REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL APPEAL NO. 52 OF 2015

(Being an appeal from original Conviction and Sentence in the Chief Magistrate's

Court at Narok Criminal Case No. 1235 of 2013 by Z. Abdul - RM)

PHILIP TANGUSI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was tried before the Chief Magistrate's Court Narok for the offence of Defilement Contrary to Section 8 (1) (3) (sic) of the Sexual Offences Act. The particulars stated that on the 6th day of September 2013, at [Particulars Withheld] in Narok South District in Narok County, he intentionally caused his penis to penetrate the vagina of M C a child aged 14 years old.

2. He was convicted and sentenced to 20 years imprisonment. He has now appealed to this court against conviction and sentence. On the eve of the hearing of the appeal the Appellant filed amended grounds of appeal to the effect that:-

> **"1. THAT the learned trial magistrate erred in law and facts when she convicted me in the present case yet failed to find that the charges are defective both in information and particulars.**
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> 2. **THAT the learned trial magistrate erred in both law and facts when she convicted me in the present case yet failed to find that allegations raised by the prosecution were not proved under Section 107 (1) of the Criminal Procedure Code.**
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> 3. **THAT pundit trial magistrate erred in both law and facts when she convicted me in the present case yet failed to find that vital witnesses were not called to testify contrary to Section 150of the Criminal Procedure Code.**
>
> 4. **THAT the learned trial magistrate erred in both law and facts when she convicted me in the present case yet failed to find that the provisions of Section 214/1 of the Criminal Procedure Code were not duly complied with.**
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> 5. **THAT the learned trial magistrate erred in both law and facts when she relied upon exhibits produced Contrary to Section 77 of the Evidence Act Cap 80 Laws of Kenya.**

6. **THAT the learned trial magistrate erred in both law and facts when she dismissed my plausible defence."**

3. He also relied on written submissions in support of his grounds. On the first ground, he takes issue with the manner in which the charge was drawn arguing that Section 8 (1) (3) of the Sexual Offences Act does not exist. Other reasons for asserting that the charge sheet was defective include the alleged failure to include in particulars the word "unlawful" and the time of the offence. Secondly, he contends that there are discrepancies in evidence regarding the age of the complainant, whether she was 10 or 14 years old. Further, that no birth certificate, clinical card or age assessment report was tendered in proof of age, especially as the Complainant was an unreliable witness.

4. He took issue with the failure by the prosecution to call what he said were vital witnesses including the parents of the Complainant and members of public who arrested him. He also claims that the court prosecutor PC Ihaji was not a competent prosecutor.

5. Concerning the fourth ground, the Appellant complains that the trial court failed to comply with Section 214 of the Criminal Procedure Code upon the charge sheet being substituted. He also complains in ground five that the medical report tendered by PW4 on behalf of another doctor with whom PW4 was not allegedly familiar was received by the court contrary to the provisions of Section 77 of the Evidence Act.

6. In his view the medical evidence has no value therefore and defilement stands unproven. He asserts in ground six that he gave a plausible defence to the charge but, which was not given due consideration.

7. Miss Waweru, appearing on behalf of the Director of Public Prosecutions opposed the appeal. On the main she reiterated the evidence tendered during the trial.

8. The duty of the first appellate court was spelt out in **Okeno -Vs- Republic [1973] EA 32** to be as follows:-

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- Republic [1957] EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –Vs- Republic [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –Vs- Sunday Post [1958] EA 424."**

9. Through four witnesses, the prosecution presented the following case. The Complainant M C was a girl aged 14 years in 2013. She was residing at [Particulars Withheld] with her family. The Appellant was known to her as a neighbour. On 6/9/2013 she went alone to fetch water from the river. On her way back, she was pursued by the Appellant who confessed to be in love with her and proposed a relationship. He gave her a phone, make TECNO and asked to meet the Complainant on the same date later. At the appointed time, he came to meet the Complainant and took her to a bush. He had sexual intercourse with her. He then left with the phone.

10. A second meeting happened between the two on 9/9/2013 at noon. The Appellant gave the same phone to the Complainant. The whole matter was exposed when the Complainant gave the said phone to an aunt. Eventually the mother of the Complainant reported to the village elder and the matter was escalated to police at Mulot. The Complainant was examined at Longisa District Hospital on 10th September 2013.

11. In his defence, the Appellant gave an unsworn statement to the effect that he was a farmer at

[Particulars Withheld]. He said that between 2/9/2013 and 7/9/2013 he had a job at [Particulars Withheld], returning home on 7/9/2013. That while seated at the local centre he saw the Complainant pass through the centre on her way from the river. That after she had gone some distance, a boda boda rider appeared and he got aboard the motor cycle intending to go to a place called [Particulars Withheld] to charge his phone.

12. After the two passed the Complainant they had a mishap that forced him to jump off the motor cycle. In the process he lost his phone. Suspecting the Complainant had picked the phone, he went to her home. The phone was given to him by the Complainant's mother but the father came later and snatched it, and after lengthy discussions ordered him to go to the home on the next day. When he did, he was attacked by the said man and his sons. The local elder rescued him. He denied the charges, stating that he was framed up.

13. Certain technical objections raised by the Appellant in the appeal can be disposed of right away. Submissions that PC Ihaji who prosecuted the case was not competent, no doubt arise from lack of awareness that Section 85 of the Criminal Procedure Code was amended in 2007, expanding the discretion Director of Public Prosecution in the appointment of prosecutors. Nothing turns on that issue therefore.

14. On the question on whether the charge sheet is defective, the answer lies in Section 134 of the Criminal Procedure Code which states:-

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

15. It is true, as the Appellant has contended, that the charge of defilement in this case should be brought under Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. Defilement is unlawful *per se* and there is no requirement to further include the ingredient of unlawfulness in the charge particulars. The charge sheet in this case contained sufficient facts even without stating the time of the offence, to inform the Appellant of the nature of the charges facing him. The record of the trial shows that he understood fully the charges that he was facing. He has not been prejudiced in any way by the poor drafting of the statement of the offence.

16. With regard to his complaint that the court failed to invite him to recall witnesses after substitution of the charge, I find it justified. The court received the substituted charge sheet on 15th April 2014, after the Complainant had testified. In such a case the provisions of Section 214 (1) of the Criminal Procedure Code apply.

17. The Section is in the following terms:

> **"Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**
>
> **Provided that-**
>
> i. **Where a charge is s altered, the court shall thereupon call upon the accused person to plead to the altered charge;**
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> ii. **Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the**

prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

18. The record of the day does not show that the Appellant was informed about his right to recall PW1, the only witness who had testified. However, the charge sheet that was substituted differed with original charge in only one respect: the penalty section amended and the appropriate age of the victim being changed to 14 years. The offence principally remained the same. It has been stated several times by the Court of Appeal that the offence of defilement is created in Section 8 (1) while the penalties are provided in Section 8 (2) to 8 (4) of the Sexual Offences Act. The penalties are graduated on the basis of the age of victims.

19. In **Bakari Ndoro -Vs- Republic [2016] eKLR** the Court of Appeal stated that: -

"Under Section 8 of the Sexual Offence Act, the gravity of the offence is determined by the age bracket of the victim. The first age bracket is a child aged eleven years and below, followed by the age bracket between twelve and fifteen years and lastly sixteen and eighteen years."

20. The younger the age of the victim, the tougher the sentence. In this case, the amendment brought the charge under Section 8 (3) rather than 8 (2) of the Sexual Offences Act, the latter which provides for a harsher sentence. In this instance, I cannot see how the substitution prejudiced the Appellant as the basic offence – defilement – was sustained in the substitution. The Appellant put up a robust defence. Nevertheless, the trial court ought to have informed the Appellant after the substitution of his right to recall PW1 for further cross-examination.

21. I will say more on the amendment while considering whether the prosecution proved the victim's age, or indeed the entire case to the required standard. For now, the foregoing disposes of ground 1 and 4 of the Appellant's grounds. The remaining grounds i.e. number 2, 3, 5 and 6 relate to the quality and adequacy of the prosecution evidence in light of the defence offered by the Appellant and can be handled together.

22. The Complainant M C testified on 10/3/2014 after the prosecutor addressed the court as follows:

"[T]he girl's age has been assessed at 14 years."

On the original record of the lower court is an age assessment form dated 10/2/2014 which on the face of it was tendered by the prosecutor at the time. The medical officer who prepared it was never called to testify. But based on the said information the court proceeded to conduct a *voire dire* examination of the minor.

23. Two errors were committed at that point. Firstly the age assessment report is an exhibit that ought to be produced in the regular fashion through a witness and not as in this case, handed over the bar by the prosecutor. Secondly, a child of 14 years is not a child of tender years and therefore there was no need for a *voire dire* examination **(See Haro Guffil Jillo –Vs- Republic [2014] eKLR** and **Agnes Kasyoka Ibrahim –Vs- Republic [2012] eKLR**.

24. Section 2 of the Children Act defines a child of tender years as one aged below 10 years. In this case however, whether Complainant gave evidence under oath or not, the requirement for corroboration in the latter case is removed by dint of the proviso to Section 124 of the Evidence Act which states:-

"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."

25. Turning to the substance of the Complainant's evidence, the witness gave an account of the first and second encounters with the Appellant on 6th and 9th September, 2013. On the first occasion, the Appellant approached her, it was in broad day light. They were known to each other and walked together conversing as the Appellant declared his love for her.

26. They reached an agreement to meet later after PW1 delivered the water. She was given a phone and when they met later they had sexual intercourse in a bush. On the second occasion that they met the Appellant gave back the phone to the Complainant. Her possession of the phone in her home brought to light the events that had transpired as her parents got concerned and reported to the headman Julius Towett (PW2). He too came to the home and made inquiries.

