



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KANTAI, J.J.A)

CRIMINAL APPEAL NO. 58 OF 2016

BETWEEN

KENNEDY MAVINDU KYENGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Ruling/Judgment of the High Court of Kenya at Machakos (Mutende, J.) delivered on 12th June, 2014

in

H.C.C.R.A. NO. 92 of 2012.)

JUDGMENT OF THE COURT

1. On 14th August, 2011 **FM**, a girl aged 15 years was looking after the family goats near the river. **Kennedy Mavindu Kyengo (the appellant)** was at the river. According to F M, she knew him well as they were neighbours and so when the appellant called her, she went to him to find out what he wanted.
2. She said that the appellant just got hold of her, removed her clothes, as well as his and then defiled her as he covered her mouth. In the meantime the goats which F M had abandoned had strayed into a nearby farm and one Nziku a young man who went to drive them out of the farm, spotted F M and the appellant as they emerged from the bushes and on seeing the young man, the appellant fled but not before warning FM not to report the matter to her parents.
3. F M went home but did not inform her parents what had happened to her that evening. The following morning however, her mother (**M K PW2**) noticed that F M was walking with difficulty and she enquired from her what had happened. The child narrated the story and named the culprit.
4. They went to the area sub-chief (**Andrew Musyoki PW3**) where they reported the incident. PW3 referred them to the police station where they were issued with a P3 Form. The child was examined by **Gilbert Kyalo Ngutu (PW4)** who found no external injuries on the child's genitalia. However, an examination of the HVS (High Vaginal Swab) revealed spermatozoa, red blood cells and epithelial cells. There was therefore evidence of penetration. The appellant was subsequently arrested by his area assistant chief and thereafter handed over to the police station where he was charged with defilement of a girl aged between 12 and 15 years "contrary to **Section 8(3) of the Sexual Offences Act No. 3 of 2006 (SOA)**". In the alternative, he was charged with indecent assault of a girl contrary to **Section 11(1) of the SOA**.
5. He denied both charges and the matter proceeded to hearing with the prosecution calling six witnesses. The appellant on his part gave unsworn testimony and denied the charge. He narrated how he was arrested and taken to the police station for an offence he said he knew nothing about. The learned Magistrate having considered the evidence before the court found the appellant guilty as charged on the main count and convicted him, and sentenced him to 20 years imprisonment.
6. Being aggrieved, the appellant moved the High Court on appeal basing his challenge on four grounds of appeal but principally on grounds that the charge was defective and that his defence had not been considered. It was his contention that the evidence adduced before the trial court was insufficient to support a conviction.
7. The High Court (**Mutende, J.**) re-analysed and re-evaluated the evidence adduced before the trial court. On the issue of the charge being

defective, the learned Judge while admitting that the charge omitted to cite **Section 8(1) SOA** which is the section that creates the offence of defilement found the omission non-fatal. The learned Judge cited the decision of this Court in ***Amedi Omurunga v. Republic, Criminal Appeal No. 1789 of 2012 (Malindi)*** where the court expressed itself as follows:-

“Any person who commits an offence of defilement with a child between age of twelve and fifteen years is liable upon conviction for a term not less than twenty years.”

The learned Judge found no prejudice had been occasioned to the appellant and further that the offence had been committed in broad daylight by the appellant who was well known to F M and her family before the date in question. The court found the witness credible and concluded that the charge had been proved to the standard required in law and the conviction was therefore safe. The appeal was accordingly dismissed.

8. Still aggrieved, the appellant moved to this Court on second and possibly final appeal, this time appealing only against sentence. His **“Memorandum Grounds of Appeal** read as follows:-

1) THAT the learned judge of the superior court made an error in law by entering a manifestly harsh sentence against the weight of evidence without considering that I was a first offender.

2) THAT I respect the authority and decision of the High Court, but do pray for a reduction of the sentence on compassionate grounds.

3) THAT I have learnt my lesson, made peace with my God and accusers and I am reformed and engaged in rehabilitation programmes in prison which stands me in good stead to be a responsible citizen upon release.

It is clear from the above that his appeal was only against sentence. However, when the appeal came up for hearing on 29th June, 2016 the appellant came with supplementary grounds of appeal this time challenging both conviction and sentence. He relied on five (5) grounds of appeal which challenge the evidence of identification; that his defence was not considered; the charge was not proved to the required standard; and the generic ground of noncompliance with **Section 169 of the Criminal Procedure Code** without specifying what the learned Judge failed to comply with.

9. In his written submissions, which he relied upon exclusively, the appellant challenges evidence of penetration which he claims was not proved purely because there were no injuries found in F M’s genitalia. He also submitted that the minor’s age was not proved there being no documentary evidence to support her age. He urged us to allow the appeal.

10. The appeal was opposed by the State through learned counsel Mr. Naulikha, who maintained that penetration had been proved based on the evidence of the child herself and the medical examination. On the issue of age, counsel submitted that the child’s mother who was the best person to know her daughter’s age had confirmed that the child was 15 years old. Further, that the P3 form indicated that the child’s age was about 14 years. That age placed the sentence in the same category and so the appellant had been properly convicted and sentenced. Counsel also reiterated that the appellant’s defence had been considered by the two courts below but the same had been found insufficient to displace the strong prosecution evidence. He concluded by saying that the appeal lacks merit and the same should therefore be dismissed.

11. This being a second appeal, our remit is circumscribed by **Section 361(1) of the Criminal Procedure Code**. This Court has addressed this issue in a catena of cases among them ***M’Riungu v. Republic [1983] KLR 455*** where we stated that on second appeal, the guiding principle is that the Court will normally not interfere with the decision of the first appellate court unless it is apparent from the evidence on record, that no reasonable tribunal could have reached that conclusion. Additionally, this Court is beholden to accept the findings of fact of the two courts below, provided they are based on acceptable and clear evidence which was adduced at the trial. This Court in the case of ***Thiaka v. Republic [2006] 2 EA 326*** reiterated this principle and expressed itself in the following terms:-

“... [this Court] will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings.”

It is with these confines in mind that we address this appeal.

12. Was penetration proved? The two courts below made concurrent findings of fact that penetration was indeed proved. We have no doubt in our mind that penetration was proved. We say so because F M herself told the court how everything happened. The mother confirmed she saw her daughter walking with difficulty the following day and on enquiry, the child disclosed that it was the appellant who had defiled her. Moreover, the medial evidence revealed spermatozoa in her vagina which by itself is evidence of penetration. We are not persuaded that any basis has been laid for us to interfere with the concurrent findings of the two courts below on the issue of penetration.

13. On the issue of age, the complainant told the court she was 15 years old.

Her mother corroborated her evidence to that effect. There was no indication that she was not a credible witness. The P3 form also gave the child’s age as approximately 14 years. This Court has said time on end that age can be proved in absence of documentary evidence. In ***Kaingu Elias Kasomo v. Republic in Malindi Criminal Appeal No.504 of 2010***, this Court acknowledged that age assessment may come in many forms. The Court stated that:-

“Age of the victim of the sexual assault under the sexual offences act is a critical component. It forms part of the charge which must be proved in 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 upon conviction will be dependent on the age of the victim....”
(Emphasis added).

The credibility of the child and her mother was not impeached. We are satisfied that the child’s apparent age was 14 to 15 years as per the evidence on record. That ground therefore fails. We also find that both courts below considered the appellant’s defence but rejected it. In any event, the defence he proffered was in respect of the date he was arrested and not on the date he is alleged to have defiled the child.

14. On the whole, we find no reason to interfere with the concurrent findings of the two courts below. We are satisfied that the appellant was properly convicted and sentenced. His first appeal was also firmly predicated on the law. We find this appeal devoid of merit and dismiss it accordingly.

Dated and delivered at Nairobi this 8th day of February, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR