IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, MUSINGA & MURGOR, J.JA)

CRIMINAL APPEAL NO. 76 OF 2018

BETWEEN

KIPKOSGEI KORENYAN KIPROTICH.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal from the conviction, Judgment, decree, order, or as the case may be of the High Court

of Kenya at Eldoret (C.W. Githua, J.) dated 28th June, 2017

in

High Court Criminal Case No. 26 of 2016)

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JUDGMENT OF THE COURT

Kipkosgei Korenyan Kiprotich, ***the appellant***, was charged with the offence of defilement contrary to ***Section 8(1)*** as read with ***section 8(2)*** of the ***Sexual Offences Act*** No. 3 of 2006. The particulars of the offence are that on the 17th day of February, 2015 at about 0400 hours at Marich Sub Location, Kaben Location within Elgeyo Marakwet County, he intentionally and unlawfully caused penetration of his genital, organ, namely penis into the genital organ namely vagina of the complainant ***BCL, PW 1*** a girl child aged 14 years.

The alternative charge was that he committed an indecent act with a child contrary to ***Section 11(1)*** of the same Act, the particulars of which are that on the same day, he intentionally and unlawfully committed an indecent act with BCL a girl child aged 14 years by touching her private part namely, her vagina.

The facts are that in the early hours of the morning of 17th February 2015 while her mother was away selling mangoes at Ortum market, ***BCL,*** a pupil in Standard 8 at a local Primary School was asleep at home together with her younger siblings ***CB, (PW2), MC, (PW3)*** and ***DK (PW4)***. She awoke suddenly when she realized that someone was on top of her. With the assistance of bright light from a delight ***(d. light)*** lamp, she saw that the appellant, a person she knew, had removed her underpants and was defiling her, causing her to bleed from her genitalia. She screamed and tried to push him off her, but he threatened her with a knife. PW3, her brother, woke up and on seeing the appellant also begun to scream. After the commotion, the appellant who had removed his clothes pretended to go to sleep on BCL's mattress, whereupon she took the opportunity to escape through the door which, she then locked from the outside. She went to seek help from their neighbour Linah, who did not respond, forcing her to return home alone. As she approached the house, she saw the appellant climbing out of the window. Her screams alerted the other neighbours who came to her aid. She immediately reported that "Arthur" had defiled her. He was later traced to the gate of one, teacher Alex where he was arrested, and later charged with the offence.

BCL was examined at Chebalolwa Health Centre at Tot by ***Micah Kiptum, PW 5,*** a clinical officer, who found that her labia was inflamed, and there was a whitish discharge. He formed the opinion that there had been penetration., and he prepared and signed the P3 form.

PW 2 saw the appellant whom he identified as, Korinyan get up while naked, collect his clothes and escape through the window, leaving his knife behind. He stated that it was not dark; that thereafter BCL came and opened the door for them. He corroborated BCL's evidence that the appellant had threatened his sister with a knife. ***PW 4***, BCL's mother, stated that her daughter was born on 27th December, 1998, and produced her Birth Certificate.

In his defence, the appellant denied committing the offence and recalled being at Sambarat Trading Centre on 17th February, 2015 at about 11.00 a.m. when he was arrested and taken to Tot Police Station and charged. He merely stated that he was framed with commission of the offence.

The trial magistrate convicted and sentenced the appellant to 15 years' imprisonment upon finding that the offence was proved to the required standard. The appellant was dissatisfied with the decision, and appealed to the High Court (Githua, J.), which upheld the conviction and sentence. The appellant was aggrieved by the conviction and sentence, and appealed to this Court against that decision on the grounds that the trial court convicted him on the basis of a defective charge sheet which failed to indicate the complainant's correct age; that he was not properly identified; that crucial witnesses were not called to testify; and finally that, the courts below failed to appreciate that there were inconsistencies and contradictions in the prosecution's evidence.

In the submissions, the appellant complained that the charge sheet was defective, because it indicated that the complainant was 14 years of age and yet her birth certificate showed that she would have been 17 years and 2 months when the offence was committed, that this rendered the conviction and sentence a nullity. On the next issue that he was not properly identified, he contended that there was no indication as to the nature or quality of available light that the prosecution witnesses used to identify him. It was further submitted that it was not clear from the witnesses' evidence to what the word 'delight' referred to, as the context in which it was placed was an indication of the witnesses' lack of understanding of the meaning of the word. On the complaint that crucial witnesses were not called, the appellant complained that one Kipchumba, Linah and the village elder did not testify, which omission was prejudicial to his case.

Finally, it was submitted that the first appellate court failed to evaluate the evidence, and in so doing, arrived at the wrong conclusion that the appellant defiled the complainant.

The respondent also filed written submissions where it submitted that the prosecution proved its case beyond reasonable doubt, as the prosecution witnesses' evidence overwhelmingly implicated that appellant. In response to the allegation that the charge sheet was defective, it was asserted that, though the age and the charging provision specified on the charge sheet were at variance with the complainant's age, the charge sheet clearly specified that the offence the appellant faced was one of defilement, of which the appellant was at all times aware.

Concerning the assertion that Kipchumba, Linah and the village elder who were crucial witnesses were not called to testify, it was submitted that neither of the persons indicated were present when the offence was committed and therefore their evidence would not have lent any further support to the prosecution's case; that the crucial witnesses were the witnesses who testified.

Addressing the question of whether the appellant was properly identified, it was stated that he was properly identified by the witnesses, and that the complainant immediately named him as the person who defiled her. Further, the appellant accorded her ample opportunity to identify him, during the ensuing struggle after she awakened from sleep.

We have considered these submissions and carefully read the record of appeal. This being a second appeal and by dint of ***Section 361(2)*** of the ***Criminal Procedure Code***, this Court can only address a point or points on law. In the case of ***Karingo vs Republic (1982) KLR 213*** this Court stated,

> ***"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 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 Karari C/O Karanja vs R (1956)17 EACA 146."***

Having regard to the circumstances of this case, it is our view that the issues for consideration are as set out in the appellant's memorandum of appeal. We consider it appropriate to begin with the complaint that the trial court failed to evaluate the evidence. To do so, it will be necessary to establish whether the prosecution's case proved its case to the required standard by interrogating whether, the key ingredients for the offence of defilement, which are, the complainant's age, the appellant's identity and whether there was penetration, were properly established.

On the question of BCL's age, there is no doubt that she was 17 years and 2 months at the time the offence was committed as her age was specified in her Birth Certificate produced by PW 4 which indicated her date of birth as 28th October 1997.

Regarding the issue of whether the appellant was properly identified, the High Court found that;

> ***On my own appraisal of the evidence, I find that the appellant was very well known to PW1, PW2 and PW3. This was not disputed by the appellant. They testified that they all saw and recognized him in the room in which they were sleeping through light from a delight (solar generated) lamp)".***

We agree with the learned judge, that this was a case of identification through recognition. BCL and her siblings all saw the appellant in the room with the assistance of light from a delight lamp that was in the room. The appellant has however argued that no such lighting was available; that it was not known to whom the lamp belonged, that is, whether it belonged to the complainant or to the appellant. He further argued that though the evidence referred to his having left his knife and the delight lamp in the house, the knife was produced in court, but the delight lamp was not; that the controversy surrounding the "delight" would lead to doubt as to whether there was light available in the room with which he could have been identified.

Whether there was a delight lamp in the room was a matter of fact. Both courts below concurrently found that there was light from a delight lamp in the room that enabled the children to realise that it was the appellant and no other in the room. The courts below having so found, we cannot interfere with this concurrent finding of fact. In the case of ***Njoroge vs Republic (1982) KLR 388***, it was stated that,

On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on the evidence."

What we are required to ascertain is whether there was sufficient light that enabled them see to recognise the appellant. The evidence of BCL and PW2 is clear. They stated severally that the delight lamp was on and it was bright; that its light was sufficient to enable them identify the appellant. The evidence also shows that appellant stayed in the room long enough for them to have identified him, giving the impression that he was not in any hurry to leave. There is also the additional evidence of BCL who saw him escaping through the window after she had run out of the room and locking him inside, and PW2's evidence confirming that he left through the window. Thereafter the first reports made named "Arthur", the appellant, as the assailant.

Furthermore, the evidence points to the appellant as being a person that was known to BCL and her siblings, as they all stated that he was a person who lived in their locality and they would see him in the market from time to time. They were therefore able to identify him through recognition. This Court in ***Peter Musau vs Republic (2008) eKLR*** stated thus:-

"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him, and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect had been known to him for sometime is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness in serving the suspect at the time of the offence, can recall very well having seen him before the incident in question."

See also: Anjononi & Others v Republic [1980] KLR 59."

It is therefore clear from the evidence that the appellant was properly identified as the person who defiled BCL, and we so find.

As to whether penetration was proved, BCL stated with clarity that she woke up to find that the appellant, a person she knew, had removed her underpants and defiled her, and that she had bled from her genitalia. When Micah Kiptum a clinical officer examined her, he found that her labia was inflamed, and there was a whitish discharge. He formed the opinion that there had been penetration. We can find nothing in the evidence that would lead to the conclusion that BCL was being untruthful. We consider that any inconsistencies or contradictions in the facts were not material so as to affect the prosecutions' case. We are satisfied that penetration was properly established, and that the evidence pointed to BCL as having been defiled.

As concerns the complaint that the prosecution did not call Kipchumba, Linah or the village elder to testify, in this case, BCL and her siblings were called to testify as the crucial witnesses who saw the appellant in the room. Since Kipchumba, Linah and the village elder were not eye witnesses to the events of that morning, their evidence would not have added any further support to the prosecution's case. We therefore reject this contestation.

From the above, we are satisfied that the prosecution proved its case to the required standard. Our reanalysis of the facts as succinctly enumerated by the witnesses who were in the room that morning, and saw the appellant or as in BCL's case was subjected to the heinous act, would lead us to conclude that their evidence far outweighed his mere denial, and that both the courts below properly evaluated the evidence and came to the right conclusion that the appellant defiled BCL.

Finally, we turn to consider whether the charge sheet was defective since it specified BCL's age as 14 years and indicated a charging provision as ***section 8 (2)*** that was not applicable to her age bracket, yet her Birth Certificate indicated that she was 17 years of age. Pointing out the anomaly, the trial court appreciated that the prosecution ought to have amended the charge sheet to reflect BCL's age, but the defects notwithstanding, the court did not consider them to be fatal and went on to convict the appellant. For its part, the High Court, after observing that the offence of defilement the appellant faced was concerned with the commission of a sexual assault against a child is below the age of 18 years, and BCL being a child aged 17 years, concluded that the discrepancies were immaterial; that though the prosecution ought to have amended the charge sheet, the failure to do so was not fatal, as the appellant was at all times aware that the charges he faced were with respect to the defilement of a child.

A consideration of the charge sheet indicates that, firstly, the appellant's age was specified as 14 years, and second that the provision under which the appellant was charged was specified as ***section 8(2)*** that related to offences where the complainant is below age 11 years and carries a sentence of life imprisonment. Whereas, owing to BCL's age as indicated in her birth certificate as 17 years and 2 months, the charge sheet should have specified the charging provision as ***section 8 (4)*** which concerns cases where the complainant is between ages of 16 and 18 years. As such, were the apparent defects in the charge sheet fatal to the prosecution's case?

Whilst addressing a similar issue in the case of ***Edward Katana Safari vs Republic [*****2015] eKLR,*** this Court stated;

"The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an Appellant's conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the Appellant. In the case *of J.M.A v R [2009] KLR 671****, it was held inter alia that:***

"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the Appellant is not discernible."

In discerning whether there was a miscarriage of justice on account of the defects, we begin by referring to ***section 134*** of the ***Criminal Procedure Code,*** which deals with the framing of charges and states that**;**

> ***"Every charge …shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*** **[**Emphasis ours**].**

In this case the charge sheet clearly specified that the appellant was facing the offence of defilement, and the evidence led by the prosecution proved beyond reasonable doubt that the appellant defiled BCL. As a consequence, the appellant was convicted in respect of an offence for which he was aware. In effect, notwithstanding the charge sheet specified her age as 14 years and it later turned out that she was a child aged 17 years did not take away from the fact of the defilement having occurred.

That said, did BCL's age and the charging provision specified in the charge sheet impose a sentence that was prejudicial to the appellant?

In ***Criminal Appeal No. 504 of 2010, Kaingu Elias Kasomo vs Republic*** *(unreported)* this Court state thus;

> ***"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."***

The charge sheet indicated that the appellant was charged under ***section 8 (2)*** which imposes a sentence of life imprisonment for the defilement of a child below the age of 11 years. The trial court, and rightly so, sentenced the appellant to 15 years' imprisonment under ***section 8 (4)*** which pertains to a child between the ages of 16 and 18 years, since BCL was 17 years and 2 months at the time of commission of the offence. Since no distinction can be drawn in the offence of defilement, whether the child was age 14 or 17 years at the material time, the only difference being in the sentence to be meted out in such cases, we are satisfied that there was no miscarriage of justice in the appellant's conviction or sentence notwithstanding the defects. In effect the defects were not fatal to the prosecution's case, and were in any event curable under ***section 382*** of the ***Criminal Procedure Code.*** We find the complaint to be lacking in merit and is accordingly dismissed with the result that we uphold the appellant's conviction.

On the question of the sentence, the appellant did not request us to review his sentence, but since he was convicted and sentenced, the Supreme Court in the case of ***Francis Karioko Muruatetu & Another vs Republic SC Pet. No. 16 of 2015*** has held that the mandatory death sentence to be unconstitutional. On the basis that the offence of defilement sets out a mandatory sentence, the trial court sentenced the appellant to 15 years' imprisonment. In his mitigation the appellant who was 19 years at the time pleaded for forgiveness as a first offender.

Having regard to the circumstances of the case, and notwithstanding the appellant's age and his plea in mitigation, we consider the sentence to be appropriate and have no reason to interfere with it.

As a consequence, the appeal is unmerited and is dismissed.

It is so ordered

Dated and Delivered at Nairobi this 9th day of October, 2020.

W. KARANJA

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JUDGE OF APPEAL

D.K. MUSINGA

….....

JUDGE OF APPEAL

A.K. MURGOR

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR