IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 142 OF 2015

BETWEEN

PAUL SYENGO MUSYOKA .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Garissa (Dulu, J.) dated 6th *May, 2015* ***in H.C.CR.A No. 69 of 2014*****)**

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JUDGMENT OF THE COURT

1. Paul Syengo Musyoka (the appellant) was charged in the Principal Magistrate's Court at Kyuso with one count of defilement contrary to ***Section 8(1)*** & ***(2)*** of the **Sexual Offences Act** and an alternative count of committing an indecent act with a child contrary to ***Section 11(1)*** of the ***Sexual Offences Act***. The trial court on finding him culpable of the main count convicted and sentenced him to life imprisonment. He was dissatisfied and he preferred an appeal in the High Court which equally confirmed the conviction and sentence issued by the trial court.

2. Unrelenting, the appellant is before us on a second appeal and as such, our jurisdiction is well captured in the case of ***Karani vs. R [2010] 1 KLR 73*** as follows:

> **"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."**

3. With the extent of our mandate in mind, a brief background of the facts which gave rise to the appellant's conviction will put the appeal in context. On 23rd October, 2012 at around 4:00 p.m. K K (PW2) sent her granddaughter DM (PW1) to a nearby canteen to purchase sugar and millet. While on her way, DM met the appellant who after greeting her inquired about the whereabouts of her mother. DM informed him that her mother was in Meru. Thereafter, the appellant held her by the hand and led her to a river which was close by. She obliged because the appellant was a neighbour and well known to her.

4. The appellant then undressed DM and laid her on the ground; he went on to cover her eyes with the *lesso* she had and lay on top of her. DM described that she felt the appellant insert something inside her vagina which caused her to cry out in pain. After a short while the appellant stood up and gave her Kshs.50. Immediately she got home she informed Kasyoka and her grandfather about what had transpired.

5. It is then that K examined DM and noticed bleeding and bruises on her private parts. Apparently, the following day the appellant came to the house and sought K's forgiveness for defiling DM. He went as far as offering K Kshs.50 which she took. K explained that she was not able to report the matter to the police or take DM to hospital on the material day or soon thereafter because of lack of money to cater for transport. The best she could do at that particular moment in time was to inform a village elder about the incident. Nonetheless, she was able to get in touch with DM's mother, A (PW3) who later travelled back home on 8th November, 2012.

6. Once again, DM narrated the incident to her mother who also upon examining her noticed she had bruises on her private parts. A reported the same to the area chief, Daniel Mwendwa (PW4), on 9th November, 2012. As per Anne, the appellant confessed to defiling DM and

entreated her to pardon him. Nevertheless, she reported the matter to the police on 15th November, 2012. Afterwards, DM was taken to hospital for examination and the P3 form was filled in.

7. It is on the basis of the foregoing that the appellant was arrested, arraigned in court and charged with the aforementioned offences. In his defence, the appellant simply stated that he was arrested on 5th December, 2012 by four people and taken to the chief. At the chief's camp he met another man who had been arrested in connection to the alleged incident. However, the said man was later released while he was transferred to the police station where he was charged.

8. As we had stated in the opening paragraph of this judgment, the appellant was convicted and sentenced to life imprisonment for the offence of defilement. He now challenges the same on the grounds that the learned Judge erred in law by:-

i. Failing to appreciate that his conviction was based on a defective charge sheet.

ii. Failing to find that the prosecution had not established the essential elements which give rise to the offence of defilement.

iii. Failing to find that he was not accorded a fair trial.

iv. Failing to appreciate that the prosecution had failed to call essential witnesses to testify.

9. At the hearing of the appeal, the appellant appeared in person and relied entirely on his written submission whilst Ms. Maina, Senior Principal

Prosecution Counsel, appeared for the State and made oral submission in response.

10. The appellant claims that the charge sheet as drawn was defective because contrary to ***Section 134*** of the ***Criminal Procedure Code***, the particulars thereof did not sufficiently disclose the nature of the offence that he faced. In that, a key element had been omitted, that is, to say the alleged offence was committed unlawfully. More specifically, the particulars in the charge sheet read, '***the appellant intentionally caused his penis to penetrate the vagina of DM…'*** as opposed to ***'the appellant unlawful and intentionally caused his penis to penetrate the vagina of DM…'*** He emphasized that it is the unlawfulness of the act which constitutes the criminal element of the charge against him. He went on to contend that such a defect was not curable under ***Section 381*** of the ***Criminal Procedure Code***.

11. He argued that the prosecution had failed to establish yet another important element to sustain a conviction for the offence of defilement. For the reason that despite DM giving evidence to the effect that she felt him put something in her vagina there was nothing to establish what 'something' meant or for that matter whether it referred to the appellant's genital organ. As a result, penetration as contemplated under ***Section 2*** of the ***Sexual Offences Act*** was not established.

12. The appellant also complained that DM's age had not been proved to the required standard to sustain his conviction and sentence for the offence of defilement. According to him, only documentary evidence like a birth certificate and baptism card could establish DM's age and nothing else.

Equally, no age assessment had been carried out and the only evidence tendered in that respect was by DM. As such, there was no basis for the trial court to have concluded that she was 9 years at the material time.

13. The appellant added that his right to a fair trial had been violated because his request for the trial court to avail a person or an advocate who would help him understand the witness statements produced by the prosecution fell on deaf ears. In the end, he was not able to put forth his best defence to challenge the prosecution's case.

14. He urged us to draw an adverse inference against the prosecution for failing to avail DM's grandfather who was allegedly the first to be informed by DM about what had occurred and the doctor who examined DM as witnesses. As far as the appellant was concerned, there was no basis for Francis Saku (PW6), a clinical officer, to produce the P3 form on behalf of the doctor who examined DM and filled in the same. He also took issue with the medical evidence which in his view was inconclusive and incapable of warranting his conviction. All in all, the prosecution had not proved its case to the required standard.

15. In opposing the appeal, Ms. Maina contended that there was no reason for us to interfere with the concurrent findings of the two courts below. In her view, there was no doubt that DM had been defiled; apart from DM's evidence her grandmother testified that after examining DM on the material day she noticed bleeding and bruises on her private parts. Furthermore, the P3 form confirmed that her hymen was broken. Counsel submitted that DM's evidence was sufficient to establish her age. Last but not least, she asserted since the appellant was not facing a capital offence he was not automatically entitled to an advocate at the State's expense.

16. We have considered the pertinent facts as set out herein above, the record, submissions by the appellant and learned counsel as well as the law. It goes without saying that one of the tenets of a fair trial is that an accused person should not only be informed of the charge(s) against him/her but should also be supplied with sufficient particulars thereof as is necessary to enable him/her appreciate the nature of the offence. See ***Article 50(1) (b)*** of the ***Constitution***. This is achieved firstly, by a charge sheet which ought to be properly drawn as envisaged under ***Section 134*** of the ***Criminal Procedure Code***.

17. In this case, the appellant argued that the particulars of the offence of defilement as set out in the charge sheet did not disclose such an offence because the word 'unlawfully' was omitted therein. Conversely, our reading of ***Section 8(1)*** of the ***Sexual Offences Act*** describes the offence of defilement in the following terms:

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

From the foregoing it is clear that the term 'unlawfully' is not employed in the definition of what constitutes the offence of defilement. It follows therefore, that the particulars set out in the charge sheet as constituting the offence of defilement were in conformity with ***Section 8(1)*** of the ***Sexual Offences Act*** and gave the appellant a clear picture of the charge against him. Consequently, the allegation that the charge sheet was defective fails.

18. Still on the issue of whether the appellant was accorded a fair trial, we cannot help but note from the proceedings that on 21st January, 2013 prior to the commencement of the trial, the appellant asked to be supplied with witness statements and the trial court adjourned the matter to enable the prosecution furnish him with the statements. Upon being supplied with the statements the appellant made a further request to the court for assistance to read the same. His plea was not for representation by an advocate at the State's expense rather his request was for the contents of the witnesses statements to be explained to him. The proceedings in question were as follows:

"21.2.13

Before- Hon. B.M. Mararo P.M

Pros. IP Mwangi

Court Clerk- Martha

Accused- present in person

Prosecutor

I have 4 witnesses

Accused

I am not ready. I pray for statements

…

Court

Hearing to proceed at 2:00 p.m. Accused to be supplied with

statements.

At 2:00 p.m.

Accused

I am illiterate. I need someone to read for me.

Court

Hearing stood over to 27.3.13."

19. It appears from the foregoing that the trial court adjourned the hearing to facilitate the appellant's request. Subsequently, when the matter came up for hearing on 27th March, 2013 the appellant indicated to the trial court that he was ready to proceed. What is more, we are satisfied from the record that he actively participated throughout the trial by cross examining the witnesses with the understanding of the nature of the proceedings. In the end, we find that the allegation that his right to a fair trial had been violated holds no water.

20. Moving on, it goes without saying that to establish the offence of defilement three key elements should be proved; penetration, age of the victim and identity of the perpetrator. For starters penetration is defined under ***Section 2*** of the ***Sexual Offences Act*** in the following manner:

"…the partial or complete insertion of the genital organs of a person into the genital organs of another person."

There is no doubt that there was penetration on DM as in her own evidence she stated that she felt what she described as 'something' being inserted in her vagina. Further, DM's evidence was corroborated by her grandmother, K, who after examining her immediately after the incident observed bleeding and bruises on her private parts. In addition, the P3 form indicated that her hymen had been torn.

21. Of concern to the appellant is the fact that DM never mentioned in her evidence that penetration was caused by his genital organ or at the

very least, there was no evidence to that effect. In his view, what DM referred to as 'something' could mean anything hence the offence of defilement was not established. It is common ground that proof that penetration of a victim was caused by genital organ of the accused is essential to sustain a conviction for defilement. This particular aspect is what distinguishes the offence of defilement from that of sexual assault under ***Section 5*** of the ***Sexual Offences Act.*** While the former is restricted to penetration by genital organs the latter extends to penetration by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose. See ***John Irungu vs. R [2016] eKLR***.

22. Having looked at DM's evidence which gave a detailed account of what transpired on the material day we, like the two courts below, are inclined to find that penetration on DM was by the male genital organ of the perpetrator. We say so because during cross examination DM testified that after the appellant undressed her she saw him open his zip; he then lay on top of her and inserted something in her vagina. In as much as DM did not specifically mention that penetration was by a male genital organ that by itself did not negate that fact. Perhaps, the failure to specifically mention that it was the male genital organ and instead opting to describe it as 'something' could be attributed to DM's naivety or a matter of semantics.

23. As to who was responsible, we are convinced that DM's evidence on that aspect was unshaken; she testified that it was the appellant and no other. Besides, the appellant was well known to her prior to the incident, and the incident occurred during the day negating any possibility of mistaken identity.

24. Proof of age for purposes of conviction and sentencing for the offence of defilement has been considered by this Court on numerous occasions and is now well settled. There is no need to rehash the same save to state that ideally the actual age of the victim should be proved through a birth certificate, birth notification card or other formal documents. Be that as it may, where actual age of a victim is not known, proof of his/her apparent age is sufficient under the ***Sexual Offences Act*** through evidence. See ***Evans Wamalwa Simiyu vs. R [2016] eKLR***.

25. It is not in dispute that the actual age of DM was not established through a birth certificate. The only evidence in that regard was given by DM who testified she was 9 years old which was corroborated by the P3 form which indicated the same as her estimated age. We concur with the two courts below that the foregoing was sufficient to prove her apparent age was 9 years.

26. On the issue of failure to call crucial witnesses, it is important to bear in mind that the provisions of ***Section 143*** of the ***Evidence Act*** do not prescribe for any particular number of witnesses to prove a particular fact in the absence of any provision of law to the contrary. In any event, whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive. See ***Mwangi vs. R [1984] KLR 595***.

27. In our view, we cannot perceive any oblique motive on the part of the prosecution for failing to call DM's grandfather who was one of the first people to be informed of the incident. At best he would have reiterated Kasyoka's evidence as to what DM narrated to them. Similarly, there was no prejudice in the P3 form being produced by Francis Saku on behalf of the doctor who examined DM and filled in the form. This is because the said doctor had since been transferred and in any case ***Section 77*** of the ***Evidence Act*** allows for such a document to be produced by a person other than the maker thereof. The provision in question reads:

> **"77.**
>
> **1. In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.**
>
> **2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.**
>
> **3. When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.**

Moreover, the appellant neither objected to such production nor indicated to the trial court that he wished to cross-examine the maker thereof. See **Joshua Otieno Oguga vs. R [2009] eKLR**.

28. The upshot of the foregoing is that we find that the prosecution established the requisite elements to sustain a conviction for the offence of defilement against the appellant. Consequently, we see no reason to interfere with the concurrent findings of the two courts below which means that the appeal herein lacks merit and is hereby dismissed.

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

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR