IN THE COURT OF APPEAL

AT KISUMU

[CORAM: OUKO (P), KOOME & SICHALE, JJ]

CRIMINAL APPEAL NO. 115 OF 2015

BETWEEN

ANTONY ODHIAMBO OJWANG..........................APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from the judgment of the High court of Kenya at Migori (D.Majanja, J) dated 22nd July, 2015

IN

MIGORI HC.CR.APPL. NO. 4 OF 2015)

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JUDGMENT OF THE COURT

The appellant, **Antony Odhiambo** was charged 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 were that on **3rd May, 2010** in Rongo District of the then Nyanza Province, he caused penetration with his genital organ to a child, **CAM** (name withheld). There was an alternative charge of an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative charge being that on the same day at the same place, the appellant committed an indecent act with a child, namely **CAM** (name withheld) by touching her genital organ.

In a trial conducted by **Nyakundi,** the then Senior Resident Magistrate, Rongo Law Courts and the subsequent judgment rendered on **10th December, 2010,** the appellant was found guilty of the charge of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act, 2006 and sentenced to twenty (20) years imprisonment. The appellant was dissatisfied with the said outcome and his first appeal to the High Court was dismissed on **19th December, 2012** by **Sitati, J**. thus provoking the appeal before us.

The appellant listed 7 grounds of appeal in his homegrown Memorandum of Appeal. However, these were substituted by Supplementary Grounds of Appeal filed on **14th May, 2013** by the appellant's counsel in which the learned judge was faulted for:

(i) failing to find that the offence of defilement was not proved;

(ii) failing to re-evaluate the evidence tendered by the prosecution;

(iii) failing to find that the charge sheet was defective and finally,

(iv) failing to appreciate the law.

On **29th July, 2019**, the appeal came before us for plenary hearing. **Mr. Nyambati**, learned counsel for the appellant relied on the Supplementary Memorandum of Appeal as well as the written submissions dated **22nd May, 2019.** In the written submissions as well as the oral highlights before us, counsel contended that the victim's (P.W.1) evidence was that the appellant inserted his hand on her private parts; that this did not constitute defilement but an indecent act; that **Douglas Ombati**, (P.W.3) who examined P.W. 1 after two days found a whitish discharge which is a normal occurrence and was not evidence of penetration. Further, counsel contended that P.W.1's age was not proved. In his view, the evidence tendered by the prosecution did not meet the threshold of proof beyond reasonable doubt.

In opposition to the appeal, **Mr. Kakoi**, the leaned Principal Prosecution Counsel (PPC) highlighted the respondent's written submissions filed on **29th July, 2019**. As to the age, the State Counsel contended that P.W.1's mother, (**Mercy John)** who testified as P.W.2) gave the age of P.W.1 as fifteen (15) years and that the fact of P.W.1's age was corroborated by P.W.3, the Clinical Officer who assessed P.W.1's age as fifteen (15) years. As to the contention of lack of penetration, it was his view that P.W. 1 testified on how the appellant penetrated her private parts; that P.W. 3 found that there was tenderness on P.W.1's thighs and hip, injury on labia minora and vaginal introituses, suggestive of forcible penetration. There was also presence of epithelial cells. As for the identity of the appellant, counsel pointed that P.W.1 and the appellant are cousins, the incident happened at 11.00 a.m. (during hours of daylight) and thus the appellant's identity was proved to the required standard.

We have considered the record, the rival oral and written submissions and the law. For a start, the appeal before us is a second appeal, hence the jurisdiction of this court is as set out in Section 361 (I) (a) of the Criminal Procedure Code. By virtue of that section, we are enjoined to consider only matters of law but not matters of fact which have been considered and re-evaluated by the trial and the first appellate court, respectively.

Our mandate as a second appellate court is succinctly stated in S.361 of the Criminal Procedure Code which provides:

> ***" Sec. 361 (I) a party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:***
>
> ***(a) on a matter of fact, and severity of sentence is a matter of fact; or***
>
> ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."***

In so far as case law is concerned, the decision of **David Njoroge Macharia vs. Republic [2011] eKLR** sums up the said mandate. In the said decision, it was stated:

> ***"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (****see also* ***Chemagong vs. Republic [1984] KLR 213)."***

Similarly, in ***Kaingo versus Republic [1982] KLR 213*** it was held as follows:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karoti S/O Karanja versus Republic [1956 17 EALA 146]."***

The two courts below found as a fact that P.W.1 was aged fifteen (15) years. The mother of P.W.1 who testified as P.W.2 stated as much. There was also corroboration from the Clinical Officer, P.W.3 who examined the victim on **5th May, 2010**. From his observation, he found that there was forced penetration. He gave the victim's estimated age as fifteen (15) years.

As regards identification, P.W.1 knew the appellant as they are cousins, hence it was identification by recognition. The incident occurred during the day. In our view, all the elements constituting the offence of defilement were proved. The aforesaid being our findings, there is no justifiable reason to disturb the concurrent findings of the two courts below.

Accordingly, the appeal herein is hereby dismissed.

It is so ordered.

Dated and Delivered at Kisumu this 31st Day of January, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

M. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR