IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, WARSAME & MAKHANDIA & JJ.A)

CRIMINAL APPEAL NO. 32 OF 2019

BETWEEN

DKG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Kiambu (Ong'udi, J.) dated 3th August, 2018 in H.C.CR.A No. 147 of 2018)

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JUDGMENT OF THE COURT

The appellant, **DKG**, was charged in the chief magistrate's court with the offence of defilement of contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act.** The particulars of the offence being that:

> ***"On the 2nd day of June 2014 in Gatundu South Sub County within Kiambu County, intentionally and unlawfully did an act which caused penetration with the genital organ namely penis into the genital organ namely vagina of TWK a child aged 4 years."***

The appellant also faced an alternative charge of indecent act with a child contrary to **section 11(1)** of the **Sexual offences Act**. The particulars of the alternative charge are that:

> ***"On the 2nd day of June 2014 in Gatundu South Sub County, intentionally and unlawfully touched the buttocks of TWK a child aged 4 years old with his hands."***

The appellant denied both charges prompting the trial in which the prosecution called a total of **six (6)** witnesses while the appellant was the sole witness for the defence.

The brief facts are that on the material day PW2, **JN**, left her daughter, PW1 in the home of PW3, her sister-in-law and proceeded to work at a nearby hotel. According to PW1, the appellant removed her from PW3's house, took her to his own house, removed her trouser and put his finger in her vagina. At 7.00 p.m., the appellant escorted the child to the hotel where her mother worked. The appellant left and PW1 and PW2 proceeded home. As PW2 was preparing to bathe PW1, she noticed some sticky substance oozing from her vagina. She inquired from her what the problem was and that is when PW1 told her that the appellant had inserted his finger "there" while pointing at her vagina. She then called PW3 to whom PW1 narrated her ordeal. They all proceeded to the home of FG, PW2's father in law who advised them to turn the appellant over to the police. They proceeded to hospital where they were advised to report the matter to the police and to go back to hospital for further treatment.

The following morning, PW2 and her husband reported the matter to the police. PW4, APC **Stanley Mathenge**. Upon interrogation, PW1 told him that she had been defiled by DK who was her cousin. He then went to the home of the appellant in the company of PW1's parents and APC **Monica Gathigie**, arrested him and took him to Gatundu Police Station where PW6, Corporal **Marion Chogo** booked the report and referred them to Gatundu Level

4 hospital where a P3 was filled and later produced by **Dr. Irungu** (PW5) as an exhibit.

The findings in the P3 form were that the complainant's private parts had no injuries but the hymen was broken. She had discharge from her private parts which upon examination had red blood cells, pus cells which were indicative of an infection and epithelial cell. No spermatozoa were seen. After receiving the P3 form confirming that PW1 had been defiled, PW5 charged the appellant accordingly. The appellant denied the offence and stated that when the alleged crime happened, he was working at a green house in Thika and that PW2 was attempting to frame him over a land dispute.

The learned trial magistrate upon assessing and analyzing the evidence tendered before him found the appellant guilty of the offence in the main count, convicted him and sentenced him to life imprisonment. The Court state as follows:

> ***"On the issue that a finger other than a penis was inserted, my view is that a 4 year old may not differentiate between a big finger and an erect penis. In any event to a child something that is inserted is either a finger or a stick. In many times children will imagine that it is a stick that has been inserted. My view is that the fact that the child stated that it was a finger does not actually mean a finger on the limbs. It means the male genital organ***".

The appellant was aggrieved by that conviction and sentence and he appealed to the High Court. The learned Judge (Lady Justice Hedwig Ong'udi) after re-assessing, re-evaluating and re-analyzing the record before her, found no error in the trial court's findings on the appellant's culpability, for the main offence, save that the use of the male genital organ was not established. Consequently, the court held that the offence committed was sexual assault contrary to section **5(1) (a) (i)** as read with section **5(2)** of the **Sexual Offences Act,** substituted the charge and sentenced the appellant to serve **twenty-five (25)** years imprisonment.

The appellant is now before us on a second appeal raising six (6) grounds of appeal in an amended grounds of appeal filed on 17th January 2020. In summary, the appellant contends that the learned first appellate judge erred by: convicting him of an offence that was not charged, convicting him on the complainant's untrustworthy evidence, failing to find that his right to fair trial was infringed since he was not furnished by witness statements and by meting out a severe sentence.

The appellant filed written submissions and invited us to adopt them as his submissions in support of his appeal. He submitted that the complainant's evidence under cross-examination was contradictory and she was coached by her mother who had ulterior motives. Citing the case of ***Elizabeth Waithegeni Gatimu vs. Republic [2015] eKLR***, he maintained that there was reasonable doubt as to his guilt given that the medical report stated that there was no spermatozoa found in the complainant's discharge and she had no injuries on her private parts. Relying on the case of ***Kalu vs. Republic (2010) 1 KLR*** the appellant argued that there was no law which authorizes a judge on appeal to convict a person with an offence he was never charged with. In his view, it was incumbent on the trial court to amend the charges to suit the circumstances of the suit. Furthermore, he submitted that since the High Court had acquitted him of the defilement charge, it was his constitutional right not to be tried again and consequently he was entitled to an acquittal for the charge on sexual assault. Finally, he urged, that in default of an acquittal, the court substituted the enhanced 25-year sentence with the minimum sentence as prescribed by law under **Section 5(2)** of the **Sexual Offences Act**.

In response to the appellant's submissions, **Mr. Obiri** the learned ADPP urged us to dismiss the appeal on the grounds that the prosecution's evidence against him was overwhelming given that he was the one who took the appellant to his house, the doctor confirmed that there was penetration and that there was no requirement for penile penetration under **Section 5** of the Sexual Offences Act.

This being a second appeal, this Court is restricted to address itself on matters of law. As has been stated many times before, this 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 its findings. (See ***Chemangong vs. Republic, [1984] KLR 611)***

We have examined the totality of the record in the light of the rival arguments set out above. In our view, two issues emerge for our consideration, namely:-whether the High Court erred in law in evaluating the evidence on the guilt of the appellant and whether the appellant was lawfully convicted for an offence for which he was not charged.

The appellant's major complaint is that the prosecution failed to discharge its burden of proof. He faults both courts for relying on the contradictory evidence of the complainant and maintains that penetration was not proved. It is not in doubt that the burden of proof lies with the prosecution. The *locus classicus* on this is the case of ***Woolmington vs. Director of Public Prosecution [1935] A.C. 462, (1935) UKHL 1*** where the court aptly stated that "*Through the web of the English law one Golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt*"

With the foregoing in mind and having perused the evidence on record, we concur with the lower courts that the prosecution's case was unchallenged. It is clear that PW1 in her evidence detailed the events that occurred on the material day and clearly identified the appellant as the one who inserted his finger in her vagina. Her evidence was corroborated by PW2 who stated that it was the appellant who brought PW1 to the hotel on the material day and that when she was about to bathe PW1, she noticed a sticky substance oozing out of her vagina. In addition, Dr. Irungu who examined the minor testified that in his opinion, the hymen 4-year-old of can only break by way of penetration and that the child had been defiled.

In our view, the inconsistencies and contradictions in the complainant's evidence, which the appellant pointed out did not water down the prosecution's case. We say so because the High Court being very much alive to the contradictions in the complainant's statement directed itself as follows:

> ***"My take on this is that PW1 having been only 4years 10 months when the incident occurred and 71/2 years when recalled for another cross examination she may have forgotten a few things. It is obvious a lot had taken place between 2nd June 2014 and 13th February 2017 and being a child of her age indeed she could not even recall who the appellant was as she had put everything behind her. That to me does not alter her initial testimony to the court as alleged by the appellant***."

Secondly, the trial court after conducting a *voir dire* examination found that PW1 was a credible witness. There is no reason to interfere with that finding since it is the trial court that had the opportunity to observe her demenour when she gave evidence (See the case of ***Martin Nyongesa Wanyonyi vs. Republic [2015] eKLR***). From the clear and uncontroverted evidence of PW1 and PW2, we are satisfied that the prosecution did indeed discharge its burden of proof.

Clearly, it was the appellant who removed the child from the house of PW3, in order to commit a heinous crime. The sequence of events culminating in the removal, commission of the crime and taking the child to the hotel, clearly shows that the appellant had the opportunity to commit the crime and indeed there is ample evidence to show that he committed an offence under **Section 5(1) (a) (i)** as read with section **5(2)** of the **Sexual Offenses Act.** On the other hand, the prosecution proved its case beyond any reasonable doubt and placed the appellant at the scene of crime as the person who violated the rights of the child.

We now turn to consider the question of substitution of the charge. As the record clearly shows, the appellant was found guilty of the main charge of defilement of a girl aged 4 years. Based on the evidence adduced, the trial court was convinced that the appellant committed the offence and sentenced him to life in prison. However, upon appeal and re-evaluation of the evidence afresh by the High Court, the court was satisfied that the minor was sexually penetrated by appellant but found that the offence as charged was not committed by the appellant '*given that the use of the male genital organ was not established*.'

Instead, the High Court took the view that the facts proved by the prosecution established that the appellant was guilty of Sexual Assault pursuant to **Section 5(1)(a)(i)** as read with section **5(2)** of the **Sexual Offenses Act** which reads:

> ***5. (1) Any person who unlawfully -***
>
> ***(a) penetrates the genital organs of another person with -***
>
> ***(i) any part of the body of another or that person; or***
>
> ***(ii) …;***
>
> ***(b) …,***
>
> ***is guilty of an offence termed sexual assault.***
>
> ***(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.***

Although the Learned Judge did not cite the provision of the law on which she relied on, it is apparent that it was premised on **Section 186** of the **Criminal Procedure Code** which provides:-

> ***"When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it."***

Even though the evidence on record did not disclose penetration with a genital organ to warrant the charge of defilement, the evidence clearly points to the fact that the appellant had inappropriate sexual contact with the complainant. The Learned Judge was therefore correct in concluding that the evidence on record disclosed the offence of sexual assault under the **Sexual Offences Act** and not defilement under **Section 8(3)** of the Sexual Offences Act. We consequently do not agree with the appellant's contention that failure of the trial court to invoke **Section 214** of the **Criminal Procedure Code** and amend the charges to suit the circumstances of the case was fatal. Accordingly, we see no reason to interfere with the appellant's substituted conviction for the offence of sexual assault under section **5(1) (a) (i)** as read with section **5(2)** of the

Sexual Offences Act.

However, on the issue of sentence, the minimum sentence upon conviction under this provision of the law is ten (10) years. The High Court had imposed a twenty-five-year sentence on the appellant which in the circumstances was quite lawful but excessive given that the appellant was a first offender. We therefore set aside the sentence of twenty-five (25) years and instead substitute it with a sentence of ten (10) years.

In the end, the appeal herein succeeds in part to the extent that we set aside the sentence issued by the High Court and substitute the same with imprisonment for a period of 10 years effective from the date of the appellant's conviction on 18th July, 2017.

Dated and delivered at Nairobi this 22nd day of May, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR