REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 112 OF 2012

(An appeal from the conviction and sentence by B. Ombewa (SRM) in Wby CrC No 683 of 2011)

RICHARD SIMIYU MAKOKHA…….APPELLANT

VERSUS.

REPUBLIC……..RESPONDENT

JUDGMENT.

RICHARD SIMIYU MAKOKHA (the appellant) was convicted on a charge of defilement c/sec. 8(1) and (2) of the Sexual Offences Act and sentenced to serve life imprisonment.

The charge stated that on 11th day of May 2011 at about 1700 hours at [particulars withheld] village, NDALU Location in Bungoma County, he unlawfully caused his penis to penetrate the vagina of RN (initials used to protect her identity) a girl aged 9 years.

The appellant denied the charge.

On 11/05/2011 at about 5.00p.m. RN was on her way home after fetching vegetables when she met the appellant who hit her using his fist, and she fell down. He removed her clothes, removed his pants and lay on top of her, then had sex with her. She felt pain and screamed, drawing the attention of J W W (PW1) who followed the appellant and found him in the act. He raised an alarm while holding the appellant to the ground, drawing a crowd of people who helped him to escort the appellant to the AP Camp before being handed over to PC. GLADYS KOECH of KIMININI Police Station.

RN was examined at NAITIRI Sub District Hospital by ERIC SOITA JUMA (PW4) a Clinical Officer who noted that there was laceration in the vagina and her hymen was torn and hyperamic with visible blood stains; and there were visible blood stains in her genitalia. A lab test done on urinalysis showed red blood cells. RN's age was assessed on 06/01/2011 and estimated at 11 years.

In his unsworn defence, the appellant said he was from his place of work on 10/05/2011 when he met 4 people who were taking alcohol, and who claimed that he had been using their materials to make baskets without paying them and demanded money from him which he did not have. They assaulted him and took him to the Police Station where it was alleged that he had defiled a girl. He insisted that the whole matter was a frame-up.

The Trial Magistrate in his Judgment noted that RN was 11 years and not 9 years as stated in the Charge Sheet but was satisfied that it was not fatal as she still fell within the age bracket contemplated under Sec. 8(1) and (2) of the Sexual Offences Act, for purposes of sentencing. He held that from the Medical evidence presented, coupled with RN's evidence it was proved that she had been defiled.

The Trial Magistrate was also satisfied that the appellant was the culprit because just apart from RN's evidence on to what took place, there was the evidence of Pw1 who heard her scream and went to her rescue and caught the appellant in the act. The appellant's claim that he was framed up was rejected in light of what Pw1 told the trial Court.

The appellant contested these findings on grounds that the evidence presented at the trial was doubtful and not sufficient to warrant the conviction. He also lamented that he was not medically examined and urged this Court to allow the appeal.

The appellant submitted in writing that whereas the Charge Sheet stated the victim was 9 years old, the age assessment indicated she was 11 years old. He contends that this anomaly ought to have been resolved in his favour.

He also argued that the medical evidence did not support what the child alleged, since it indicated that upon examination of the minor there was no blood oozing and no tears on her clothes. He also wondered why the other members of public who responded to Pw2's alarm were not called to testify at the trial, and suggested that such omission was because the case was a frameup.

In opposing the appeal MR. AKELLO on behalf of the state submitted that the charge was proved beyond reasonable doubt and confirmed by the medical findings so there would be no justifiable reason for interfering with the trial court verdict.

As to the defect in the charge sheet visa vis the evidence presented, MR. AKELLO argued that such is curable by the provisions of Sec. 382 CPC, and would not warrant altering the findings of the trial court.

It is correct that the child's age is given as 9 years, but when she underwent an age assessment at the hospital by DR. KIPROP JONATHAN whose report was presented by ERIC SOITA JUMA (PW4), the minor's age was given as 11 years. Was this fatal? Did the trial magistrate fail to consider this discrepancy? In his Judgment the Trial Magistrate took into account this issue and stated:-

> ***"The complainant testified that she was 09 years old. The age assessment report……by DR. KIPROP JONATHAN on 6/10/2011……..assessed the complainant's age at 11 years. It is therefore clear that the complainant was 11 years when the alleged incident happened and not 09 years. I do not consider this fatal to the prosecution as the estimated age of 11 years and 9 years as stated by the complainant is not material for the purposes of sentencing. 11 years and 09 years fall within the same bracket for purposes of sentencing".***

I need not say more - the trial magistrate duly considered this disparity in evidence, and gave a well reasoned explanation which resnates with the Court's findings on that aspect. This limb of the appeal therefore fails.

The second issue is whether the evidence sufficiently proved the charge of defilement. Again the trial magistrate dwelt at length on the Medical findings and I have perused the P3 Form which gave the history, the examination and the findings. The minor had laceration on the vagina which was sore and bleeding. Laboratory tests revealed presence of spermatozoa and epithelia cells. At **NAITIRI** Sub District Hospital whom examination was conducted on 12/05/2011 the hymen was noted to be torn and appeared fresh and this is what led the medical officer to conclude that she had been defiled. It was not so much the presence on absence of blood, but the sperm cells, the freshly torn hymen and the epithelia cells. Indeed the examining Health Officer noted at Page 3 of the P3 Form that the child had

> "A torn hymen, hyperaemic with visible blood stains"

The "no blood stains" referred to by the appellant is at page 1 of the P3 Form Part II paragraph 1 which was in reference to the state of her clothing and not her physical state. That limb therefore has nothing to support it and must also fail.

The issue as to who defiled the child cannot be moot - the appellant was identified by the minor and was caught spot on committing the offence – a factor which the trial court also addressed. My findings is that the evidence was duly considered and indeed proved the offence, hence the conviction was safe. The sentence meted was legal as provided by law and I confirm it.

Consequently the appeal fails in its entirety and is dismissed.

Delivered and dated this **11th** day of **July, 2017** at **Bungoma.**

H. A. OMONDI

JUDGE