is whether the age of the complainant was proved. The age of the complainant at the time of the commission of the offence is important. In **Kalusi Elis Kasomo – VS – Republic Malindi Criminal Appeal No.504/2010** the court of appeal stated:

"Age of the victim of sexual of assault under the sexual offences Act is a crucial component. It forms part of the charge which must be proved the same way as penetration in cases of rape and defilement. It is therefore essential for the same to be proved by credible evidence for the sentence to be imposed will be depending on the age of the victim"

The age of the complainant can be proved by direct evidence of the complainant, evidence of the parent/guardian by birth document which would include, baptismal card, birth certificate or by medical examination by a doctor or a dentist.

The complainant in her evidence on the age stated

> **" I am SM. I stay at [particulars withheld]. I am a pupil at [particulars withheld] girls primary school. I am in standard 5. I am fifteen years old"**

During cross-examination by the appellant she maintained

> **"I am 15 years old. I shall avail my birth certificate.**

PW2 SAE the mother of the complainant in her evidence testified

> **" I am SAE . I stay at [particulars withheld]. I am a business woman. I sell flour and fish. The complainant is my daughter. She is my forth born is a student at [particulars withheld]. She is in standard 5 at [particulars withheld] girls primary school. She is 15 years old. She had a birth certificate but they were guffed down with other documents in a fire".**

From this evidence both the complainant and the mother testify that her age at the time of the offence was 15 years. The complainant was also examined by PW4 Sonyah Etopon Moses a clinical officer at Lokitaung District hospital who testified that upon examination he estimated the age o the complainant to be 15 years old as at 10/6/2013 the time of examination.

In Francis Omuoni – vs – Uganda 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 or by observation or common sense".**

The appellant submits that the age of the complainant was not proved, because no birth certificate was produced. It is not mandatory that age of the complainant can be proved by production of birth certificate alone. Age can be proved besides this birth certificate, by other documents where date of birth is indicated, such as clinic attendance cards, school admission documents or by oral evidence of parents or guardian and the victim or by observation by court where the same is possible. In this case the age of the complainant was stated by the complainant, supported by her mother and confirmed by the clinical officer who estimated her age to be 15 years old. I am therefore satisfied that the age of the complainant was proved to be 15 years old and therefore a child under the sexual offences act.

The other ingredient the prosecution must prove in defilement cases is penetration. In this appeal the appellant submits that there was no evidence of penetration as this was the finding of **PW4 Sanye Etopon Moses** the clinical officer. His evidence was that:

> **"I examined S M examination revealed she was 15 years old child alleged to have been defiled by a person known to her. I examined genitalia external genitalia normal, no foul smell. Labia majora and minora normal. Hymen intact. There was no penetration"**

Penetration is by section 2 of the act to mean complete or partial insertion of the genital organ of a person into the genital organ of another. Penetration can be proved by oral evidence, circumstantial evidence and/or confined by medical examination evidence. The complainant in her evidence stated

> **"I had sexual intercourse with accused on 9th March, 2013. We had it at his sister's place. His name is CL This happened at 10.00am. The accused sent AE who is our neighbor. The accused is my social studies teacher. A took me to C's place. I found the accused and we had sex. The accused removed all his clothes. He also asked me to remove my clothes. We then slept on bed which was within that house. He inserted his penis into my vagina. We had love. I felt pain in my vagina during the incident. He did the act to his satisfaction. He did the act for long. Actual act took five minutes. He released me after the incident. We continued having sex on several occasions. We had the affair until the day we were discovered on 2nd June, 2013 we also had sex. We had sex at Lopiding's place. This was at about 8.00am. He had two shots. He had two shots that day. This is the day the accused wife discovered that we had a relationship. She confronted me. I think she heard the story from people"**

The evidence of the complainant is that the appellant inserted his genital organ into her genital organ. That is penetration. The appellant contends that since the clinical officer did nor mike a finding that there was penetration, then the prosecution did not prove its case. On this issue;

In Kassin Ali – vs – Republic Msa Cr. App 84/05 the court of appeal held

> **".Absence of medical evidence to support the fact of rape is not decisive and the fact of rape can be proved by oral evidence of the victim or circumstantial evidence".**

The evidence of the complainant was believed by the trial magistrate, on the issue of penetration I find no reason to depart from her finding. It is important to note that penetration need not be lead to the tearing of the hymen to amount to penetration. There can be penetration without going past the hymen membrane. I am therefore satisfied that penetration was proved.

The appellant submitted that the prosecution did not call crucial witnesses who included his wife and one E. He submits that this prejudiced him. **In criminal Appeal No.1 of 2014 Martin Kagundu Njagi – vs – Republic 2016 EKLR**

In the case of ***MARTIN NYONGESA WANYONYI VS REPUBLIC [2015] eKLR (where)*** the appellant alleged that vital witness had not been called. The court observed as follows;

> **We are also satisfied that no prejudice was visited upon the appellant by the failure to call witnesses. In any event, section 143 of the Evidence Act provides that no particular number of witnesses is required to prove a particular fact, and, we take the view that it was the prerogative of the prosecution to determine and call such witnesses as it deemed necessary to prove its case.**

The prosecution in this case called the witnesses whom it assessed as crucial to prove its case. In the present case, the appellant has not demonstrated what prejudice he suffered by failure to call his wife as a witness. The prosecution is at liberty to call the number of witnesses they wish, to prove their case.

The appellant submitted that there were contradictions in the evidence of the complainant and the mother in the school she attended. I have looked at the original record, and I do not find such discrepancy as alleged as prosecution stated that the complainant was previously at [particulars withheld] primary school and presently at [particulars withheld] Girls Primary.

Lastly the appellant submits that his defence was not considered. The trial magistrate in her judgment stated

> **"Accused defence was a mere denial. It did not challenge the prosecution case"**

Indeed the appellant in his defence dwells on how he came to be arrested. He only confirms that he received information that his wife had fought with the complainant over his sexual affair with the complainant. He did not say anything about the material day. The trial magistrate considered this and rejected the defence.

Upon considering this appeal and reviewing and analyzing the evidence before the trial court, I am satisfied that the appellant's conviction for the offence of defilement contrary to section was proper. I therefore uphold the conviction and affirm the sentence of 20 years imprisonment imposed. The appeal is hereby dismissed.

Dated at Lodwar this 15th day of June, 2017.

S N RIECHI

JUDGE