IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 96 OF 2018

BETWEEN

KAAKA MASARA MARGETI…...……..….. APPELLANT

AND

REPUBLIC ……..……..……..…… RESPONDENT

(Appeal from a Judgment of the High Court at Nairobi (G.W. Ngenye, J.) dated 30th May, 2018 in H.C.CR.A 517 of 2009)

JUDGMENT OF THE COURT

The appellant was charged with the offence of defilement contrary to **section 8(1)(3)** of the Sexual Offences Act, and in the alternative with indecent act with a child contrary to **section 11(1)** of the Sexual Offences Act. The trial court found him guilty of the main count and after conviction sentenced him to 25 years' imprisonment.

Aggrieved by this decision, he lodged his first appeal on both conviction and sentence arguing, *inter alia* that: the charge sheet was defective; the ingredients of the charge were not proved beyond reasonable doubt; his defence was not considered; that the age of the complainant was not proved; there was failure to conduct a *voire dire* on PW2 and; the prosecution evidence was circumstantial and uncorroborated.

The respondent conceded to the appeal and like the appellant, prayed that the appeal be allowed.

Ngenye, J, upon re-evaluating the evidence, as she was bound to, and considering the submissions including the concession by the respondent, nonetheless found that the offence was proved beyond reasonable doubt and that the appellant's conviction was safe. She however interfered with the sentence of the trial court and reduced it to 20 years' imprisonment, in accordance with the law.

Once again aggrieved by this outcome, the appellant has now proffered this second appeal on more or less the same grounds as those that were raised before the trial court, namely, that the learned Judge erred in law by: convicting him on a defective charge sheet; failing to evaluate the entire evidence and find that the case was not proved beyond reasonable doubt; failing to make a finding that the medical evidence did not prove defilement or sexual assault; not considering the sworn evidence of the appellant contrary to **section 169(1)** of the Criminal Procedure Code; failing to consider that there was no proof of age of the complainant; failing to conduct a *voire dire* examination on PW2 who was a minor; convicting the appellant on insufficient and unsafe evidence and; convicting him whilst the respondent had conceded to the appeal.

In his supplementary memorandum of appeal, he presented additional grounds claiming that the learned Judge: failed to conclude that there was non-compliance with **section 200(3)** of the Criminal Procedure Code; failed to make a finding that the appellant's rights under **Articles 25**, **40,** and **50(2)** of the Constitution were violated;and failed to make a finding on violation of **sections 85** and **88(1)** of the Criminal Procedure Code.

The appellant, who prosecuted his appeal in person, submitted that there was non-compliance with **section 200** aforesaid as the matter was partly heard by Hon. Wanjala, who went on study leave after hearing 8 witnesses; that the matter proceeded before Hon. Kidula who heard one defence witness; that in taking over the trial, Hon. Kidula was duty bound to comply with **section 200(3)** of the Criminal Procedure Code and to remind the appellant of his right to either have the witnesses recalled or for the matter to start *de novo*.

The appellant contended that, as a result, he suffered prejudice because the convicting magistrate was not in a position to assess the personal credibility and demeanor of all the prosecution witnesses in the case; that likewise the issue of the age of the complainant was treated in a cavalier manner. He cited the following cases to support these submissions: **Ndegwa V R** [1985] KLR 535; **Joseph Kamau Gichuki V R**, Criminal Appeal No. 523 of 2010; **Nyabutu & Anor V R** [2009] KLR 409 and **Abdi Adan Mohamed V. R** (2017) eKLR.

Submitting on ground about the proof of the complainant's age, the appellant stated that under the Sexual Offences Act age is a determinant factor on the sentence; and significantly that the trial court failed to probe whether the complainant understood the duty to tell the truth by conducting a *voire dire* examination. To demonstrate that the age of the complainant was never conclusively proved, the appellant cited the charge sheet where the age was shown as 15 years while the complainant herself said she was 14 years old though, she did not know her date of birth and did not have a birth certificate; that her mother did not know her age; that PW4 a medical officer only gave an estimate of her age as 15 years based on her physical development; and that the convicting magistrate did not see the complainant to be able to assess for herself the complainant's likely age. In light of these things the appellant contended that there was a likelihood that the complainant was an adult.

On the substance of the case the appellant submitted that the element of penetration was not proved as the victim had an infection whereas he did not have; that PW2 was not a reliable witness as he lied; and that the case against him was a witch hunt.

The appellant faulted the learned Judge for imposing a minimum mandatory sentence upon him without considering the *ratio decidendi* in the recent cases of **M.K V. Republic** [2015] eKLR and **Francis Karioko Muruatetu & Anor V. R** [2017] eKLR.

Lastly, the appellant urged us that, should we find merit in these arguments we may feel disinclined to order for retrial on account of how long it has taken to conclude the case, over 10 years from the date of plea; and that he has since served half of the sentence.

Mr. Obiri, learned counsel for the respondent, in opposing the appeal argued that the appellant, who had the service of counsel cannot complain at this stage about compliance with **section 200** whereas they had the chance to apply to the succeeding magistrate for the recall of witnesses.

On the age of the complainant it was posited that the complainant herself stated that she was 14 years old though she was not educated; that PW4 also confirmed after assessment that her apparent age was 15 years. He asked us to accept that evidence as sufficient proof of the complainant's age.

Counsel contended the mere absence of the words "intentionally" or "unlawful" in the charge sheet did not render it defective as those words are not a requirement under **section 8(1)** of the Sexual Offences Act; that the section only requires the elements of penetration and identification. On the merit of the appeal, counsel maintained that there was sufficient evidence of occurrence of the offence from the victim, PW2 and the medical evidence and that the defence was considered but found to be wanting in substance.

By the provisions of section **361(1)** of the Criminal Procedure Code this Court, on second appeals is enjoined to consider only issues of law in this appeal. Where the two courts below have made concurrent findings of fact, this Court is required to respect those findings unless the conclusions by those courts are not supported by the evidence or are based on a misapplication of the evidence. See: **M'Riungu V. Republic,** [1983] KLR 455, where this Court explained this edict as follows**:**

> **"Where a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law".**

In our estimation we are being asked in this appeal to determine whether **section 200** of the Criminal Procedure Code was complied with; whether the elements of the offence of defilement were proved; whether there was a basis to receive the evidence of PW1 and PW2; whether the charge sheet was defective and whether the sentence was excessive. All of these constitute points of law.

As we consider those grounds, it is important to highlight the fact that before the first appellate court the State conceded the appeal. Despite this concession, the learned Judge proceeded, properly in our view, to re-evaluate the evidence and determine the appeal on its merit. In the end she noted that the only reason why the State conceded was that fact PW1 and PW2 were not competent to testify on account of lack or inadequacy of *voire dire* examination. Upon examination of the evidence on the issue the learned Judge found no substance in it and rejected the concession.

With respect we agree with the approach taken by the learned Judge because she was duty bound as a first appellate court to re-evaluate the evidence in order to determine whether the concession was merited. In **Mwanguo Gwede Mwarua V. Republic,** Mombasa Criminal Appeal No. 41 of 2015, where the State had conceded the appeal, this Court said:

> **"The concession notwithstanding, it is still our duty as a second appellate Court to consider the issues of law raised by the respondent as grounds for conceding the appeal in order to determine whether the said concession is merited. (See *NORMAN AMBICH MIERO & ANOTHER VS REPUBLIC, CR. APP. NO. 279 OF 2005 (NYERI).*"**

Before us, the State seems to have changed tune, as the appeal has been entirely opposed. Nothing really turns on this issue.

Moving to the substantive issues, **section 200(3)** provides that;

> **"(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re summoned and reheard and the succeeding magistrate shall inform the accused person of that right."**

Ideally, it is desirable and where practical, for the same magistrate or judge to hear a case from the beginning to conclusion. This allows the

magistrate or judge as the final arbiter to be in a position to look at the entirety of the evidence holistically and having first hand advantage of observing the demeanour of the witnesses. This need was explained in the case of **Ndegwa V Republic** [1985] KLR 535 as follows:

> **"It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case in our opinion."**

But as we have said this is idealistic. **Section 200(3)** embodies an accused person's right to fair hearing, which is now constitutionally guaranteed under **Article 50(1)**. As such, non-compliance with it may amount to failure of justice and result in a mistrial. See: **Anthony Otieno Ndonji V. Republic,** Kisumu Criminal Appeal No. 106 of 2015 and **Mark Limo Chesire V. Republic,** Criminal Appeal No. 66 of 2018.

The record before us shows that the trial commenced on 18th June, 2008 before Hon. Wanjala who heard a total of 8 prosecution witnesses who were the only prosecution witnesses. Upon closure of the prosecution case, Hon. Wanjala delivered a finding under **section 210** of the Criminal Procedure Code, that the appellant had a case to answer, placing him on his defence. At the stage the appellant was ready to testify, Hon. Wanjala had gone on study leave.

The record of 27th March, 2009 is of great relevance. It is recorded as follows:

> **"27/3/09**
>
> **Coram – Mrs. M.A Odero (CM)**
>
> **Prosecutor – CIP Musyoka**
>
> **Cc – Chivoli**
>
> **Accused – present**
>
> **Mr. Omboga holding brief accused** (sic)**.**
>
> **Court: This matter is part-heard before honourable Wanjala who is now away on study leave. Counsel asked if he seeks *de novo* hearing.**
>
> **Mr. Omboga: We do not seek a *de novo* hearing.**
>
> **Accused is ready to give his defence.**
>
> **Court: Hearing in court 1 under section 200 CPC, defence hearing 11/5/09, mention 27/4/09.**
>
> **MRS.ODERO**
>
> **C.M**
>
> **27/4/09."**

On 3rd July, 2009 the defence hearing commenced before Hon. Kidula, C.M, with Mr. Ochanda holding brief for Mr. Nyandieka for the appellant. The appellant testified and the defence closed its case.

We understand the appellant's two-pronged complaint to be that the magistrate ought to have addressed the appellant personally on his right to either request for the witnesses to be recalled or for the hearing to start *de novo* and secondly, that the succeeding magistrate was not in a position to assess the personal credibility and demeanor of all the prosecution witnesses who had testified against the appellant.

It is clear to us that the appellant was represented by counsel; that counsel, on behalf of the appellant made a conscientious election not to recall the prosecution witnesses, although he had three options available to him as enunciated by this Court in **Anthony Otieno** (supra). The Court in that case said;

> **"A careful reading of section 200(3) of CPC gives an accused person three options; to have the case commence *de novo*, if he decides to have all the previous witnesses re-summoned and reheard, have some witnesses re-summoned and reheard or proceed from where the previous judicial officer had reached with the case…"** (Our Emphasis)

On the presumption that Mr. Omboga had ostensible authority to act in his client's best interests, we reject this ground.

The more consequential ground, to which we return, is whether the prosecution proved its case beyond reasonable doubt.

The elements of the offence of defilement are: the victim must be a child and; there must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice. Starting with the victim's age, we reiterate what has now been accepted as the norm, that, while determining the age of a child, apart from medical evidence and birth certificate, a court can rely on the child's, the parents' or guardians' word as to that child's age. See **Mwalango Chichoro Mwanjembe V. Republic**, Mombasa Criminal Appeal No. 24 of 2015.

The two courts below having made concurrent findings of fact on the complainant's age, we are persuaded that that aspect of the offence was established.

On penetration, the Judge noted that the medical evidence was not conclusive save for stating that there was presence of seminal fluid and spermatozoa on the complainant's biker and that her hymen was missing. But the Judge nonetheless, found even in the absence of conclusive medical evidence linking the appellant with the seminal fluid and spermatozoa on PW1's biker, PW1 herself;

> **"Detailed the whole affair and how the appellant pulled her to a bush and started raping her. This was corroborated by PW2 who testified that he responded to her screams only to be sent away by the appellant who was defiling her. PW2 caught the appellant red handed defiling PW1. That consequently when PW1 got home PW3 checked her and was sure she had been defiled as she found the discharge flowing on her legs. All the evidence crystalized together points to recent sexual activity particularly the presence of the seminal fluid on the biker. Just as the learned trial magistrate found, I have no reason to doubt the testimonies of PW2 and 3 which corroborated that of PW1".**

The importance of this passage is that, although the Judge did not specifically make reference to the proviso to **section 124** of the Evidence Act, she had it in mind when she said that the complainant gave a detailed account of **"the whole affair and how the appellant pulled her to a bush and started raping her"**. On the other hand, the court on whose shoulders the conclusion of truthfulness or otherwise of the complainant lay, that is the trial court, made a specific finding on **section 124**; that the complainant was a witness of truth. The proviso allows the admission of evidence of a victim in a criminal case involving a sexual offence if it is the only evidence, and the court can convict the accused person, if, for reasons to be recorded in the proceedings, it is satisfied that the alleged victim is telling the truth.

Next, the appellant contends before us that PW1 and PW2 ought to have been subjected *voire dire* examination, to determine whether they were possessed of sufficient intelligence to justify the reception of their evidence. Our short answer to this question is that, once the age of the complainant was established as 15 years the issue of *voire dire* examination did not arise for the following reasons that were given by this Court in the case of **Maripett Loonkomok V. Republic,** Criminal Appeal No.

68 of 2015:

> **"It follows therefore that the time-honoured 14 years remains the correct threshold for *voir dire* examination. It follows from a long line of decisions that *voir dire* examination on children of tender years must be conducted and that failure to do so does not *per se* vitiate the entire prosecution case…"**

See also: **Patrick Kathurima V. Republic,** Criminal Appeal No. 137 of 2014, and **Samuel Warui Karimi V. R,** Nyeri Criminal Appeal No 16 of 2014. There is no suggestion that PW2 who gave evidence as an adult male, was a child of tender years, requiring *voir dire* examination.

This ground of appeal must therefore fail.

Similarly, we reject the ground that the charge sheet was defective because the words "intentionally" or "unlawful" were not included. The act of defilement in itself is unlawful. The words do not constitute any of the elements of the offence of defilement as was explained in the case of **Josephat Wanjala Olbai V. Republic,** Eldoret Criminal Appeal No. 92 of 2015, which stated:

> **"[25] The offence of defilement is unlawful and the absence of the words "intentional" and "unlawful" in the particulars of the charge do not render the charge defective. The words *'intentional'* and *'unlawful'* are not ingredients of the offence of defilement under section 8(1) of the Sexual Offences Act. Defilement itself is unlawful. Those words are only elements of a charge of rape and attempted rape under section 3(1) and section 4 of the Sexual Offences Act respectively."**

Lastly, regarding the sentence, we observed at the beginning of this judgment that the appellant was sentenced by the trial court to 25 years' imprisonment, when the minimum sentence for an offence under **section 8(1)(3)** of the Sexual Offences Act is 20 years. The Judge expressed the view that the sentence was not inherently illegal but thought that 20 years' imprisonment would be sufficient deterrence. She substituted 25 years with 20 years.

We find no basis, even on the application of **Francis Karioko Muruatetu & Anor V. Republic,** Supreme Court Petition No. 15 & 16 of 2015, to interfere with the sentence.

The upshot is that the appeal is bereft of merit and is accordingly dismissed in its entirety.

Dated and delivered at Nairobi this 24th day of April, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPTY REGISTRAR