27. PW2 did not buy the Appellant's explanation that he had dropped the telephone while riding on a motor cycle and that the Complainant picked it up. He said that having learned that the Appellant had a sexual relationship with the Complainant he escalated the matter to police. Both PW1 and PW2 were cross-examined by the Appellant but did not waver. Part of the testimony of PW1 was confirmed by the Appellant, in particular, with regard to meeting her on the afternoon of 6th September 2013, albeit denying the defilement.

28. At no time did the Appellant suggest to PW1 that she picked his phone where he dropped it accidentally and hence her possession thereof. It would seem that PW1's parents and PW2 took the view that the Appellant was using the phone to lure the minor into a sexual relationship, hence the questioning of the two. The phone was identified by PW1 and PW2 and tendered as an exhibit. The same is independent corroboration of PW1's account. For the Appellant's part, apart from his explanation of the possession of his phone by PW1 sounding contrived, he never put the explanation to PW1 during cross-examination.

29. The fact that PW1 engaged in sexual intercourse is confirmed by the P3 form produced by Dr. Anthony Kerich (PW4) on behalf of one Dr. Lilian. Although PW4 admitted that he did not work at Longisa District Hospital at the same time as Dr. Lilian he said the Medical Superintendent of the hospital had sent him to testify on behalf of Dr. Lilian. He identified the P3 form as emanating from his hospital and confirmed he could read the writings thereon. In cross-examination PW4 stated that Dr. Lilian had left the hospital.

30. The Appellant has attacked this evidence citing the fact that PW4 did not know Dr. Lilian. Section 77 of the Evidence Act states that:-

"(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

31. The court did not consider it necessary to summon the maker of the document. Neither did the Appellant raise any objection to the production of the report when the matter was raised at the trial. The

P3 form having been owned by Longisa District Hospital and identified with a doctor previously working there, there can be no cause to fault its production by PW4. The report clearly indicates that the Complainant had bruises on the labia minora and a breached hymen. Also noted was vaginal candidiasis. Her age was assessed at ten years. The examination report coming only four days since the sexual encounter described by PW1 goes to confirm her evidence of defilement.

32. There was no necessity of calling her parents as asserted by the Appellant as witnesses since they too did not witness the sexual assault. It is unlikely that their evidence could have improved upon the testimony of the elder PW2. However, they would perhaps have shed light on the age of the Complainant. The fact that her father worked as a night watchman while the mother kept the home may have contributed to their absence. Even then, PW1 gave evidence that she was 14 years old, which was the age contained in the age assessment form on the record. The medical report gave her age as 10 years. And contrary to the Appellant's assertions, the original record of proceedings states that PW1 was in standard five at the time of testifying but in class four during the previous year.

33. The question of her age was not taken up during cross-examination. The prosecution amended the charge to reflect her age as 14 years, based, no doubt on the age assessment report and pw1'S evidence. Possibly the doctor who prepared the medical report relied on the age indicated by police on the first part of the P3 form.

34. The Complainant's evidence on age is consistent and was not challenged during the trial. The age of the minor determines the applicable sentence. The trial court was alive to this fact and found, based on the age assessment report that the Complainant was 14 years old during the offence. As indicated before the age assessment report was irregularly tendered and denied the Appellant a chance to cross-examine thereon.

35. In this case, the court believed the Complainant's evidence, giving reasons. Therefore, the court was entitled to find the age of the minor proven through the minor's oral evidence. In the case of **Mwalongo Chichoro Mwajembe -Vs- Republic Msa. Cr. App. No. 24 of 2015 (UR)** the Court of Appeal stated on this aspect:

> **"……..the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof" It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense.** ***(See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014)*** **and** ***(Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015).*** **We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of** ***Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000.*** **We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable……."**

36. The Appellant's defence was dislodged by the prosecution evidence. His explanation as to how his phone ended up with the minor does not add up, nor explain medical evidence of penetration. There is no evidence of a pre-existing grudge between him and the Complainant or PW2. If his account is believed, the Complainant had stolen his phone but refused to hand it over. Surprisingly the Appellant rather than seek police help engaged in several sittings with Complainant's family and PW2. The admitted conduct does not seem consistent with that of the victim of theft, at all.

37. His whole defence is made up to explain the reason behind PW1'S possession of his phone. The family of PW1 could not have conspired with PW1 to make a false case of defilement over a phone they clearly had no claim to. The defence is not plausible and the trial court properly dismissed it. Clearly, the Appellant was enticing a minor into a sexual relationship by allowing her to use this mobile phone. And

he succeeded thereby to have a sexual encounter on 6th September, 2013 with the minor.

38. Reviewing all the evidence before the trial court, this court is satisfied that all the ingredients of the charge were proved and that the Appellant was properly convicted. There is no merit in this appeal and I dismiss it in its entirety.

Delivered and signed at Naivasha, this **14th** day of **July, 2016.**

In the presence of:-

For the DPP : Mr. Koima

For the Appellant : N/A

C/C : Barasa

Appellant : present

C. MEOLI

JUDGE