IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KARANJA, KIAGE & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 62 OF 2014

BETWEEN

KEFA MOSE MOMANYI ..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisii (Sitati, J.) dated 27th October, 2011

in

HC. CR. A. No. 169 of 2010)

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JUDGMENT OF THE COURT

The appellant **Kefa Mose Momanyi** is before us challenging the dismissal by the High Court at Kisii (Sitati, J.) of his appeal against conviction and sentence by the Nyamira Principal Magistrate's Court on a charge of defilement contrary to **section 8(1) (2)** (sic) of the **Sexual Offences Act**. In so doing, the learned Judge confirmed the sentence of life imprisonment meted on the appellant.

The appellant is said to have intentionally and unlawfully caused his penis to penetrate the vagina of **INA**, a girl aged 8 years old, on 29th August 2009 at Mokomoni sub-location in Nyamira District. The evidence led was that on the material date at about 2.00pm, INA was on an errand to sift maize at a posho mill within Amagura Tea Estate as sent by her mother **VA** (PW2). At the tea buying centre, she met a person she did not know before, who offered to help her carry the load of maize. They walked along but, on reaching the tea farm, the man placed the maize on the tea bushes and pulled her by the hand into the bushes before pulling down her underpants then *"doing bad things"* to her on her *"private parts."* He did so while covering her mouth but she eventually screamed and one **Joseph** came to her rescue, whereupon her attacker ran away.

Joseph then escorted her home and handed her to her mother (PW2), reporting that the defiler was one **Kepha**, with whom he used to play football. PW2 went and informed the village elder and later went to Nyamira District Hospital where INA was admitted for the night and discharged the next day. A medical examination conducted by **James Bogonko** (PW4) a registered a clinical officer at the hospital and captured in the P3 Form indicated that INA had *abrasions and lacerations on the vulvar walls* and her *labia majora* were torn although the hymen was intact. A whitish thick discharge from the vulva was noted and it contained some spermatozoa. She was HIV negative. The witness formed the opinion the opinion that she had been subjected to penetrative vaginal sex assault.

While INA was in hospital, a mob of people descended on the house of the appellant at about 10.00pm. He was studying by lamplight as he was a Form 4 candidate but on responding to knocks at his door, about 10 people entered the house, put out the lamp, tied him with a rope and marched him to the Magura Administration Police Post where he was re-arrested. He was eventually charged with and tried for with the offence which he denied in his sworn statement of defence, to no avail. As stated, first appeal fared no better hence his current appeal.

In his self-crafted memorandum of appeal, the appellant complains that the learned Judge erred by failing to observe that the charge sheet was defective; failing to find that the offence of defilement was not established; failing to note that no medical evidence linked him to the offence; failing to observe that the age of the appellant was not established; failing to protect his rights as a minor at the time of the of the alleged offence; and upholding a mandatory and therefore unconstitutional sentence. The appellant filed written submissions and also addressed us by video-link at the virtual hearing of the appeal necessitated by the Covid-19 Pandemic contending, in particular, that his conviction was not safe because essential witnesses, and especially Joseph, were not called by the prosecution.

For the Republic, written submissions were filed in opposition to the appeal and the learned Principal Prosecution Counsel, **Mr. Kakoi** also addressed us. He argued that the offence of defilement was properly proved in the three ingredients that this Court has identified in many cases including ***JOHN MUTUA MUYWOKI vs. REPUBLIC [2017]*** **eKLR** namely, the age of the complainant, penetration and positive identification of the assailant .

We have considered the submissions made and the case law cited therein in light of the record, and have no difficulty finding that the age of the complainant was definitively established to be 8 years by her own testimony, that of her mother PW2, and that of the clinical officer, PW4. She was a class 2 pupil at [Particulars withheld] Primary School as at the date of the incident. There is no doubt at all that as far as the graduated penal scheme of the Sexual Offences Act is concerned, she was below the age of 11 years. There exists no basis for our interfering with the concurrent findings of the two courts below on the complainant's age.

The same goes for the second element of the offence, namely penetration. INA's testimony was cogent that the man who did *'bad things'* to her after removing her inner clothes did so to her *private parts*, which she pointed at to the trial court. She felt pain and screamed attracting the attention of Joseph, who came to her rescue. In cross examination she was categorical that the person did *'defile'* her. We, however, think that trial courts ought to ensure that they record the exact or the closest paraphrase and translation of the words that young victims of sexual offences use to describe the acts done to them, and eschew the recording of technical-legal terms the witnesses certainly did not use. It is hardly conceivable that a little girl testifying in '*Ekegusii*' language somewhere in Nyamira, as INA was, would say repeatedly that she was *'defiled'* as the trial magistrate recorded herein.

Beyond INA's testimony, however, there was consistent and confirmatory medical evidence showing abrasions and lacerations in the vulvar walls, torn *labia majora* and the presence of whitish discharge from the vulva containing spermatozoa. We find to be reasonable PW4's conclusion, accepted by the two courts below, that she had been subjected to penetrative sexual assault.

Whereas the State contends that the third ingredient, that of the perpetrator's identity, was also proved beyond reasonable doubt, the record does not lend such assurance. Even though there are concurrent findings of fact that it is the appellant who defiled INA, we think that this is a case where, as this Court has stated on numerous occasions including in ***NJOROGE vs. REPUBLIC [1982] KLR 388,*** we would be entitled to interfere because the particular finding is not backed by evidence or was arrived at by a misapprehension of the evidence. The record is quite explicit that INA did state, repeatedly in examination in chief and cross-examination that she met a certain man *"who, [she] did not know"*. Indeed, she did not know the accused person before court even though at the end she dock-identified him. Such identification, unpreceded by the description, and without an identification parade having been conducted, is probatively worthless.

On this crucial point of the assailant's identify, we are of the respectful view that the learned Judge did not properly, fully and exhaustively re-evaluate the evidence and arrive at a fresh and independent conclusion. This was her bounden duty as the first appellant court, and the appellant was entitled to expect that she discharge it fully and faithfully which should have been apparent in her judgment. See ***OKENO vs. REPUBLIC*** **[1972] EA 32.**

There are unresolved gaps and doubts as to the identity of the perpetrator which could have been laid to rest had the prosecution called essential witnesses. First, it emerged from PW2's evidence on cross-examination that in her statement to the police, which is more than she had stated in her direct examination, she had written as follows;

> ***"Two boys came in the company of my daughter [INA]. They narrated to me how they found one man follow my daughter, defile my daughter and run to the forest."***

These two boys were well known to **PW2,** being her neighbour's children. Even though she said they were younger than INA, they definitely were intelligent enough to have narrated to her what happened to INA. She recorded this in her statement to the police but for reasons unknown, the children were not called to give evidence yet, by all accounts, they appeared to have been eye-witnesses to the act and would have been ideal identification witnesses. No explanation is given as the why they were not called as witnesses and the learned Judge made no mention of this aspect of the case, which we think was a serious non-direction.

Equally baffling is the prosecution's failure to call the aforesaid Joseph. He is said to have told **PW2** that one "*Kepha Mose,*" whom PW2 did not know, had defiled INA. Joseph was known to both INA and her mother. He was not some stranger who could not be traced. He definitely was a crucial witness because it is said that he caught the assailant in *flagrante delicto*. Strangely, however, no statement was recorded from him. Indeed, the investigating officer, Police Corporal **Francis Njuguna** (PW6) made no mention of him in his testimony. The anomaly of not calling Joseph as a witness was raised before the learned Judge but we think, with respect, that she handled it in a wholly unsatisfactory, and even cursory, manner as follows;

> ***"It is true that Joseph was not called as a witness, but then the complainant told her mother about Joseph and how he had rescued her. In my considered view I can see a chain link between what the complainant said regarding Joseph and the arrest of the appellant by members of the public on the same night of the day on which the complainant was defiled. I am satisfied that it was the knowledge which Joseph had that led to the arrest of the appellant on that night of 29th August, 2001."***

With respect, this approach was entirely wrong. There was no basis for the learned Judge's satisfaction that *"the knowledge which Joseph had"* led to the arrest of the appellant. There is no evidence that Joseph gave any such knowledge to any of the unnamed persons who seized the appellant on the material night. Nor did Joseph give any information to the police. The police said nothing about this Joseph who remains the ubiquitous mystery in the case.

We think that the state of the evidence was questionable and barely adequate without the testimony of Joseph. Both the trial magistrate and the learned Judge ought to have drawn the inescapable inference that the prosecution failed to call Joseph because, had they called him, his evidence would have been adverse to their case. See ***BUKENYA vs. UGANDA [1972] EA 549.***

We have said enough to show that the evidence adduced, did not prove the case against the appellant beyond reasonable doubt and his conviction was unsafe. We accordingly allow this appeal, quash the conviction and set aside the sentence.

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

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

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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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

Signed

DEPUTY ***REGISTRAR***