



IN THE COURT OF APPEAL

AT NAIROBI

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

KISUMU CRIMINAL APPEAL NO. 106 OF 2016

BETWEEN

MAURICE WEGESA WAMBURA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Migori

(A. C. Mrima, J.) dated 17th March, 2016 **in H.C. Cr. A. No. 26 of 2015)**

JUDGMENT OF THE COURT

1. The appellant, Maurice Wegesa Wambura, was arraigned before the Principal Magistrate's Court at Kehancha for the offence of defilement contrary to **section 8(1)** as read with **section 8(4)** of the Sexual Offences Act No. 3 of 2006. The particulars being that on diverse dates between 15th October, 2013 and 30th October, 2013 at Ramanyonki village in Kuria East district within Migori County, he intentionally caused his penis to penetrate the vagina of RBM a girl aged 17 years.

2. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the Sexual Offences Act, in that on the same diverse dates and place he committed an act of indecency with RBM a girl aged 17 years by intentionally touching her vagina with his penis. The appellant denied both charges prompting the trial to proceed with the prosecution calling a total of five (5) witnesses; PW1 was the victim herein, PW2 was the victim's grandmother and guardian, PW3 was the arresting officer, PW4 was the investigating officer and PW5 was the clinical officer. The appellant was the sole witness for the defence.

3. The brief facts are that on or about 15th October, 2013 at around 5.00 p.m. PW1 met the appellant while she was walking home with a person known to her, one Susan Robi. The appellant who claimed to know PW1 requested her to accompany him under the guise that he intended to send her somewhere during which time he expressed to her that he was looking for a girl to marry who would also be his mother's helper. She declined his advances and stretched out her hand to bid him goodbye when he seized her hand, refusing to let her go and instead led her to the nearby bushes. He then took her against her consent to his home aboard a motorcycle.

4. Some time after 8.00 p.m., overwhelmed with the unfolding of the day's events, she decided to lie down. She lay on the bed looking away from the appellant who forcefully turned her towards him and asked her why she was afraid of him yet he had married her. After about an hour's struggle, the appellant forcefully undressed her and forced himself on top of her penetrating her vagina.

5. She continued to stay at the appellant's home under duress from the appellant and his mother for two weeks during which period he continued to have unconsented to sexual intercourse with her on a daily basis.

6. Following her disappearance, PW2 made reports to the school the child attended and also to the police. Consequentially, on 30th October, 2013 at around 5.00 a.m. the police went to the appellant's home and arrested both the appellant and PW1 and took them to Nyamatiro Police Post where the two were put under police custody after recording their statements under PW4's instructions. He then took PW1 to Chirator Health Centre where a P3 form was filled by the clinical officer, PW5, who after a medical examination found PW1's hymen was broken and that there was presence of live spermatozoa in her vagina indicating penetration. The clinical officer concluded that the child had been defiled. The appellant denied the offences on both charges alleging that he did not know PW1 and that he only came to know of the charges

against him when he was arrested.

7. The learned trial magistrate upon assessing and analyzing the evidence tendered before her found the appellant guilty of the offence of defilement, convicted him and sentenced him to 15 years' imprisonment.

8. Aggrieved by both conviction and sentence, the appellant appealed to the High Court. The learned Judge (A. C. Mrima, J) after re-assessing, re-evaluating and re-analyzing the record before him, found no error in the trial court's findings that the appellant was guilty of the offence of defilement, save that, in view of the age of PW1 there was sufficient evidence to ascertain that she was about 13 years and 8 months by the time the offence was allegedly committed and not the age of 17 as held by the trial magistrate. He however upheld both the conviction and sentence for defilement as meted out by the trial Court.

9. The appellant is now before this Court on a second appeal. The appeal is premised on six (6) homemade grounds which in summary are that the learned Judge fell into error when he affirmed the appellant's conviction and sentence notwithstanding that: PW1's age was erroneously assessed by the trial court as being 17 years despite lack of evidence on record; the trial magistrate after establishing that the appellant had a case to answer failed to explain the substance of the charges against him and inform him of his right to defence hence infringing on his right to a fair trial and; that the appellant was charged on a defective charge sheet.

10. The appellant appeared in person. He tendered written submissions in support of his grounds of appeal and made oral arguments before the Court. Urging the Court to allow his appeal, he submitted that the learned Judge failed to consider that the trial magistrate failed to explain the substance of the charges against him and inform him of his right to defence contrary to **section 211** of the Criminal Procedure Code hence infringing to his right to a fair trial as envisaged under **Article 50** of the Constitution.

11. He maintained that the learned Judge erred by finding that the appellant's allegations that he was charged and convicted based on a defective charge sheet did not have merit as the charge sheet was drafted with clarity and met all prerequisites in law.

12. He argued that it is trite that in sexual offences cases, specifically defilement cases, it is the age of the minor that is used in determining the appropriate sentence. He challenged the first appellate court for failing to find that the trial court had erred in finding that PW1 was 17 years of age.

13. In response to the appellant's submissions, it was the prosecution's submission that from the record it is evident that trial magistrate explained the substance of the charges against the appellant and informed him of his right to defence. Further, that the appellant pleaded not guilty on the charges levelled against him and was placed on his defence after the prosecution presented a *prima facie* case after calling five (5) witnesses hence his allegation that he was not accorded a fair trial do not have merit.

14. It was submitted that the appellant's allegations that the learned Judge failed to consider that the trial court erroneously assessed PW1's age was false. That it was evident from the learned Judge's decision that he analysed the evidence on record and reached his own finding that PW1 was actually 13 years old and not 17 as assessed by the trial magistrate. He maintained that despite the disparities the learned Judge gave the appellant benefit of doubt and refrained from interfering with the sentence as meted out by the trial Court. He urged the Court to dismiss the appeal.

15. This being a second appeal, by dint of section **361(1)** of the Criminal Procedure Code, this Court is restricted to addressing itself to matters of law only. It will also not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence or they are based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making the findings. See **Kaingo v. Republic (1982) KLR 213**.

16. With the above principles in mind and having carefully read the record and considered it along with the rival arguments as set out above, we discern the issues falling for the determination of this Court as:-

i. Whether the appellant's sentencing was justified as imposed by the trial Court and upheld by the High Court.

ii. Whether the learned Judge erred by failing to establish that the appellant was charged based on a defective charge sheet.

17. On the first issue, the charge and penalty applicable in the circumstances of this case are as provided for under the Sexual Offences Act. The pertinent provisions are as follows:-

“8. Defilement

- 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
- 2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**
- 3. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable**

upon conviction to imprisonment for a term of not less than twenty years.

4. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

18. It is the appellant’s contention that the age of PW1 was not settled and as such neither the trial Court nor the first appellate Court had any legal basis to either convict and/or sentence him. This Court has on several occasions had opportunity to address the vexing issue of victims’ age in defilement cases. For instance, in Moses Nato Raphael v. Republic, NRB CA.CRA. No. 169 of 2014 this Court expressed itself as follows:-

“On the challenge posed by the uncertainty in the Complainant’s age, this court had occasion to deal with a similar issue in Tumaini Maasai Mwangi –v- R. Mombasa CRA. No.364 of 2010 where it was held that proof of age for the purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established.

The age which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child’s age cannot therefore assist the Appellant to avoid criminal culpability.” (Emphasis supplied)

19. In the instant case, proof of age for purposes of establishing the offence of defilement was settled by the concurrent findings of the two courts below. The appellant has also neither raised nor made any compelling arguments to prompt this Court to depart from the findings that the offence of defilement was committed. It is undisputed that the complainant was below 18 years of age. It is evident from the appellant’s arguments that what is in contention is PW1’s age for the purposes of sentencing.

20. In Edwin Nyambogo Onsongo v. Republic (2016) eKLR citing the case of Mwolongo Chichoro Mwanjembe v. Republic, Mombasa Criminal Appeal No. 24 of 2015, this Court held that:-

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence , among other credible forms of proof.”” we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.” (Emphasis supplied)

21. In her evidence, PW1’s testified that, “I go to school at Kiongo Primary Std. 7 and I am 15 years old. I was born in the year 2000 ...” She also produced before court a child health card bearing the name of child Margaret Robi Chacha born in the year 2000 4th February.

22. Having considered the evidence before the court as outlined above, the learned Judge concluded as follows:-

“This Court therefore opts to be guided by the Clinical Health Card instead. That being so, as PW1 was born on 04/02/2000 then it means that she was about 13 years and 8 months by the time the offence was allegedly committed. To that end, the trial court erred in determining PW1’s age as 17 years instead.... He was rightly convicted and sentenced to the minimum sentence in law. In fact the appellant should remain grateful to the State that it did not pursue the issue of PW1’s age on appeal since that would have definitely led to the enhancement of the sentence.”

23. On the second issue, the learned Judge held as follows:-

“On the appellant’s contention that he was charged and convicted on a defective charge sheet, I equally find no merit in the same. Indeed the charge sheet is one of those which was professionally drafted with clarity and met all the prerequisites in law.”

24. Although the appellant complains that the charge sheet was defective, he has not demonstrated the incompetence of the charge sheet, or demonstrated what prejudice, if any, he has suffered on account of the charge sheet as drawn. We have looked at the charge sheet and we agree with the learned Judge of the High Court that the same meets all the legal prerequisites of a proper, legally compliant charge sheet. We have no reason to interfere with the learned Judge’s finding in that respect. None of the grounds of appeal raised by the appellant have any merit.

25. Overall, we find the conviction safe. On the issue of sentence, we find that the appellant was lucky to escape with 15 years' imprisonment which was based on a presumption that the child was 17 years of age. The learned Judge acknowledged that fact and quipped that he could not enhance the sentence as he had not been moved by the State to do so. Our view is that the appellant should be happy with that sentence, which is well deserved. Ultimately, we dismiss this appeal in its entirety.

Dated and delivered at Nairobi this 7th day of August, 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