IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OUKO (P), GATEMBU & M'INOTI, JJ.A)

CRIMINAL APPEAL NO. 28 OF 2019

BETWEEN

SAMUEL MWANGIRI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court at Malindi (Hon. Njoki Mwangi, J.) delivered on 27th July, 2018

in

Cr. Appeal No. 17 OF 2017)

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JUDGMENT OF THE COURT

In upholding both the conviction and sentence imposed by the trial court, and after an analysis of the evidence, Njoki Mwangi, J expressed satisfaction that the offence of defilement of a girl contrary to **Section 8(1)(3)** of the Sexual Offences Act was proved beyond any reasonable doubt; that the evidence presented before the trial court established that the victim was 15 years old, therefore a child, within the meaning of **section 2** of the Children Act, at the time the offence was committed on 6th June, 2014 and 20th August, 2014; and that the appellant, who was the victim's teacher, was the culprit. She noted that the trial court, in observing the demeanor of the victim, concluded that she gave a vivid and candid account of the sexual encounter with the appellant, how their sexual liaisons would take place in the appellant's school staff quarters; that through the testimony of the complainant as corroborated by medical evidence, penetration was proved; that by the proviso to **section 124** of the Evidence Act, the trial magistrate properly directed herself by expressing satisfaction that the victim was a witness of truth.

In conclusion, she stated;

> **"42. The result of this appeal is that the evidence tendered by the prosecution was watertight against the appellant. The conviction is sound and the sentence meted against him is lawful. The appeal is hereby dismissed in its entirety".**

The appellant now comes to us by way of a second appeal complaining that the learned Judge did not properly exercise her judicial discretion in imposing mandatory sentence; that the alleged admission of their relationship by both the complainant and the appellant before the headmaster was inadmissible and contrary to **section 25A(1)** and **26** of the Evidence Act; that the learned Judge did not consider the medical evidence in which it was clarified that the victim did not suffered any physical injury in her private parts; that there was no evidence establishing the age of the victim; that the learned judge failed to consider his health condition, namely, that he suffered from epilepsy; and that his evidence in defence was not considered. In person, he presented these grounds before us.

The respondent, through Mr. Jami Yamina, urged us to dismiss the appeal as the learned Judge, in his opinion properly reviewed both the evidence and the judgment of the trial court and was satisfied, from them that the conclusions reached by the trial court were correct; that the appellant, indeed, defiled the complainant; that the events that took place or words that were spoken before the Headmaster by the appellant did no amount to confession; that the age of the victim and penetration were both established; and that, based on the foregoing the appellant's defence was properly rejected.

By **section 361** of the Criminal Procedure Code, and as guided by many decided cases, such as **Karani vs. R** [2010] 1 KLR 73, our jurisdiction in a second appeal is limited to consideration only of matters of law and we cannot interfere with the decision of the High Court

on facts unless we are satisfied that the trial court and the first appellate court considered irrelevant matters or failed to consider matters they should have considered.

Complaints such as the love letters between the appellant and the victim, the inquiry and finding of the two teachers who were tasked by the Headmaster to investigate the relationship between the complainant and the appellant, as well as whatever transpired before the Headmaster are all matters of fact which do not fall for our consideration.

It is equally a matter of factual sequence with a bearing on the matters of law argued in this appeal, that the two had a relationship which culminated in the appellant proposing to marry the complainant; that the appellant defiled her for the first time on 6th June, 2014 in his house. She felt pain and bled. They had sex again on 20th August, 2014 in his house.

Thereafter, it became a common routine for the two to go out and were seen together at Marafa and Malindi. It was during the outing in Malindi town, that the complainant's father was tipped off, traced and found them. He caused their arrest by the police. The matter was escalated to the school Headmaster, while the complainant underwent medical examination.

The appellant denied all these allegations including the accusation that he had defiled the complainant.

All these questions were settled by both the trial and the first appellate court. We have only rehashed them for purposes of context and as we have said, to ascertain if the learned Judge properly directed herself on the issues before her.

For us, the germane issues are whether there was proof that the appellant defiled the complainant, which further begs two further questions; of identification and the complainant's age.

Although throughout his defence the appellant avoided to state whether he knew the complainant, or even acknowledge that he was her mathematics teacher, there was overwhelming evidence linking him to the offence.

But more particularly, the trial Magistrate's application of **section 124** of the Evidence Act, to which the High Court gave due deference, established that the complainant was reliable and credible. The section states that;

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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.**
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> **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."**

The learned trial magistrate made an express factual finding that the complainant was a truthful witness after warning herself of the dangers of convicting on the evidence of a single witness.

Looking at the manner in which both courts below treated the evidence presented by the complainant, the doctor and other witnesses, we entertain no doubt that the offence with which the appellant was charged was proved beyond any doubt. The complainant was 15 years at the time the act was committed.

Through her testimony that on various occasions they had sexual contact with the appellant and from the corroborative medical evidence produced by PW4 that the complainant's hymen was broken, we, like the courts below find sufficient proof of penetration by the appellant and his defence was properly rejected.

In the result, and for all the reasons we have given, this appeal clearly has no merit. We accordingly dismiss it in its entirety.

Dated and delivered at Nairobi this 5th day of February, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISRAR