REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 144 OF 2011

(An appeal against both conviction and sentence of the Senior Resident Magistrate's court at Vihiga in Criminal Case No. 635 of 2011 [T. N. BOSIBORI, RM] dated 11th July, 2011)

SIMON KABANDE ANYANDE ….....APPELLANT

VERSUS

REPUBLIC ……....RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with 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 charge were that on diverse dates between 11th and 26th June 2011 at [particulars withheld] in Vihiga County within Western province wilfully and unlawfully defiled a girl namely H K aged 9 years by causing the penetration of his genital organ namely penis into the genital organ namely vagina of the said girl. In the alternative, he was charged with indecent act with a child contrary to **Section 11 (1)** of the same Act. The particulars were that between the same diverse dates, and place wilfully and intentionally caused his genital organ to make contact with the genital organ of a girl named H K aged 9 years by touching her vagina.

When the charge was read, the appellant was recorded as having pleaded guilty in Kiswahili. The facts were then summarized by the Prosecutor and he admitted the same He was then convicted on his own plea of guilty and sentenced to life imprisonment.

He has now appealed to this court initially in person. Later, a petition of appeal was filed on his behalf by Mr. Lugadiru & Company advocates. At the hearing of the appeal, he was represented by Mr. Lugadiru advocate. In the submissions, counsel for the appellant emphasized that the age of the complainant was not established through evidence. That the immunization card relied upon was for a girl called S and not the complainant whose name was H. Counsel also argued that the learned trial magistrate failed to warn the appellant of the seriousness of the offence before conviction.

The learned Prosecuting Counsel Ms Opiyo, supported the conviction and sentence. Counsel argued that the charge was read and explained to the appellant in a language which he understood. In counsel's view, even if age of the complainant was not proved, the alternative charge of committing an indecent act would still stand.

I have perused the record of proceedings in the lower court. I have also perused the documents

relied upon in that court. Indeed, it is on record that the appellant admitted both the charge and the facts which were summarized to him in Kiswahili. I have no doubt that the appellant understood both the charge and the facts.

I agree with what the Court of Appeal stated in the case of **Ijah Aywa Zedekiah vs Republic** Criminal Appeal No. 87 of 2000, cited by the appellant's counsel in which the court stated that in taking a plea, an offence has to be explained to an accused in his own language or a language which he can speak and understand. That the court should thereafter explain to him the essential ingredients of the charge and ask him if he understands the same before a plea of guilty can be entered.

In the present case, the above was done. However, even where the above is complied with, the facts given by the prosecution should establish beyond reasonable doubt that what happened disclosed all the ingredients of the offence and that it was the accused who committed the offence.

The main and alternative charges herein relate to an offence where the age of the complainant is an essential ingredient. The age element therefore required to be established beyond reasonable doubt.

The complainant's age was not medically assessed. No birth certificate was tendered in evidence to establish the age. A child immunization card was instead used to establish the age. The name on that card is that of S K, while the complainant herein is called H K. No explanation was given regarding that variance of names.

In my view, S and H are two totally different names which naturally leads me to the conclusion that they refer to two different people. I cannot say that S is the same as H. Therefore, the age of S cannot be that of H.

The facts as given by the prosecutor were also scanty. The prosecutor merely said that the complainant visited the appellant a number of times. In my view, the prosecutor should have given more details regarding the connection or sexual activities between the appellant and the complainant. Such would clear the doubt as to whether sexual intercourse occurred. Be that as it may, even if the appellant had sexual intercourse with the complainant but assuming the complainant was above 18 years of age, and since the complainant did not deny consent, no offence will have been committed.

In my view, the facts given by the prosecution and the documentary evidence provided did not establish the commission of either the main or the alternative charge. Age of the complainant was not established as required by law. The age of the complainant was a necessary ingredient of the offence. The facts did not give particulars that unequivocally established commission of the offence by the appellant. The appellant was therefore entitled to an acquittal as the elements of the charge were not established by the prosecution.

In the result, I find that the appeal has merits. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered this 6th day of March, 2014

George Dulu

J U D G E